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* Resigned October 15, 1905.

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⁴ Appointed to fill vacancy.

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^{1a}Resigned January 31, 1906.

^{1a}Appointed February 24, 1906.

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STATE v. ROMANO.

(Supreme Court of Washington. Dec. 28, 1905.)

1. CRIMINAL LAW — INSTRUCTIONS — CONVICTION OF LESSER OFFENSE—DUTY OF COURT.

Where an information charging defendant with making an assault with a deadly weapon with intent to commit murder is not so drawn as to include the lesser crime of assault with intent to do bodily harm, a conviction of the latter crime cannot be had; but, where it is so drawn, it is error for the trial court to refuse to instruct that defendant might be convicted of such lesser crime.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1923, 1924.]

2. HOMICIDE—ASSAULT WITH INTENT TO KILL —INSTRUCTIONS.

Where an information charged defendant with willfully, unlawfully, feloniously, etc., and with intent to kill and murder one U., an assault did make in and on the person of said U. with a deadly weapon, to wit, a razor, with which he then and there willfully, unlawfully, etc., struck at, cut, and wounded the person of the said U., with the intent aforesaid, no considerable provocation appearing therefor, it was the duty of the trial court to charge, not only as to all necessary facts which must be proven to authorize a conviction of the crime of assault with intent to commit murder, but also as to all facts necessary to be proven to warrant a conviction of the crime of assault with intent to do great bodily harm.

3. SAME—INTENT—CONSEQUENCES OF VOLUNTARY ACT.

In a prosecution for assault with intent to murder, where the information required a charge on the crime of assault with intent to do great bodily harm, the court charged (1) that in order to warrant a conviction for assault with intent to murder the jury must find, not only the fact of the assault, but also defendant's intention to kill prosecutor; (2) that if they found defendant cut and wounded prosecutor, intending so to do, but not intending to kill him, he could not be found guilty as charged; (3) that in order to prove the crime of assault with intent to inflict bodily injury it was necessary for the state to prove that defendant purposely and unlawfully cut prosecutor, etc., without any considerable provocation, with the intention of inflicting great bodily injury, etc., but "that such intent need not be proved by direct and positive testimony, but may be inferred by the jury from the facts and circumstances presented as evidence in this case, provided they are sufficient to satisfy you beyond a reasonable doubt of the existence of such intent; and I further charge you that every sane person is presumed to intend the natural and ordinary consequences of his voluntary act." *Held*, that the language "that

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every sane person is presumed," etc., referred only to the crime of assault with intent to do bodily harm, and did not constitute prejudicial error.

4. CRIMINAL LAW — DEMONSTRATIVE EVIDENCE.

Where, in a prosecution for assault with intent to commit murder, the information charged the assault to have been made with a knife; but it appeared that prosecutor was also and at the same time shot with a gun, and that subsequent to defendant's arrest a shotgun and empty shell were found in defendant's room, and that defendant admitted to certain parties the making of the assault, and had stated to others that he would treat them the same as he did prosecutor, it was not error to admit in evidence such shotgun and shell, together with shot, taken from the person of prosecutor and of the same size as those formerly in the empty shell.

5. HOMICIDE—ASSAULT WITH INTENT TO KILL —IDENTITY OF ACCUSED—SUFFICIENCY OF EVIDENCE.

In a prosecution for assault with intent to commit murder, evidence examined, and held sufficient to identify defendant as the person who committed the crime.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Matteo Romano was convicted of assault with intent to commit murder and appeals. Affirmed.

Wm. C. Keith and E. F. Klenstra, for appellant. Kenneth Mackintosh, Hermon W. Craven, and William D. Totten, for the State.

CROW, J. Appellant, Matteo Romano, was convicted in the superior court of King county of the crime of assault with intent to commit murder, and has appealed to this court.

About 2 o'clock on the morning of March 19, 1904, while Sebastian Uccl, the prosecuting witness, was asleep in his room in the city of Seattle, some unknown person made an attack upon him with a sharp instrument, cutting his throat, and immediately thereafter shot him in the back. He did not see, nor was he able to identify, his assailant. On May 12, 1904, appellant was arrested and charged with said crime. The evidence shows that prior to his arrest, in conversations with Mrs. Sebastian Uccl, the divorced wife, and Mrs. Concheta Rosetta, the daughter of said Sebastian Uccl, appellant admit-

ted he had made said assault. Two days after his arrest the police officers found a shotgun and empty shell in his room, which were admitted as evidence. Fifty or sixty shot taken from Ucci's wound, of the size of those that had been contained in the empty shell, were also admitted as evidence. Officer Adams, who arrested appellant, testified that while appellant was on the way to prison he said to John Rosetta, husband of Concheta Rosetta: "I will cut your throat if I get out of this. I may get a year, but I will cut your throat"—and that he also made angry statements to said Rosetta in the Italian language, which Adams could not understand. From the testimony of appellant it appears that he claims to have sustained criminal relations with said Concheta Rosetta for a considerable period of time prior to his arrest; also that much bitterness and animosity existed between him and said John Rosetta. He evidently regarded John Rosetta and his wife as being responsible for his arrest. John Rosetta testified that, while appellant was in the custody of Officer Adams, he, speaking in the Italian language, said: "I may get two or three years; but when I get back I will do the same to you as I did to your father-in-law." Mrs. Sebastian Ucci, divorced wife of the prosecuting witness, testified to the admission made to her by appellant, and Mrs. Concheta Rosetta, daughter of the prosecuting witness, testified that about a month previous to his arrest appellant had told her that, if she did not leave her husband and live with him, he would do the same to her as he had her father, and that he had cut and shot her father. It appears that on the day of his arrest appellant was expected to call at the house of Concheta Rosetta, and that she, being fearful of an assault, caused Officer Adams to be notified, who, as the result of such notice, was present and arrested appellant when he arrived, at which time appellant was heavily armed.

Appellant has made three assignments of error: First. That the court erred in giving the following as a portion of one of the instructions to the jury: "And I further charge you that every sane person is presumed to intend the natural and ordinary consequences of his voluntary act." Second. That the court should have set aside the verdict and granted a new trial, for the reason that the information does not charge appellant with shooting the prosecuting witness, and that the court therefore erred in admitting the shotgun in evidence. Third. That the court erred in refusing to set aside the verdict for insufficiency of evidence as to the identity of the person who made the assault.

Appellant evidently bases his main reliance for a reversal upon his exception to the charge of the court on the question of intent, citing the case of *State v. Dolan*, 17 Wash. 499, 50 Pac. 472, and in his opening brief

says: "The prosecuting witness was not murdered, and the above instruction as applied to the facts of this case left the jury to understand that, as death might have resulted as the natural consequence of the assault, the law presumes that he intended that such consequences should follow. If death had resulted from the act, the instructions would have been applicable, but this court has held that such an instruction is inapplicable in the case of assault where death did not result, and that the intent to murder must be established as any other fact." Before discussing the instructions in *State v. Dolan*, supra, or those in the case at bar, we call attention to a material variance of the information in the *Dolan* Case from the one upon which appellant has been prosecuted. In *State v. Ackles*, 8 Wash. 462, 36 Pac. 597, this court held that on the information then under consideration, which charged that the defendant "did unlawfully, purposely and of his premeditated malice, and with intent to murder, assault, and shoot one Benjamin Franklin with a deadly weapon, * * * with intent to murder the said Benjamin Franklin," said defendant could not be convicted of the crime of making an assault with a deadly weapon with intent to do bodily harm, for the reason that the latter crime was not included in the information. *Anders, J.*, there speaking for this court, said: "While it is true that the jury may find a defendant not guilty of the crime charged, but guilty of an offense of lesser degree, or of an offense necessarily included within that charged, it is also true that 'accusation must precede conviction,' and that no one can legally be convicted of an offense not properly alleged. The accused, in criminal prosecutions, has a constitutional right to be apprised of the nature and cause of the accusation against him. Const. art. 1, § 22. And this can only be made known by setting forth in the indictment or information every fact constituting an element of the offense charged. This doctrine is elementary and of universal application, and is founded on the plainest principle of justice. Tested by this rule, we think the verdict and judgment in this case were erroneous, and must be set aside. Under our statute, an assault with a deadly weapon with intent to inflict upon the person of another a bodily injury is made a felony only upon the express condition that the assault is without considerable provocation, or where the circumstances of the assault show a willful, malignant, and abandoned heart." The information in *State v. Ackles*, supra, which is set forth at page 463 of 8 Wash., page 598 of 36 Pac., of the opinion discloses an utter absence of any allegation that the assault was without any considerable provocation, or that it was the impulse of a willful, abandoned, or malignant heart. 2 Ballinger's Ann. Codes & St. § 7058. This court therefore reversed the final judg-

ment entered on a verdict finding the defendant guilty of the lesser crime of an assault with a deadly weapon with intent to do bodily harm. In *State v. Young*, 22 Wash. 274, 60 Pac. 650, the defendant was prosecuted upon an information charging him with the crime of making an assault upon the prosecuting witness with a deadly weapon with intent to kill and murder said prosecuting witness. But an examination of the information, which appears in the opinion, will show that by reason of the use of the words "with the intent aforesaid, no considerable provocation appearing therefor," it was sufficient to sustain a conviction of the lesser crime of assault with intent to do bodily harm. The trial court, however, refused to instruct the jury that they could find the defendant guilty of such lesser crime, and this court, speaking through Dunbar, J., held such refusal to be prejudicial error, saying: "The refusal of the court to give this instruction is alleged here as error. We think it was error, and prejudicial to the defendant. It is true that in *State v. Ackles*, 8 Wash. 462, 36 Pac. 597, we held that under the information in that case it was not competent for the jury to return a verdict of guilty of assault with a deadly weapon with intent to do bodily harm, but for the reason that the lesser crime was not described in the information; there being no allegation that the assault was without considerable provocation, or that it was the impulse of a willful, abandoned, or malignant heart. * * * Under our statute (Ballinger's Ann. Codes & St. § 7058) an assault with a deadly weapon, with intent to inflict upon the person of another a bodily injury, is made a felony only upon the express condition that the assault is without considerable provocation, or where the circumstances of the assault show a willful, malignant, and abandoned heart; and, when an act is punishable in a particular manner under certain conditions, these conditions must be set forth so as to show that the act is punishable. But the information in this case meets all the objections urged by the court in the case cited. It is alleged that the assault was made in the manner and form stated, no considerable provocation appearing therefor, and as the statute is in the alternative, so far as the conditions mentioned (viz., no considerable provocation appearing, or that it was the impulse of a willful, abandoned, and malignant heart) are concerned, the statement of the existence of either was sufficient." By these decisions the law of this state is well settled to the effect that, where an information charging a defendant with making an assault with a deadly weapon with intent to commit the crime of murder is not so drawn as to include the lesser crime of assault with intent to do bodily harm, a conviction of the latter crime cannot be permitted; but, where it is so drawn,

it would be error for the trial court to refuse to instruct the jury that the defendant might be convicted of such lesser crime. The information in *State v. Dolan*, supra, which we find in the record, was not so drawn as to authorize a conviction of the lesser crime of assault with intent to do bodily harm, but corresponds to the information in *State v. Ackles*, supra. It therefore followed that the only crime as to which the court was authorized to instruct the jury was the one therein charged, to wit, assault with intent to commit murder.

In this case the information, omitting formal parts, is in the following language: "Matteo Romano is hereby accused by W. T. Scott, the prosecuting attorney in and for the county of King, state of Washington, in the name of and by the authority of said state of Washington, and on oath by this information, of the crime of assault with intent to commit the crime of murder, committed as follows, to wit: He, the said Matteo Romano, in the county of King, state of Washington, on the 19th day of March, 1904, willfully, unlawfully, feloniously, purposely, maliciously, and with intent to kill and murder one Sebastian Ucci, an assault did make in and upon the person of the said Sebastian Ucci with a deadly weapon, to wit, a razor, then and there had and held in the hands of the said Matteo Romano, with which he then and there willfully, unlawfully, feloniously, purposely, and maliciously struck at, cut, and wounded the person of the said Sebastian Ucci, with the intent aforesaid, no considerable provocation appearing therefor." It will be seen that this information is almost identical with that in the case of *State v. Young*, supra, hence it here became the duty of the trial court to charge the jury, not only as to all necessary facts which must be proven to authorize a conviction of the crime of assault with intent to commit murder, but also as to all facts necessary to be proven to warrant a conviction of the crime of assault with intent to do great bodily harm. The trial court first charged the jury as follows: "Under this information it is possible, should the evidence under my instructions justify it, that the defendant be convicted of any of three separate offenses. They are: (1) Assault with a deadly weapon with intent to commit the crime of murder. (2) Assault with a deadly weapon with intent to do bodily harm. (3) Assault and battery." After giving this charge, the court proceeded to define the different grades of crime above mentioned, and also to state the facts necessary to be proven to authorize a conviction in each instance. Thereafter the following instructions, which we will number for the convenience of reference, were given: "(1) The defendant in this case being charged with cutting and wounding one Sebastian Ucci with intent to kill and murder the said Sebastian Ucci, before the defendant can be convicted as charged in the information, it is

necessary that you be satisfied by the evidence beyond a reasonable doubt, not only that the defendant did cut and wound said Sebastian Ucci, but that in so doing he intended to kill and murder said Ucci. This intent is as essential an element of the crime as is the act itself, and must be found by the jury as a matter of fact before a conviction can be had of the crime charged in the information. (2) If you find from the evidence that the defendant cut and wounded said Sebastian Ucci, and intended to cut and wound him, but are not satisfied that in so doing he intended to kill the said Ucci, you cannot find the defendant guilty as charged in the information. An intent to wound is not sufficient. (3) I charge you that, in order to prove the crime of assault with intent to commit the crime of murder in this case, it is necessary for the state to prove beyond a reasonable doubt that the defendant, at the time and place, and in the manner and form charged in the information, cut Sebastian Ucci with a razor or other sharp instrument purposely and maliciously, intending to take his life; and that, in order to prove the crime of assault with a deadly weapon with intent to inflict bodily injury in this case, it is necessary for the state to prove beyond a reasonable doubt that at the time and place mentioned in the information the defendant purposely and unlawfully cut Sebastian Ucci with a knife or other sharp instrument, without any considerable provocation, with the intention of inflicting great bodily injury upon the person of said Sebastian Ucci. But I charge you that such intent need not be proved by direct and positive testimony, but may be inferred by the jury from the facts and circumstances presented as evidence in this case, provided they are sufficient to satisfy you beyond a reasonable doubt of the existence of such intent; and I further charge you that *every sane person is presumed to intend the natural and ordinary consequences of his voluntary act.*" In the above quotation we have italicized the language to which the appellant has taken exception, and upon which he assigns his first error.

It is contended by respondent that the exceptions taken by appellant are not sufficient to justify any consideration of said assignment by this court. We have some doubt as to their sufficiency, but will nevertheless consider the assignment on its merits. If the only crime of which the appellant could be convicted, under the information herein, was that of assault with intent to murder, the language objected to would have no place in the instruction, and under the authority of *State v. Dolan*, supra, might possibly be prejudicial error. It is conceded by the appellant that this language or instruction on the question of intent is not erroneous or prejudicial when applied to the crime of assault with intent to do great bodily harm, but as to that crime states the law. Our view of the entire body of the instructions is that upon the different

degrees of crime involved in the information the several instructions given were proper. It will be noticed that instructions 1 and 2 above quoted are almost identical with the first and third instructions which were asked of, and refused by, the trial court in *State v. Dolan*, supra, shown at pages 510, 511, of the opinion, and which were approved by this court as proper under an information charging only the crime of assault with intent to commit murder. These instructions were given by the trial court at the request of appellant, and correctly stated the law of intent as applied to the crime of assault with intent to murder. In addition to giving this charge, it also became the duty of the trial court to instruct the jury, under the information here, on the law of intent as applied to the crime of assault with intent to do bodily harm, and our understanding of the language excepted to by the appellant is that it refers to the latter crime only. Appellant, however, contends that because the court gave the instructions 1 and 2, as requested by him, and also gave that to which he has excepted, the entire body of instructions as given became inconsistent and necessarily tended to mislead and confuse the jury. We cannot agree with this contention, as to do so would be to hold that under an information such as the one at bar the trial court could instruct only on the question of intent as applied to the charge of assault with intent to murder. But, if this was done, and no proper instruction was given on the lesser crime, the action of the court would be error under the authority of the *State v. Young*, supra. Considering all the instructions in the light of the information upon which the appellant was prosecuted, we are unable to find any prejudicial error.

By his second assignment of error the appellant in substance contends that, as he was not charged with shooting the prosecuting witness, the court erred in admitting in evidence the shotgun which was found in his room two days after his arrest. In view of statements made by appellant to the various witnesses, as above narrated, and the evidence of the physician who attended the prosecuting witness, showing and identifying the shot and other articles taken from the wound, and as the prosecuting witness was actually shot by the person who cut his throat, we think this evidence was proper.

The last contention made by appellant is that the court committed prejudicial error in refusing to set aside the verdict for insufficiency of evidence to identify appellant as the person who committed the crime. An examination of the statement or facts shows this assignment to be absolutely without merit. The verdict is sustained by the evidence.

The judgment is affirmed.

MOUNT, C. J., and DUNBAR, FULLERTON, and HADLEY, JJ., concur.

RUDKIN, J. (concurring). By the same information the appellant was charged with the commission of two felonies: First, an assault with intent to murder; and, second, an assault with a deadly weapon with intent to inflict a bodily injury, where no considerable provocation appeared. The court charged the jury in general terms that the intent was an essential element of the crime charged, and must be proved as a fact, that it might be proved by circumstantial, as well as by direct evidence, and that *every sane person is presumed to intend the natural and ordinary consequences of his voluntary act*. The majority holds that the italicized portion of the charge referred only to the charge of an assault with intent to inflict a bodily injury, and that the charge is correct as applied to that crime; thus distinguishing this case from the case of *State v. Dolan*, cited in the majority opinion. I confess I am at a loss to know how the jury could understand that the above general statement of an abstract proposition of law applied to the question of intent involved in the commission of one felony, but not in the other. I am at a still greater loss to know why the charge is correct as applied to one felony, but not as to the other. If a sane man does not intend the natural and probable consequences of his voluntary act, when charged with an assault with intent to murder, because murder does not ensue, it would seem inevitably to follow that a person charged with an assault with intent to inflict a bodily injury does not intend the natural and probable consequences of his voluntary act, unless bodily injury ensues, and it would be manifest error for the court to assume in its charge to the jury that bodily injury did, in fact, ensue. I concur in the judgment of affirmance because I think the portion of the charge excepted to is a correct statement of a familiar proposition of law, and is applicable in every case where the question of intent is involved. In charging the jury in *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711, Shaw, C. J., said: "This rule is founded on the plain and obvious principle that a person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own acts." The Supreme Court of the United States, in commenting on an instruction in *Allen v. United States*, 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528, says: "This is nothing more than a statement of the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act. 1 Greenleaf on Evidence, § 18; *Regina v. Jones*, 9 C. & P.

25; *Regina v. Hill*, 8 C. & P. 274; *Regina v. Beard*, 8 C. & P. 143; *People v. Herrick*, 13 Wend. 87, 91." Greenleaf says, in the section cited: "Thus, also, a sane man is conclusively presumed to contemplate the natural and probable consequences of his own act; and therefore the intent to murder is conclusively inferred from the deliberate use of a deadly weapon."

Why should the application of this familiar principle depend on something that transpires long after the commission of the crime? I cast two men overboard in midocean. The one succumbs; the other is rescued. I am prosecuted for the murder of the one, and intend the natural consequences of my act; but in the prosecution for an assault with intent to murder the other I do not intend the natural and probable consequences of my act, because, forsooth, he was rescued through no agency of mine. I shoot recklessly into a crowd, and, by the same act, kill one person and dangerously wound another. I intend the natural consequences of my act as to the one, but not as to the other. Let us suppose in this case that the majority found that the court below did, in fact, charge the jury that the appellant intended the natural and probable consequences of his act on the charge of an assault with intent to murder, and reversed the judgment for that error; and let us further suppose that the prosecuting witness has died in the meantime from the effect of his wounds, and that the charge against the appellant is changed from assault with intent to murder to a charge of murder. On the trial of the latter charge the court instructs the jury that a sane man intends the natural and probable consequences of his voluntary act, and this court affirms the judgment. It is thus established by two solemn judgments of this court that a man intends the natural and probable consequences of a certain act, and that he does not intend the natural and probable consequences of the same act, and in the opinion of the majority both judgments are founded on correct legal principles. In fact, the judgment in this case is affirmed solely because the majority concludes that the court below in one breath told the jury that the appellant was presumed to intend the natural and probable consequences of certain acts, and in the next breath told them exactly the contrary. I do not care to indulge in any such refinements, but vote for affirmance on the broad ground that the instruction excepted to embodies a correct statement of the law as to any or all of the crimes charged.

ROOT, J., concurs.

(41 Wash. 77)

GRITMAN v. UNITED STATES FIDELITY & GUARANTY CO. et al.

(Supreme Court of Washington. Dec. 20, 1905.)

1. PLEADING—AMENDMENT TO CONFORM TO PROOFS.

Where an architects' certificate was introduced in evidence on the first trial of an action, and on rebuttal defendant affirmatively proved the giving of the certificate and attempted to show that it was given without sufficient investigation, it was proper for the court, on a second trial on which the certificate was introduced, to permit the complaint to be amended to conform to the proof by alleging that the architects had audited and certified the claims made as required by the contract, so as to authorize proof of such certificates.

2. PRINCIPAL AS SURETY—EXECUTION OF BOND—WAIVER OF OBJECTIONS.

Where a contractor's surety delivered the bond to him for the purpose of closing a building contract with plaintiff, the surety thereby constituted the contractor its agent, and in the absence of anything on the face of the bond tending to put plaintiff on inquiry the surety was bound.

3. JUDGMENTS—COLLATERAL ATTACK.

Mechanics' lien judgments are not subject to collateral attack in an action on a building contractor's bond in which they were proved as a part of the damages.

Appeal from Superior Court, Adams County; Henry L. Kennan, Judge.

Action by H. E. Gritman against the United States Fidelity & Guaranty Company and another. From a judgment for plaintiff, defendant guaranty company appeals. Affirmed.

Merritt & Merritt and Crow & Williams, for appellant. O. R. Holcomb and Post, Avery & Higgins, for respondent.

DUNBAR, J. This is an action by respondent, who was the owner, against the contractor and appellant surety on the contractor's bond, for damage on account of the default of the contractor. The complaint alleged, the execution of the contract; that the contractor had entered upon the performance of the contract, and had, during the continuance thereof, abandoned the work; that he had paid divers sums upon the estimate of the architects, and was compelled to pay certain judgments upon materialmen's and laborers' liens, and certain other amounts to complete the building; that the contractor was to pay \$10 per day for the time after the 1st day of August; that the building was not completed for 36 days thereafter, and that altogether he was damaged in the total sum of \$2,787.44. It was not alleged in the complaint that the accounts for expenses incurred by the owner were audited and certified by the architects, as provided by article 5 of the contract. Appellant demurred to the complaint on general grounds. The demurrer was overruled, issues were joined, and an affirmative defense set up that the contract under which the building was erected was not the contract under which the bond was given; that the judgments upon the me-

chanics' liens were erroneous and void, etc. The respondent replied, denying the affirmative answer. The case was tried in October by a jury, resulting in a verdict for respondent. The verdict was afterwards set aside and a new trial granted. The second trial was by the court. During the first trial the respondent offered in evidence a certificate of the architects by which the correctness of the expenses was certified. To this offer appellant objected, on the ground that it was irrelevant, incompetent, and immaterial, and there were no allegations in the complaint to justify it. The certificate was admitted in part and excluded in part; the part excluded being held to be improperly in the certificate. After the new trial was granted, the appellant applied for, and was granted, leave to file an amended answer. Respondent asked, and was granted, leave to amend his complaint in certain immaterial particulars, but no effort was made to amend by alleging that the architects had audited and certified as required by the contract. When the case came on for trial the second time, on the 10th day of February, 1904, it was stipulated that the testimony taken at the former trial should be extended and transcribed, and the parties should offer any additional testimony they desired and interpose additional objections, and the court should consider all testimony taken and objections made at both trials. Again respondent offered the certificate of the architects upon the expenses incurred after the default of the contractor. Objection was again made, upon the same ground as in the former trial, and upon the additional ground that it was not in the manner and form contemplated in the contract. In April the case came on for argument upon the objections to testimony and upon the merits. On the 28th day of October the court signed an order permitting respondent to amend his complaint and, at the same session, signed the findings of fact, conclusions of law, and judgment upon the amended complaint, to all of which appellant objected, and it was allowed an exception. On October 29th, the order granting leave to amend, the amended complaint, the findings, conclusions, and judgment were filed with the clerk.

The appellant's contention is that the court erred in allowing the amendment to the complaint in relation to the architects' certificate at the time it was made. Conceding without deciding that the complaint was not broad enough to admit the certificate of the architects, the trial court did not commit error in granting the motion to make the pleadings conform to the evidence, and, if it had not done so, this court, under the liberal provisions of the statutes and its own uniform decisions, would consider the pleadings amended to conform to the facts proven and necessary to be proven, when such amendment would be in furtherance of justice, and when neither party would be in any wise misled or prejudiced thereby. A very earnest appeal has

been made by appellant, by both brief and oral argument, on that question, and it is insisted that injustice has been done it by allowing this amendment. Counsel differ widely as to what actually occurred during the trial of the case, tending to show whether or not objection was made to the introduction of the evidence of the architects' certificate for the special reason that it was not pleaded. An examination of the record shows that there is room for contention on this proposition. However, the more material question is, has the appellant been in any way surprised or misled by the action of the court in allowing the amendment? Upon this question, the following excerpt from the language of the court in passing upon the motion to amend has great weight. The court, in making its ruling on the motion to amend, among other things, said: "After the certificate was received in evidence by the court, counsel for defendant offered evidence tending to impeach said certificate, all of which was admitted, considered, and received by the court; that the court is of the opinion that the allegations of the complaint were broad enough to entitle the plaintiff to introduce in evidence said certificate, and inasmuch as defendants were permitted to introduce evidence for the purpose of impeaching or destroying the force and effect of said certificate the same as if an issue had been made thereon by the answer as well as by the complaint, and as the point of insufficiency of the complaint in this respect with other objections was not argued before the court until several weeks after both parties had introduced their evidence and rested, and agreed that the case should be argued after the evidence had been transcribed by the stenographer, and the point as to the sufficiency of the complaint is purely technical, and no improper advantage could be obtained by the plaintiff, and no harm done to defendant by considering the complaint as amended to accord with the proofs. Now, therefore, it is ordered upon motion of plaintiff, that said complaint be treated as amended with the proofs in the above respect, and, further, that the plaintiff may, if he desires, file amended complaint as of the time of the second trial of this cause, to wit, February 19, 1904; said amended complaint to contain an allegation as to the execution and delivery by the architects of said certificate and estimate, auditing said account above referred to, and also that the answer of the defendant shall likewise be deemed amended to accord with the proofs, so that all testimony and evidence introduced by defendant tending to impeach or destroy the effect of said certificate shall be considered properly in evidence and within the issues in said cause.

Not only was this certificate introduced in evidence on the first trial, so that the appellant cannot plead surprise or want of opportunity to prepare controverting testi-

mony, but, upon rebuttal, the appellant affirmatively proved the giving of the certificate, and attempted to show that it was given without sufficient investigation. This would probably not estop the appellant from urging the inadmissibility of the testimony offered by the respondent, but it goes to show lack of surprise or injury by reason of the order of the court allowing the amendment to the complaint. The whole record brings the case squarely within the rule announced by this court in *Green v. Tidball*, 26 Wash. 338, 67 Pac. 84, 55 L. R. A. 879, where we said: "The statute directs us to disregard any error or defect which does not affect a substantial right of the adverse party (*Balinger's Ann. Codes & St. section 4957*), and to determine all causes upon the merits thereof, disregarding all technicalities, and to consider all amendments which could have been made as made (*section 6535*). When, therefore, a cause has been tried upon its merits, as if upon pleadings sufficient in form and substance, in which the complaining party has not been misled, and has had full opportunity to present his case, some substantial wrong, some failure upon the part of his adversary to aver or prove a material matter necessary on his part to be averred and proven in order to entitle him to recover, must be shown, before this court is warranted in reversing and remanding a cause for a new trial. A mere defect in pleading is not a cause. It must not only be defective, but must have operated to the substantial injury of the complainant, before that result can follow." The same reasoning would prevent this court from dismissing the case after trial, even though the demurrer should have been sustained in the first instance. See, also, *Kinkad v. Holmes & Bull Furniture Co.*, 24 Wash. 216, 64 Pac. 157.

The next contention, that the contract sued on was not the contract upon which the bond was given, cannot be sustained. It is not material that the architect happened to be the scrivener who drew the contract. He had no authority or power whatever over the contract or over the parties to the contract, and was in no particular, as shown by the record, representing the respondent. The appellant, the bond company, delivered the bond to Covert, the contractor, for the purpose of closing the transaction with the respondent, and thereby constituted him its agent; and if there was nothing on the face of the bond which would tend to put respondent on inquiry, the appellant is bound. *King County v. Ferry*, 5 Wash. 536, 38 Pac. 538, 19 L. R. A. 500, 34 Am. St. Rep. 880; *Eureka Sandstone Co. v. Long*, 11 Wash. 161, 39 Pac. 446; *Risse v. Planing-Mill Co.* (Kan. Sup.) 40 Pac. 904; *Sweeney v. Aetna Indemnity Co.*, 34 Wash. 126, 74 Pac. 1057. We are satisfied that the lien judgments, even as against direct attack, were properly

incorporated in the judgment; but such judgments not having been moved against directly, but being assailed in a collateral proceeding, nothing is shown which affects their validity.

We think the findings of the court were justified by the testimony; that no prejudicial error of law was committed, and that, therefore, the judgment should be affirmed; and it is so ordered.

MOUNT, C. J., and RUDKIN, FULLERTON, HADLEY, JJ., concur. ROOT, J., concurs in the result. CROW, J., having been of counsel, took no part.

(41 Wash. 134)

TEATER v. KING.

(Supreme Court of Washington. Dec. 21, 1905.)

1. APPEAL — REVERSAL — INCOMPETENT EVIDENCE.

On a trial de novo in the Supreme Court it will not reverse for erroneous admission of evidence below, where there is competent evidence to sustain the judgment.

[Ed Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3648.]

2. LANDLORD AND TENANT — UNLAWFUL DETAINER — JUDGMENT.

In an action for unlawful detainer, where it appeared that defendant's lease had expired, a judgment finding that defendant at the commencement of the action was entitled to possession, and directing that plaintiff take nothing and defendant recover his costs and disbursements, was proper.

Appeal from Superior Court, King County; George E. Morris, Judge.

Action by M. M. Teater against Terry King. From a judgment for defendant, plaintiff appeals. Affirmed.

Shank & Smith, for appellant. Allen, Allen & Stratton, for respondent.

HADLEY, J. This is an action for unlawful detainer. The cause was once before here on appeal. Teater v. King, 35 Wash. 138, 76 Pac. 688. The facts are stated in that opinion, reference to which is hereby made to avoid repetition. The case went to trial the first time before a jury, and the plaintiff moved for a directed verdict and for judgment in his favor, which motion was granted by the trial court. This court reversed that ruling, and remanded the cause for a new trial. The cause was tried a second time before the court without a jury, and findings of facts and conclusions of law were entered. Judgment was rendered for the defendant, and the plaintiff has appealed.

The first assignment of error is that the trial court erred in finding that appellant is bound by the lease from Mrs. Dodds to Spores and Gavin. Upon the former appeal it was

held that the evidence bearing upon this subject sufficiently sustained the answer to require its submission to the jury, and that it was error to hold otherwise as a matter of law. The evidence was discussed in the former opinion, and it was to the same effect at the second trial. We think the court's finding upon that fact at the second trial is sustained by the evidence and should not be disturbed.

The second assignment is that it was error to admit evidence and make findings regarding the ratification of the Spores and Gavin lease by Carraher, the executor of the estate owning the premises. The competency of this evidence was recognized in the former opinion, and the finding here is amply supported by the evidence. The same is also true of the finding that respondent had the same rights that Spores and Gavin originally had.

The next assignment is that the court erred in considering a certain conversation between the parties when rent for the following month was paid. Without discussing that evidence, it is sufficient to say that, even if it were incompetent, there is sufficient other evidence to sustain the judgment, and in such case, where this court is trying the case de novo, it will not reverse a judgment merely because incompetent evidence may appear in the record. Only the competent evidence will be considered, and, if there is sufficient such to sustain the judgment, it will not be reversed. *Jefferson County v. Trumbull*, 34 Wash. 276, 75 Pac. 876; *Hunt v. Phillips*, 34 Wash. 362, 75 Pac. 970; *Muir v. Westcott*, 34 Wash. 463, 75 Pac. 1107.

The last contention is that the court erred in entering judgment for the respondent. At the time of the last trial the lease under which respondent held had expired, and it is argued that, as he was no longer entitled to possession, he was not entitled to judgment. The judgment does not in terms award him present possession. The essential part of it is as follows: "It is adjudged and decreed that the defendant Terry King, at the time of the commencement of this action, was entitled to the possession of the property described in the plaintiff's complaint herein, * * * and it is further ordered and adjudged that the plaintiff herein, M. M. Teater, take nothing by his complaint, and that the defendant Terry King have and recover of and from the plaintiff his costs and disbursements in this action * * *." We think the respondent was entitled to such a judgment, and the court did not err.

The judgment is affirmed.

MOUNT, C. J., and FULLERTON, RUDKIN, CROW, DUNBAR, and ROOT, JJ., concur.

(41 Wash. 115)

GUYATT v. KAUTZ et al.

(Supreme Court of Washington. Dec. 21, 1905.)

1. INDIANS—LANDS—PATENTS—ESTATES CONVEYED.

A patent of Indian land, reciting that it was subject to treaty stipulations that if the patentee or his family should neglect to till the soil, or should rove from place to place, the President might cancel the assignment, even though patent had issued, conveyed a base or qualified fee-simple title, subject to temporary restrictions as to alienation contained therein, which might become an absolute fee simple on the removal of the restrictions by act of Congress.

2. SAME—DESCENT OF LAND.

Under a treaty with the Puyallup Indians relating to the allotment of land to the members of the tribe, providing that the President of the United States may prescribe rules and regulations to insure to the family, in case of the death of the head thereof, the possession and enjoyment of the land, where no customs of the tribe are shown as to descent, and the President has made no rules and regulations, where a husband and wife were the only members of a family, the land descends, on his death, to her as community property.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indians, § 49.]

3. SAME.

Under Act Cong. Feb. 8, 1887, c. 119, 24 Stat. 388, providing for the allotment of Indian lands, the laws of descent of the state applied to these lands.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indians, § 49.]

4. SAME—ESTATES—STATUTORY PROVISION.

Under Act Cong. March 3, 1903, c. 1816, 33 Stat. 563, removing the restrictions on the alienation of land contained in a treaty with the Puyallup Indians, the base or qualified fee conveyed to an Indian in pursuance of the treaty ripened into a fee simple.

Appeal from Superior Court, Pierce County; W. H. Snell, Judge.

Action by Annie Guyatt against Nugent Kautz and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

F. Campbell, for appellants. Geo. T. Reid, for respondent.

CROW, J. Respondent, Annie Guyatt, brought this action against Nugent Kautz and August Kautz, appellants, to quiet title to 160 acres of Puyallup Indian land in Pierce county.

The allegations of the complaint are as follows:

"(1) That on the 26th day of December, 1854, a treaty was concluded between the Puyallup and other bands of Indians on the one part, and the United States on the other part, and was thereafter duly ratified and confirmed by the President and Senate of the United States.

"(2) That, by the terms of said treaty, lands were reserved for the members of said bands of Indians, and it was agreed that the same were to be assigned and patented to said members in severalty; that the lands

hereinafter described were a portion of the lands so reserved by said treaty.

"(3) That on and prior to the 30th day of January, 1886, Napoleon Gordon was a Puyallup Indian, and was one of the members of the Puyallup tribe of Indians, and was one of the members of said tribe entitled to an assignment of land on said reservation under the provisions of said treaty. That on and prior to said 30th day of January, 1886, said Napoleon Gordon and one Sarah, a Puyallup Indian woman, were husband and wife, and they had, prior to said date, made a location on the land hereinafter described as a permanent home.

"(4) That on the 30th day of January, 1886, under the provisions of said treaty, the United States executed and delivered to the said Napoleon Gordon a patent for said land, which said patent is in the words and figures following, to wit:

"The United States of America, to All to Whom These Presents shall Come—Greeting: Whereas, by the sixth article of the treaty concluded on the twenty-sixth day of December, Anno Domini one thousand eight hundred and fifty-four, between Isaac I. Stevens, governor and superintendent of Indian Affairs of Washington Territory, on the part of the United States, and the chiefs, headmen, and delegates of the Nisqually, Puyallup, Stellacoom, Squaksin, S'Homamish, Stehchass, T'Peeksin, Squatil and Sa-heh-wamish, tribes and bands of Indians, it is provided that the President, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable; and, whereas, there has been deposited in the General Land Office of the United States an order bearing date January 20, 1886, from the Secretary of the Interior, accompanied by a return, dated October 30, 1884, from the Office of Indian Affairs, with a list approved October 23, 1884, by the President of the United States, showing the names of members of the Puyallup band of Indians who have made selections of the land in accordance with the provisions of the said treaties in which lists the following tracts of land have been designated as the selection of Napoleon Gordon, the head of a family consisting of himself and Sarah, viz.: [Here follows a description of the land.] Now, know ye, that the United States of America, in consideration of the premises and in accordance with the directions of the President of the United States under the aforesaid sixth article of the treaty of the sixteenth day of March, Anno Domini one thousand eight hundred and fifty-four, with

the Omaha Indians, has given and granted, and by these presents does give and grant, unto the said Napoleon Gordon, as the head of a family as aforesaid, and to his heirs, the tracts of land above described, but with the stipulation contained in the said sixth article of the treaty with the Omaha Indians, that the said tracts shall not be aliened or leased for a longer term than two years, and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force until a state Constitution embracing such lands within its boundaries shall have been framed and the Legislature of the state shall remove the restrictions, and no State Legislature shall remove the restrictions without the consent of Congress. To have and to hold the said tracts of land, with the appurtenances, unto the said Napoleon Gordon, as the head of a family as aforesaid, and to his heirs forever, with the stipulation aforesaid.

* * *

"(5) That the Sarah named in said patent was the wife of said Napoleon Gordon, and the said Napoleon and the said Sarah were the only members of said family.

"(6) That in the month of October, 1886, said Napoleon Gordon died intestate in Pierce county, Wash., leaving him surviving his wife, Sarah, but leaving no issue nor father nor mother, but leaving a sister, one Kitty Kautz.

"(7) That said Kitty Kautz was not a member of said Napoleon Gordon's family, and she received a patent for an assignment of land upon said reservation at the same time said Gordon received his patent.

"(8) That thereafter said Kitty Kautz died intestate, leaving as her sole heirs, the defendants, Nugent Kautz and August Kautz, her sons.

"(9) That thereafter, and in the year 1897, the said Sarah died, intestate, leaving as her sole heir her daughter, Annie Guyatt, this plaintiff.

"(10) That after the death of said Napoleon Gordon the said Sarah remained in possession of the land in said patent described until her death; that upon the death of said Sarah this plaintiff took possession of said land, and ever since has been, and now is in possession thereof.

"(11) That heretofore the Legislature of the state of Washington, by and with the consent of the Congress of the United States, removed the restrictions contained in said treaty against the alienation of said lands by the Indians, which said removal became operative on the 3d day of March, 1903.

"(12) That by an act of Congress passed and approved on the 8th day of February, 1887, said Sarah Gordon, Kitty Kautz, Nugent Kautz, August Kautz, and this plaintiff became citizens of the United States, and upon said date, and by virtue of said act of Congress, the tribal relations of the members of the Puyallup tribe of Indians ceased and terminated.

"(13) That by reason of the facts aforesaid the defendants and each of them claim a right and interest in and to said premises adverse to plaintiff, which claim operates as and is a cloud upon plaintiff's title to said premises."

A copy of the sixth article of the Omaha treaty appears in the opinion of this court in *Bird v. Winyer*, 24 Wash. at page 274, 64 Pac. at page 179. Appellants interposed a general demurrer to said complaint, which being overruled, they declined to plead further. Judgment was thereupon entered, quieting respondent's title, and this appeal has been taken.

The only assignment of error is that the court erred in overruling said demurrer and entering judgment in favor of respondent declaring her the owner of the lands, and that appellants had no interest therein. Appellants contend that no title other than a mere right of possession passed to Napoleon Gordon under said patent, citing *Bird v. Winyer*, 24 Wash. 269, 64 Pac. 178, and *Jackson v. Thompson*, 38 Wash. 282, 80 Pac. 454. Assuming that no right other than a mere possession was granted by said patent, and commenting on said restriction on alienation, appellants, in their opening brief, say: "The facts in this case are squarely covered by both of those cases. The restrictions upon these lands were not removed, and the fee did not vest until after March 3, 1903. Sarah Gordon died in 1897. Six years before that time, and while there was nothing but a possessory right in the land, her daughter Annie, the plaintiff herein, was not a member of the family, but was her child by a former marriage; hence no rights would pass by inheritance to such child. It would make no difference in this case whether the court laid down the rule that Sarah, by virtue of the patent, took an equal interest with Napoleon Gordon at the date of the patent or not. What she did take was simply a possessory right, and that is all she held at the time of her death in 1897. She could not inherit from Napoleon Gordon, because there was nothing to inherit but a possessory right, which ceased at her death in 1897. The patent runs to Napoleon Gordon and his heirs; therefore, when the fee under the patent attached in 1903, it vested in his heirs alone. His sole surviving heirs on March 3, 1903, and now, are the two defendants in this case, Nugent and August Kautz; they are his blood relatives, namely, the children of his deceased sister, Kitty Kautz. He left no wife or children surviving him at the time his grant ripened into a fee title, on March 3, 1903, neither did he leave a father or mother. These two defendants, his now deceased sister Kitty's children, are the sole blood relatives of Napoleon Gordon, and are the sole and only owners of this land. Either this must be so, or the title could not vest in anybody, and would go to the state or county by escheat.

The defendants must take this land by inheritance, or the decisions hereinbefore referred to and rendered by this court must be reversed."

We make this quotation to show appellants' theory, which we think it unnecessary to analyze. It is true that certain language used in *Bird v. Winyer*, *supra*, and quoted in *Jackson v. Thompson*, *supra*, would seem to support appellants' contention that possession was the only right conveyed by the patent. But we do not think the question as to whether the right conveyed by the patent was possession only or amounted to a fee was necessarily involved in either of those cases. The final judgment in each instance was correct, whatever the character of the title. All expressions used in *Bird v. Winyer* on this subject were uttered *arguendo* in arriving at the final judgment of this court. Yet we there find use made of the following expression as descriptive of the title of *Bird* under his patent: "There was simply a defeasible title conveyed, and that is the condition of the estate at the present time." At said time the restrictions on alienation had not been removed. *Bird* afterwards instituted an action in the United States circuit court against one Frank Terry to enjoin him from interfering with his possession, and to secure to himself the fruits of his former litigation. In that action, although Hanford, J., speaking for the federal court, approved the decision of this court in *Bird v. Winyer*, he in substance held *Bird's* patent did convey title. See *Bird v. Terry* (C. C.) 129 Fed. 472. Again, in *Ross v. Eells* (C. C.) 56 Fed. 855, Hanford, J., in defining the character of title conveyed by a similar patent, said: "First, the patents issued by the President pursuant to the treaty made with the Indians passed the title in fee from the United States to the patentees, subject only to the restrictions and conditions subsequent, expressly declared in said treaty. No estate or reversionary interest in the patented lands is reserved or now held by the United States. The restrictions prevent alienation of the lands until authorized by a law of the state to which Congress must consent, otherwise than by leases for terms not exceeding two years. The conditions subsequent are that, for specified causes, any patent may be by the President canceled, and the land so far forfeited may be assigned to other Indians, or sold for the benefit of all the Indians of the tribe in common. Instead of reserving the right to terminate the estate by a re-entry for breach of the condition, as is usual in conveying an estate subject to a condition, each of these patents creates a power in the President to reassign the land or sell it. This power is not inconsistent with the complete investiture of title in the patentees." Although *Ross v. Eells* was afterwards reversed in *Eells v. Ross*, 64 Fed. 417, 12 C. C.

A. 205, yet, in the latter case no exception was taken to said doctrine which Hanford, J., again announced in *United States v. Kopp* (D. C.) 110 Fed. 160.

After a careful consideration of the terms of said patent, the sixth article of the Omaha treaty, the beneficial results sought to be attained thereby, and in the light of the authorities, we conclude that the patent set forth in the complaint conveyed to Napoleon Gordon a base or qualified fee-simple title subject to temporary restrictions as to alienation, which might thereafter become an absolute fee-simple title. The qualifications subjoined to said base fee resulted from the stipulation of said sixth article of the Omaha treaty, that if said patentee or his family should neglect to till the soil or should rove from place to place, the President might cancel said assignment, even though patent had issued. This was a condition, however, that never happened in the case at bar. "A qualified, base, or determinable, fee [for I shall use the words promiscuously] is an interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event circumscribing its continuance or extent * * *. It is the uncertainty of the event, and the possibility that the fee may last forever, that renders the estate a fee. * * * " 4 Kent's Commentaries, § 9; Blackstone's Commentaries, bk. 2, p. 109; 16 Cyc. 602; 11 Enc. of Law (2d Ed.) 368; *United States v. Reese*, 27 Fed. Cas. 745, No. 16,137. Some of the authorities speak of the right of alienation as incidental to a base or qualified fee. We do not think, however, that the title in fee conveyed to Gordon failed by reason of said temporary restrictions on his right of alienation. The United States imposed such restrictions for the protection and benefit of the owner, and that they do not prevent a fee-simple title, is decided in *Libby v. Clark*, 118 U. S. 250, 6 Sup. Ct. 1045, 30 L. Ed. 133. See, also, *Porter v. Parker* (Neb.) 94 N. W. 123.

Although, as intimated in *Bird v. Winyer*, *supra*, the only immediate practical benefit arising from the title conveyed was to secure to the patentee and his family possession and use of said land until such time as the restrictions on alienation should be removed by the Legislature of the state of Washington and by act of Congress, yet the estate actually conveyed was one of inheritance, being a base, fee-simple title temporarily restricted as to alienation, and subject to forfeiture in the event of the patentee or his family failing to till the soil, or upon their returning to nomadic habits of life. If, then, the fee title, subject to such restrictions, was granted to Napoleon Gordon, to whom did such title descend at the date of his death in October, 1886? Neither Napoleon nor Sarah was then a citizen of the United States. They were still members of the Puyallup tribe. In *Jones v. Meehan*, 175 U. S. 1, at page 29, 20

Sup. Ct. 1, at page 12 (44 L. Ed. 40), in a well-considered case, the following language is found: "The Department of the Interior appears to have assumed that, upon the death of Moose Dung, the elder, in 1872, the title in his land descended by law to his heirs general, and not to his eldest son only. But the elder Chief Moose Dung being a member of an Indian tribe, whose tribal organization was still recognized by the Government of the United States, the right of inheritance in his land, at the time of his death, was controlled by the laws, usages, and customs of the tribe, and not by the law of the state of Minnesota, nor by any action of the Secretary of the Interior." There is no allegation in the complaint pleading any usage or custom of the Puyallup tribe, nor can the courts take judicial notice thereof. It seems to be conceded by appellants and respondent that, as regards real estate, the Puyallup tribe of Indians had no rule of descent. The tribe, however, was still in existence when Napoleon Gordon died. The title necessarily descended to some person. In determining what became of it, we must look to the terms of the treaty in pursuance of which the patent was issued. It provides that the President of the United States may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. It is evident from this provision and from the entire body of the treaty that the allotment was made for the benefit of the family. It does not appear that the President ever prescribed any such rules or regulations. In the case at bar, none were necessary, as Sarah was the only remaining member of the family, and would be entitled to succeed to any estate or title held by Napoleon Gordon under his patent, and of which he died seised. In the absence of adoption of any such rules or regulations, or of any showing as to the customs of the tribe, we are compelled to follow the laws of descent of this state, provided they do not conflict with any of the terms of said treaty or patent, which in this instance they do not. In our opinion, the law of descent of community property would more properly apply, and under such laws of descent the land would go to Sarah. This rule is applied by us by reason of necessity, and to carry out the evident purpose of the treaty in securing said estate to the family, and not because we undertake at this time to decide either that the land was community property, or that while the tribal relations still existed the laws of descent of this state applied to these Indian lands.

A general act of Congress providing for allotments of Indian lands was passed and approved February 8, 1887 (Act. Feb. 8, 1887, c. 119, 24 Stat. 388). It is contended by respondent that, under the provisions of said act, the laws of descent in force in the state of Washington thereafter applied to these

lands. We think this contention is well founded. By section 6 of said act, Sarah Gordon, Annie Guyatt, Kitty Kautz, Nugent Kautz, and August Kautz all became citizens of the United States, and in pursuance of the doctrine announced in *Jones v. Meehan*, supra, the laws of descent of the state of Washington thereafter applied to these lands. Sarah Gordon died in the year 1897, after the enactment of said law. Respondent was her only heir and, under the laws of this state, inherited all the estate of her mother. On March 3, 1903, all restrictions on alienation under said patent were removed in pursuance of acts of the Legislature of the state of Washington (Ballinger's Ann. Codes & St. Supp. § 4553), and of Congress (33 Stat. 565, c. 1816), thereby causing the title under said patent, theretofore a base fee, to ripen into an absolute fee, and such absolute fee-simple title is now vested in the respondent, Annie Guyatt, free and clear of any claims of appellants.

The honorable superior court committed no error in overruling the demurrer. The judgment is affirmed.

MOUNT. C. J., and DUNBAR, ROOT, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

MOYER et ux. v. FOSS et ux.

(Supreme Court of Washington. Dec. 21, 1905.)

TAXATION—PARTIAL PAYMENT BY TENANT IN COMMON—SALE FOR NONPAYMENT OF BALANCE.

Property was assessed to the owner of the record title, and he, as permitted by statute, paid one-half the taxes. There was nothing to charge the officers with notice that he was the owner of an undivided half interest only, or that he was intending to pay the taxes on such an interest. Having previously sold an undivided half interest, the land was afterwards partitioned. The statute provides that, where a partition of real property is made between tenants in common, all liens which have theretofore attached to the undivided interest of one of the tenants shall thereafter be a lien only on the share assigned to such tenant. Held, that the statute did not apply so as to prevent a sale of the entire tract for nonpayment of the remainder of the taxes.

Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Action by Elwood W. Moyer and wife against Louis Foss and wife to quiet title. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Million & Houser and Dave Hammack, for appellants. Smith & Brawley, for respondents.

FULLERTON, J. On August 4, 1891, one William Munks, since deceased, held the legal title to certain lands situated in Skagit county, and on that date platted the same into lots and blocks as "Munks' First Queen Anne

Addition to Anacortes." Prior thereto he had entered into a contract to convey an undivided one-half interest in the land to the Seattle & Northern Railroad Company, and on August 10th of the same month, as a compliance therewith, conveyed to that company some 83 of the lots, being practically a one-half of the entire tract. The tract had theretofore been assessed for state, county, and municipal taxes for the year 1891 as the property of Munks, and was described on the assessment roll by legal subdivisions in accordance with the United States government surveys. Later on when the taxes matured, Munks paid to the county treasurer one-half of the amount assessed against the land. The remainder was suffered to become delinquent, and in due time a certificate of delinquency for the same was issued to the county of Skagit. The county foreclosed its certificate in 1903, and an undivided half of the property was sold in satisfaction of the amount due. At the sale the county itself became the purchaser, and later conveyed the interest so purchased to one Thomas Smith, who in turn conveyed to the respondents. Between the time of the assessment and the date of the sale thereunder, William Munks died, and the land was sold as a part of his estate to the appellants. After the conveyance to the respondents this action was instituted by the appellants to quiet their title. Issue was taken on the allegations of the complaint and a trial had, at which the foregoing facts were made to appear. It appeared also that the appellants did not tender or offer to pay to the respondents prior to the commencement of the action or at all the taxes for which the land was sold. On this fact appearing, the trial court ruled that the appellants could not maintain their action, and, refusing to pass on the question of the legality of the tax sale, entered a judgment dismissing the action. This appeal is from the judgment of dismissal.

In the argument, both in their brief and at the bar, counsel for the appellants concede that, if this is an action to recover land sold for taxes, the appellants must fail, for want of having made the required tender; but they contend that it is not such an action, because there was no tax due on the interest of the appellants in the land at the time of the purported foreclosure and sale for which the land could be sold. They argue that a tax lien is analogous to the lien of a mortgage, a mechanic's lien, or that of a judgment, and that, when such a lien is created upon an undivided interest of a tenant in common in land and the land is afterwards partitioned among the tenants, the lien at once attaches to the part assigned the tenant against whose undivided interest it was a charge, and is no longer a lien on any part of the segregated interests of his co-tenants. Consequently, in this case, when the grantor of the appellants paid one-half the taxes on the tract in question, he paid the taxes upon his own interest,

leaving the unpaid remainder a lien upon the undivided interest of the railroad company, and, when the land was afterwards partitioned, the unpaid portion of the taxes attached to the tract assigned to the railroad company. And it is concluded therefrom that there was no tax due upon appellants' portion of the property when the foreclosure and sale were had, and that such sale is therefore necessarily void. It is true that in this state it is provided by statute that, where a partition of real property is made between tenants in common through the instrumentality of the courts in a proceeding to which lien holders are made parties, all liens which had theretofore attached to the undivided interest of one of the tenants should thereafter be a lien only on the share assigned to such tenants; and that this court, in *Port v. Parfit*, 4 Wash. 369, 30 Pac. 328, applied the rule to a case where the partition was voluntarily made between parties holding lands as tenants in common. But it is plain that neither the rule of the statute nor the rule of the cited case meets the conditions here. At the time the land was assessed there was nothing on the record to show that the railroad company had any interest in it. The title stood in the name of William Munks. The statute then provided that an owner of land might pay one-half of the taxes on his land before a certain date and receive a rebate of a certain per cent. on the amount thereof, and have a given time to pay the remainder without the imposition of a penalty. When, therefore, Munks paid one-half of the taxes on this land, he did nothing more than the statute permitted him to do, and hence there was nothing on the record, or in the acts of Munks, to charge the officers of the county with notice that Munks' interest in the property was different from what it appeared to be, namely, the entire interest; and they were justified in treating it as such. The sale, for this reason, was not void for want of a valid tax against Munks' interest. It may have been the right of the holder of the interest to come into the foreclosure proceeding and ask to have the unpaid portion of the tax adjudged to be a lien upon that part of the tract conveyed to the tenant in common on the partition of the property, but this is the extent of the right. On the face of the record the tax was one for which the land sold was apparently bound. In such a case the inquiry whether it is in fact bound must be raised in the foreclosure proceedings, else the party is estopped by the judgment of foreclosure from questioning the fact. *Smith v. Newell*, 32 Wash. 369, 73 Pac. 369; *Jefferson Co. v. Trumbull*, 34 Wash. 276, 75 Pac. 876; *Washington Timber, etc., Co. v. Smith*, 34 Wash. 625, 76 Pac. 267. Inasmuch, therefore, as it is not made to appear that the tax was void on its face, the appellants cannot maintain an action to recover the land sold to satisfy the tax without first paying or tendering to the person claiming under the tax

title the amount of the tax with interest, penalties, and costs, for which the land was sold. Ballinger's Ann. Codes & St. §§ 5678, 5679, 5680; Ward v. Huggins, 16 Wash. 530, 48 Pac. 240; Merritt v. Corey, 22 Wash. 444, 61 Pac. 171; Denman v. Steinbach, 29 Wash. 179, 69 Pac. 751.

The judgment will stand affirmed.

MOUNT. C. J., and HADLEY, RUDKIN, CROW, ROOT, and DUNBAR, JJ., concur.

STATE ex rel. GOUPILLE v. SUPERIOR COURT OF KING COUNTY et al.

(Supreme Court of Washington. Dec. 21, 1905.)

PROHIBITION—JUDICIAL PROCEEDINGS—REMEDY AT LAW.

Prohibition will not lie to restrain the discharge of a writ of garnishment; there being an adequate remedy at law by an appeal, and the preservation of the fruits of the garnishment pending appeal by giving a bond superseding the discharge.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prohibition, § 5.]

Prohibition by the state, on the relation of Marguerite Goupille, to restrain the superior court for King county and Boyd J. Tallman, as judge thereof, from recalling a writ of garnishment in an action by relator against Frank Chaput. Alternative writ quashed.

Vince H. Faben, for plaintiff.

FULLERTON, J. On September 14, 1905, in a cause pending in the superior court of King county, in which Marguerite Goupille was plaintiff and one Frank Chaput was defendant, the jury returned a verdict in favor of the plaintiff and against the defendant for the sum of \$7,305.75. Immediately upon the return being made the plaintiff moved for and obtained a judgment against the defendant for the sum found to be due by the jury. Thereafter, and on the same day, the plaintiff caused a writ of garnishment to issue on the judgment against the Seattle Safe Deposit Vaults, Incorporated, requiring it to answer concerning such property subject to execution as it might have in its possession belonging to the defendant, which writ was served on the company on the same day by the sheriff. On September 15, 1905, and within the time limited by statute in which motions for new trials can be filed, the defendant moved for a new trial in the cause in which the judgment against him was obtained, and at the same time moved that the court recall and cancel the writ of garnishment sued out upon the judgment on the ground that the motion for a new trial suspended all proceedings upon the judgment, in garnishment or otherwise, until it should finally be disposed of. The trial judge took the view of the law contended for

by the defendant and announced his intention of recalling the writ of garnishment, whereupon the plaintiff applied to this court for a writ to prohibit him from so doing. An alternative writ of prohibition was issued on the application being made, and the question before us now is, shall the writ be quashed or made permanent?

We think the alternative writ was improvidently issued and must be quashed. Our statute provides that the writ of prohibition is the counterpart of a writ of mandate, and that it may be issued only in cases where there is not a plain, speedy, and adequate remedy at law. In this case there is a plain, speedy, and adequate remedy at law. If the relator feels aggrieved at the order of the court discharging the writ of garnishment, he can appeal therefrom, and can preserve the fruits of his garnishment pending the appeal by giving a bond superseding the order of discharge.

The writ is discharged.

MOUNT. C. J., and HADLEY, RUDKIN, CROW, ROOT, and DUNBAR, JJ., concur.

GRANTHAM v. GIBSON et al.

(Supreme Court of Washington. Dec. 21, 1905.)

1. NUISANCE—PRELIMINARY INJUNCTION—DAMAGES.

Where complainant alleged that he and defendants were tenants of the same building, and that defendants maintained a shooting gallery and two mechanical musical instruments therein which were a nuisance, and had already driven away 14 of the patrons of complainant's hotel, and would, if not abated, drive away the remainder, to the ruin of his theretofore profitable business, the complaint sufficiently alleged that plaintiff had suffered substantial damages justifying the issuance of a temporary injunction, though it failed to charge that complainant had suffered damages in any specific sum.

2. SAME—INJURY TO LEASEHOLD—RIGHTS OF TENANT.

Where a nuisance sought to be enjoined by a tenant consisted merely in the manner of use of adjoining premises by defendant, and was a mere injury to complainant's business, and not to the freehold, for which complainant had no adequate remedy at law, it was no defense to his right to a temporary injunction that he was not the owner of the premises occupied by him.

3. APPEAL—QUESTIONS NOT RAISED AT TRIAL.

Where the scope of a preliminary injunction granted to restrain a nuisance was not objected to at the trial, defendant was not entitled to object on appeal that it was too broad.

4. NUISANCE—PRELIMINARY INJUNCTION—EVIDENCE.

Where defendants maintained and operated a shooting gallery, with certain mechanical musical instruments connected therewith, adjoining complainant's hotel, and so operated the same that they became a nuisance and caused complainant's guests to leave the hotel, and injured his business, such facts justified the issuance of a preliminary injunction pending a suit to abate the nuisance.

Appeal from Superior Court, Pierce County; Thad Huston, Judge.

Suit by John Grantham against A. S. Gibson and another. From an order granting a temporary injunction, defendants appeal. Affirmed.

Williamson & Williamson and J. W. A. Nichols, for appellants. Harry H. Johnston, for respondent.

FULLERTON, J. The respondent brought this action against the appellants to enjoin them from operating, in connection with their business, a shooting gallery and two certain musical instruments known, respectively, as a "tonophone" and an "orchestration," alleging that their operation constituted a public nuisance specially injurious to himself. At the commencement of his action the respondent applied for a temporary injunction restraining the appellants from operating the shooting gallery and the musical instruments until the rights of the parties could be determined by a trial upon the merits. Notice of the application was duly given and a hearing was had thereon, at which hearing the court granted the temporary injunction applied for. This appeal is from that order.

The appellants first attack the sufficiency of the complaint. It is contended that because the respondent neither alleged that he had suffered damages in any specific sum, nor demanded judgment for damages in any specific sum, in his complaint, the same is fatally defective, and insufficient to support a judgment or order of any kind. But we think the complaint sufficient to sustain an order for a temporary injunction. Aside from the fact that an injunction may be sued out to restrain the erection or creation of a merely threatened nuisance, there is in this complaint an allegation of substantial injuries, as well as a showing that the continuance of the acts complained of will work serious and irreparable injury to the respondent's business. It is alleged that the appellants and respondent are tenants in the same building; that the appellants exhibit pictorial views, enlarged and made attractive by electrical devices; that the respondent conducts a hotel and lodging house, and was first in the order of time; that the installation of these musical instruments and the shooting gallery by the appellants has already driven away some 14 of his patrons, and will, if not abated, drive away the remainder and prevent him from obtaining others, to the ruin of his theretofore profitable business. These allegations, we think, show, not only substantial damages already suffered, but that the respondent will continue to suffer substantial damages so long as these mechanisms are operated by the appellants.

It is next said that, because the respondent has only a leasehold interest in the prop-

erty, his remedy lies in an action of damages for the wrongs done him, as no one but the owner of the fee can maintain a suit to enjoin the continuance of a nuisance. Were the nuisance complained of merely an injury to the freehold, it may be that this contention could be maintained, but here the nuisance alleged is one that works an injury to the business of the lessee, not an injury to the freehold, and his right to maintain an injunction must be determined by the character of the injury done him, and the effectiveness of his remedies at law, not upon the title by which he holds the property in which he conducts the business injured. The allegations of the complaint show that an action of damages would afford inadequate relief, and this is the measure of the complainant's right to maintain an action of injunction.

It is next complained that the injunction is too sweeping, in that it enjoins the appellants from operating the shooting gallery and musical instruments at all times, while it does not appear that the operation in certain parts of the day would seriously interfere with the respondent's business. But this question seems not to have been suggested in the trial court. There the contest was over the right of the respondent to an injunction at all, and the court was not asked to limit the operation of the injunction to certain parts of the day. For the reason that it was not suggested below, it will not be determined here.

Lastly, the appellants contend that the evidence was insufficient to justify the order. On this question we think there can be but little doubt. Manifestly the operation of the contrivances complained of at the place when the appellant operated them constituted a nuisance specially injurious to the appellant. He was therefore entitled to have their operation enjoined, and the court did not err in so holding.

The order appealed from is affirmed.

MOUNT, C. J., and HADLEY, RUDKIN, CROW, ROOT, and DUNBAR, JJ., concur.

NISBET v. GREAT NORTHERN CLAY CO.
et al.

(Supreme Court of Washington. Dec. 21, 1905.)

1. RECEIVERS—SALE—NOTICE TO CREDITOR—ABSENCE OF NOTICE—EFFECT.

Where, on the hearing of the petition of a creditor to set aside an order confirming a receiver's sale, the creditor not having had notice of the sale, it was not shown that the trust had lost anything by the sale, a reaffirmance was justified.

2. ESTOPPEL—INCONSISTENT CLAIMS.

A creditor was in no position to contest the validity of receivers' certificates as constituting prior liens upon the trust property, where the relief sought by him was based on such certificates.

3. RECEIVER—CERTIFICATES—PRIORITIES.

Where a certain receiver's certificate was prior in time to another, and was for an actual cash loan, and was declared to be a prior lien by order of court, the subsequent certificate was subject to it, though there was no recital of the first certificate in the second.

4. SAME—LABOR CLAIMS—PREFERENCES.

By the express provisions of Sess. Laws 1897, p. 55, c. 43, laborers are entitled to a prior lien upon the property of a corporation in the hands of a receiver.

5. SAME—SALE—PAYMENT—RECEIVER'S CERTIFICATES.

It was proper on a receiver's sale to permit the purchaser who held receiver's certificates, which were prior liens on the property, to turn them in as part of the purchase price.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Robert Nisbet against the Great Northern Clay Company, in which a receiver was appointed for defendant. Appeal by the Ohio Ceramic Engineering Company from an order denying a petition to vacate an order confirming a receiver's sale. Affirmed.

Allen, Allen & Stratton, for appellant. James Kiefer, for respondent bank. McCafferty & Kane, for respondent Brown. Kerr & McCord, for respondent Carstens.

HADLEY, J. This appeal is from an order denying a petition to vacate an order confirming a receiver's sale. The original action was brought by Robert Nisbet against the Great Northern Clay Company, a corporation. Insolvency of the corporation was alleged and admitted, and a receiver was appointed. The receiver, by authority of the court, conducted the business of the corporation for some months, with unprofitable results. The first receiver appointed conducted the business for a few weeks, when he was succeeded by J. E. Ballou, who managed the receivership and affairs of the corporation for some months, when he left the state, leaving liabilities of the receivership aggregating a large sum. Ballou was then removed as receiver, and A. L. Brown was appointed as his successor. The disastrous results appear to have been due to the management of receiver Ballou. During such management the property deteriorated in value, and was in a dilapidated condition when Ballou left it. The expenditure of some thousands of dollars was necessary by way of repairing and improving the brick plant before it could be successfully operated. The receiver was unable to do this, inasmuch as the trust was insolvent. The business could no longer be conducted through the receivership. The property was constantly depreciating in value, and with this condition of affairs confronting him the present receiver, Brown, entered upon his duties. It was the desire of the court and the receiver to prevent further depreciation in value of the assets, and thenceforth the efforts of both were directed to the end that the assets of the trust might be converted into cash for

the benefit of creditors as speedily and advantageously as possible.

For a better understanding of the questions involved on this appeal a further definite and somewhat extended statement as to certain facts becomes necessary. On October 1, 1903, a receiver's certificate was issued by receiver Ballou to the First National Bank of Seattle for \$3,000, bearing interest at 8 per cent. per annum, and on the 2d day of November of the same year another certificate was issued by the same receiver to the same bank for \$2,000, bearing the same rate of interest. Upon the face of the first certificate it was declared to be a first lien upon all the assets and property of the corporation. The second one was declared to be a lien upon all the assets prior to all other liens and claims except that of the said \$3,000 certificate. The said certificates were issued by the authority of the court, and were approved by it. The amount of money represented by the two certificates was loaned by said bank to the receiver. On the 10th day of November, after the issuance of the last certificate above mentioned, another certificate was likewise issued by the receiver to the Ohio Ceramic Engineering Company, of Cleveland, Ohio, for \$1,500, bearing interest at 6 per cent. per annum. This certificate stated upon its face that it was a prior lien upon all the assets of the corporation except the \$3,000 certificate above mentioned, and the costs and expenses of the trust. The certificate was issued in payment for 100 dryer cars purchased by receiver Ballou from said payee named in the certificate. Receiver Ballou also employed certain laborers while operating the plant, and promised to pay them sums aggregating \$2,077.70. The claims of these laborers were assigned to said First National Bank of Seattle. The total amount thus held by said bank against the trust, including the two certificates mentioned and the assigned labor claims, was, with interest, \$7,248.86 on the day of the confirmation of the sale which it is here sought to set aside. On the 9th day of February, 1904, Robert Nisbet, the plaintiff in the action wherein the receiver was appointed, filed his petition with the court, asking an order for the sale of all the property of the Great Northern Clay Company, then in the hands of the receiver. Such an order was made authorizing the receiver to sell the property at public auction to the highest bidder for a minimum price of \$20,000, and requiring not less than 10 days' notice of the sale. Notice as prescribed in the order of sale was given, and the time fixed for the sale was March 5, 1904, at which time the receiver offered the property for sale, but received no bids, and thereupon he continued the sale until March 10th. Immediately after the said adjournment of sale the receiver and his attorneys, together with the attorneys of substantially all the parties who

had appeared in the action, went before the superior court then in session, and in open court reported the failure to sell. Discussion was had between court and counsel with reference to the emergency for immediate sale. The court thereupon instructed the receiver to reoffer the property for sale as before for the sum of \$20,000, and, if that sum could not be obtained, to offer the property regardless of price, subject to the confirmation and approval of the court.

Thereupon Ernest Carstens offered in open court to bid for the property, provided the aforesaid claims of the First National Bank of Seattle should be received as a part of the purchase price. This was made in the presence of the court and counsel at the time they were together as aforesaid. The court thereupon stated in the hearing of all present that, if said Carstens would bid at the adjourned sale a sum which should be accepted and approved by the court, the amount of the claims of said bank would be accepted as a part of the purchase price, if said Carstens could acquire the claims. It was in this manner and through this understanding with the court and counsel for interested parties that Mr. Carstens became involved in the matters which led to the controversy brought here by this appeal. Accordingly on March 10th the property was again offered for sale by the receiver, and Mr. Carstens bid therefor the sum of \$11,200, conditioned upon the use of the obligations of the receiver to the First National Bank of Seattle as a part of the purchase price. The receiver reported the offer to the court, and notice of hearing thereon was given to all the parties to the action, and to all creditors who had filed appearances in the action. At the hearing the advisability of accepting the offer was fully discussed and considered in the presence of counsel, who represented substantially all of the interested parties; and the court, believing that the offer was the best that could be obtained, directed the receiver to accept it. Thereupon Mr. Carstens paid the receiver \$11,200, of which sum \$7,248.86 consisted of receiver's certificates and assigned labor claims held by the bank as aforesaid, and the balance, \$3,951.14, was paid in cash. The sale was confirmed by the court, and by its order a conveyance was executed by the receiver, transferring all the property to Mr. Carstens. Thereafter the Ohio Ceramic Engineering Company filed a petition asking that the sale, or the order approving it, and the conveyance, be set aside. The petition recites the facts heretofore stated with reference to the issuance of the \$1,500 receiver's certificate to the petitioner, and alleges that the petitioner had no notice of the sale or of any of the proceedings had in connection therewith. It is also alleged that, as a consequence of said proceedings, all the purchase price of the property was appropriated by the receiver to the payment of claims other than that of the petitioner, and which

were in fact subordinate and inferior in right and equity to the claim of the petitioner. It is also alleged that allowances were made to the receiver in the sum of \$1,200 for his own services, and \$800 for his attorney's services, which sums are charged to have been excessive; and it is asked that the order of allowance be set aside. The petition was denied, and from the order of denial the petitioner is prosecuting this appeal.

From the record we are satisfied that all parties thereto were advised of the proceedings concerning the sale of the property, and assented to the confirmation thereof, except the appellant. At least, no one except appellant has raised any objection to the proceedings. We are furthermore satisfied that the highest possible sum was obtained for the property. Appellant has in no manner pointed out how a greater sum might have been realized if it had been present and had actually participated in the proceedings. Without discussing the question of its right to notice of the proceedings, and assuming that appellant is in position to contest the regularity thereof, it is nevertheless true that, with its opportunity at the hearing of its petition, it has not shown that the trust had been in any sense the loser by the sale and its confirmation. We, therefore, think the court was fully justified in entering the judgment which was rendered upon the hearing of appellant's petition, which in terms reaffirms and reapproves the sale. This was an order entered after a full hearing from appellant, and it seems to us that appellant is now concluded thereby, so far as any question of notice is concerned. It has had its day in court, and an opportunity to be heard upon the questions it is urging, and, unless some substantial right has been violated, the order of confirmation should stand.

The next question to be considered is that of the consideration for the sale which was accepted by the receiver and approved by the court. Appellant is not in position to contest the validity of the receiver's certificates as constituting prior liens upon the property of the trust, for the reason that the relief it now seeks is based upon such a certificate. Its certificate states upon its face that it is junior to one for \$3,000 held by the bank aforesaid, and also that it is junior to the expenses of the trust. The fact was, however, that eight days before its certificate was issued another one for \$2,000 was issued to the bank, which fact was doubtless overlooked by inadvertence when appellant's certificate was drawn, and was not mentioned therein. The \$2,000 certificate was, however, first in point of time, was for an actual cash loan, was declared to be a prior lien by order of the court, and appellant's certificate must therefore be held to be subject and junior to it. Its certificate was also junior to the laborers' claims for two reasons: The laborers were entitled to a

prior lien upon the property of the corporation, under chapter 43, p. 55, Sess. Laws 1897, and the certificate itself says it is subject to the expenses of the trust. The labor was performed in behalf of the trust at the instance of the receiver, and by authority of the court. It follows that all the claims allowed by the court as part of the purchase price of the assets were liens upon the assets, and prior to the appellant's claim. Being prior liens upon the assets, the holder of the claim would, so far as appellant was concerned, have been entitled to the first money from the proceeds of the sale, if the sale had been entirely for cash. By the application of the amount of the claims to the purchase price the result was the same as though the full price had been directly paid in cash. We think respondent Carstens, as the holder of those claims, would have been entitled to turn them in as part of the purchase price, even in the absence of the previous understanding had with the court. In *Mercantile Trust Co. v. Kanawha & O. R. Co.*, 58 Fed. 6, 7 C. C. A. 3, the purchasers were permitted to deposit bonds in payment of the purchase price, after paying into court sufficient cash to extinguish the costs and liens prior to the bonds. Of this the court said: "This was precisely the same as if the purchasers had paid the whole price in money, and had then withdrawn on distribution their pro rata share of the proceeds. Their rights cannot be different because they did not go through this useless formality. The railroad property, to the extent that it was paid for by bonds, was, in the hands of the purchasing bondholders, proceeds of sale."

We therefore think the sale, its approval, and all the proceedings considered together, including the order of reconfirmation aforesaid were of sufficient regularity, and that appellant's rights were not prejudiced thereby. We know of no statutory requirements regulating the sale of property by receivers in this state which make it necessary to give notice to all the creditors. The sale is made under the direction of the court as a court of equity, and it should be presumed that the court and its officers will make an honest effort to realize the greatest sum possible for the assets of the trust. When, therefore, a purchaser has bought in good faith, unless it is subsequently made to appear that the best interests of the trust would be served by not making any sale at all, or that the consideration is inadequate, his rights become established, and should not be disturbed. Particularly should it be so when it appears that no higher sum could have been realized. Under such circumstances we are unable to see that a creditor's rights are prejudiced by the mere fact that he did not have actual notice of the sale. The record of this case shows that, if appellant had been present at the sale proceedings, and at the

time of the first confirmation, it would have been unable to effect a different result from that which was obtained. Its claim would necessarily have been postponed as junior to those applied upon the purchase price, for the reason that the law under the facts fixed its status so. Being subject to those claims, appellant's claim, therefore, becomes a first lien upon the remaining assets, except expenses of the trust, for the reason that it is expressly made subject to such expenses.

Appellant's interest in the premises, therefore, seems to be confined to the right to share in the distribution of the balance with preference, according to the terms of its certificate. The purchaser paid to the receiver \$3,951.14 cash, which exceeds the amount required to pay appellant's claim by considerably more than \$2,000. Unless more than the excess is required to pay necessary expenses of the trust, appellant is still amply protected. The petition shows that by an order of the court the receiver and his attorneys were allowed for services the aggregate sum of \$2,000. It is claimed that this was excessive, and the petition asks that the order of allowance be set aside. After hearing testimony upon this subject the court reaffirmed its former decision as to the value of the services. From all that is shown in this record we shall not undertake to say that the finding was erroneous. Other allowances, said to have been made at different times during the administration of the trust, are discussed in appellant's brief, but they are not mentioned in its petition, are not within the issues before us, and are not covered by the judgment from which the appeal is taken. They therefore involve questions that are not before us.

The judgment is affirmed.

MOUNT, C. J. and RUDKIN, CROW, ROOT, and DUNBAR, JJ., concur.

THOMAS et ux. v. LINCOLN COUNTY.

(Supreme Court of Washington. Dec. 22, 1905.)
APPEAL—APPELLATE COURT—JURISDICTION—
AMOUNT IN CONTROVERSY—LEGALITY OF
TAX.

Where plaintiffs recovered a judgment against a county in a suit to recover \$64.56 taxes paid on an alleged erroneous assessment of a certain section of land which by mistake of the taxing officers was assessed as containing more land than it did in fact contain, the action did not involve the "legality" of a tax or assessment, within Const. art. 4, § 4, and 2 Ballinger's Ann. Codes & St. § 4650, permitting an appeal to the Supreme Court in cases involving less than \$200, where the case involves the legality of a tax or assessment.

Appeal from Superior Court, Lincoln County; Miles Poindexter, Judge.

Action by A. J. Thomas and wife against Lincoln county. From a judgment in favor

of plaintiffs, defendant appeals. On motion to dismiss. Granted.

R. M. Dye, for appellant. H. A. P. Myers, for respondents.

ROOT, J. Respondents instituted this action to recover taxes paid under protest. The complaint contains two causes of action. By the first it appears that respondents are, and ever since the year 1900 have been, the owners of a certain section of land which contained 761.66 acres and no more; that for each of the years 1900, 1901, 1902, and 1903, the taxing officers of the appellant county assessed this section of land as containing 859.08 acres; that respondents paid the taxes so assessed in the year 1900, by mistake and without knowledge that the section contained a less number of acres than 859.08; that thereafter they paid their taxes each year under protest as to the amount now claimed to be excessive; but it is not shown that they ever appeared before the board of equalization or in any manner endeavored to have the assessment roll corrected. The second cause of action is based on a similar claim assigned by George W. Thomas and wife to respondents. The total amount of excessive tax, alleged by respondents to have been paid by them and their assignors during said years, was the sum of \$64.56, in which amount judgment was awarded them on the trial of this cause in the superior court. From this judgment the county appeals.

Respondents move to dismiss this appeal for the reason that the amount involved is less than \$200. Appellant has filed no reply brief, but doubtless relies upon the exception in the Constitution, which permits an appeal to be taken to this court where the case involves the legality of a tax or assessment, even though the amount involved be less than \$200. Neither party has furnished us any citation of authority upon the question involved in this motion to dismiss. The question appears never to have been before this court. We think the motion must be granted. We do not think the expression "legality of a tax" comprehends such a question as is presented in this case. Here the difficulty arose from the county assessor having entered this section of land upon the assessment roll as containing 859.08 acres, whereas it contained only 761.66. The roll being returned with this number of acres set forth therein, the usual proceedings were taken by the county officials, which culminated in respondents being taxed for a larger acreage than they in reality owned. We think this was an error of fact and not of law. There was no contention that the land of respondents was not subject to taxation. There was no contention that a higher rate of levy was made than the law justified. There was no contention that property was assessed which was by law exempt. There was no lack of power to assess and levy a

tax. There was no contention that any of the proceedings appertaining to the assessment or levy were made other than as, or different from those, provided by law. The controversy did not arise from a difference of opinion on any question relating to the subject-matter, or as to any rule or construction of law; but the whole controversy took its inception from the mistake of the assessor in entering the amount of respondents' acreage in the assessment roll. This was a mistake that could and should have been called to the attention of the assessor, the county commissioners, or the board of equalization, and corrected by some of these officials. Neither the omission to do or have this done, nor the error in entering the number of acres erroneously, in our opinion, presented to the lower court a question affecting the "legality" of a tax or assessment, as that term is employed in section 4, art. 4, of the state Constitution, and in section 4650, 2 Ballinger's Ann. Codes & St. We have been unable to find any authorities exactly in point, but believe that the following have a tendency to support the conclusion we have reached: *Hansen v. Nilson*, 17 Wash. 606, 50 Pac. 511; *Brown v. Rice*, 52 Cal. 489; *Cooley on Taxation* (2d Ed.) p. 748; *Favrot v. Baton Rouge*, 38 La. Ann. 230; *State v. Recorder*, 41 La. Ann. 533, 6 South. 819; *Mason v. Gamble*, 21 How. (U. S.) 390, 16 L. Ed. 81; *Tebault v. New Orleans*, 108 La. 686, 32 South. 982; *Rocheblave Co. v. New Orleans*, 110 La. 530, 34 South. 665.

The motion to dismiss is granted.

MOUNT, C. J., and DUNBAR, HADLEY, FULLERTON, RUDKIN, and CROW, JJ., concur.

SLATER v. GRIBBEL et al.

(Supreme Court of Washington. Dec. 26, 1905.)

EQUITY—STANDING TO INVOKE PROTECTION—FRAUD OF COMPLAINANT.

Plaintiff falsely represented to defendants that he had an option on a tract of land, and procured from them a loan of \$20,000 to make the purchase. He then employed a third person to obtain a contract for the purchase of the land, giving him \$100 to pay down thereon. The contract was procured accordingly, the purchase price being \$35,000, and plaintiff contracted to buy the land from the third person for \$100,000; the contract containing an indorsement that \$15,000 had been paid thereon, whereas nothing had been paid except the \$100. On the strength of this contract and false representation as to the money paid thereon, plaintiff borrowed \$36,000 more from defendants. It was agreed between plaintiff and defendants that a corporation was to be organized to take over the lands, bonds were to be sold, and defendants were to be reimbursed from the proceeds of the bonds, and were to receive a stock bonus. Plaintiff converted most of the money to his own use and made no further payments on the contract. Tax foreclosure proceedings were instituted against the land, and on plaintiff's refusal to pay the taxes, pay the purchase price, or organize the corporation,

certain defendants, to protect themselves, bought the land from the third person for \$52,500. *Held*, that plaintiff had no standing in a court of equity to assert title to the land under his contract with the third person.

Appeal from Superior Court, King County; W. R. Bell, Judge.

Action by Robert Y. Slater against John Gribbel and others. From the judgment rendered, plaintiff and certain defendants appeal. Affirmed.

W. H. Bogle, for appellant. Wm. Parmerlee and Wm. G. Crosby, for respondents.

MOUNT, C. J. Appellant, Slater, brought this action in equity, asking the court to adjudge him a four-tenths interest in certain lands in King county. After issues were made upon the pleadings, and after a trial on the merits, the court, without making any findings of fact, entered a decree adjudging that appellant Slater was entitled to a four-tenths interest in the lands in question, on condition that within four months from the date of the decree he would repay to respondents the sum of \$27,600 borrowed from them, and the further sum of \$21,100, being four-tenths of the purchase price of the land paid by respondents, making a total of \$48,600. From that decree Slater has appealed.

There is some dispute of the facts upon the record; but, after carefully reading the same, we find the following to be the substance of the facts in the case: Prior to July, 1902, the heirs of John McHenry, deceased, were the owners of about 1,117 acres of land in sections 26, 30, 32, and 36, in township 21 north, of ranges 6 and 7, in King county, which lands are supposed to contain deposits of coal. J. B. Metcalfe was attorney in fact for the heirs of John McHenry, deceased. In May and June of 1902, appellant Slater, who is a resident of Washington, D. C., accompanied by respondent W. S. Bowen, went to the office of John Gribbel in Philadelphia, Pa., and there represented to Mr. Gribbel that they had an option to purchase the lands above mentioned; that they wanted to take up the option and acquire the title of said lands and thereupon organize a corporation, to be known as the "Green River Coal Mining Company," with a capital stock of \$5,000,000, and then bond the corporation for \$300,000, which sum of money realized from the bonds was to be used in paying the purchase price of the land and equipping the corporation for mining coal in the state of Washington. They also represented that negotiations were under way for floating the said \$300,000 worth of bonds, and that a trust company had promised to float the bonds as soon as title could be acquired to the land. They then proposed to Mr. Gribbel to borrow \$5,000 from him, which money was to be used for the purpose of taking up the option on the land. Relying upon the rep-

resentations as above stated, Mr. Gribbel advanced to Slater and Bowen \$5,000, and took a contract by which they agreed to repay the said sum of \$5,000 to Mr. Gribbel, as soon as money was realized upon the bonds above mentioned, and to issue to him 100,000 shares of fully paid stock in the corporation to be organized. They also obtained \$5,000 from I. J. McGeogh, of Philadelphia, and \$10,000 from C. T. Bride, of Washington, D. C., in the same way. They then came to Seattle; whereupon appellant Slater employed one D. B. May to call upon J. B. Metcalfe for the purpose of purchasing the land above referred to. Mr. May did so and, on July 21, 1902, entered into a contract with Mr. Metcalfe by the terms of which contract Mr. Metcalfe, for the heirs of John McHenry, deceased, agreed to sell and convey said lands to said May for the sum of \$35,000, Mr. May agreeing to assume and pay the back taxes, which were then due and delinquent in a large amount. Slater furnished May \$100, which was paid down on the contract. The balance was to be paid as soon as the title in fee, subject to the taxes, could be conveyed to Mr. May. Mr. May thereupon, on the same day, to wit, July 21, 1902, at Slater's request, entered into a contract with Slater, by which contract Slater agreed to pay to Mr. May the sum of \$100,000 for the property as follows: \$15,000 cash at the date of the contract; \$25,000 on September 1, 1902; and \$60,000 within six months from the date of the contract. At the time this last-named contract was entered into, a receipt for \$15,000 was indorsed thereon by Mr. May, but no money was paid except the \$100 which May paid to Mr. Metcalfe as above stated. With this contract in their possession, Slater and Bowen returned to Pennsylvania, where they began to solicit funds, which they stated were for the purpose of meeting the \$25,000 payment due on September 1st. They represented that said D. B. May was the owner of the land; that Slater held a contract for the purchase thereof from May for \$100,000; that \$15,000 of this sum had been paid, and that the lands were valuable for deposits of coal contained therein; that they intended to form a corporation as hereinbefore stated, and that they had arranged with a New York trust company to float the bonds for \$300,000 as soon as a good title was obtained to the lands. Upon the strength of these representations, they succeeded in borrowing about \$36,000 from the respondents, in addition to the \$20,000 hereinbefore referred to, issuing individual contracts, promising to repay each person contributing money the amount he contributed as soon as the \$300,000 in bonds were realized upon, and also promising to deliver to each person a stated number of shares of stock of the Green River Coal Company, when the same should be incorporated. The whole of the money realized

In this way was turned over to the appellant R. Y. Slater. No payments were made upon the contract between Slater and May, and no further payment was made upon the contract between May and Metcalfe. In October, 1902, King county, in which the lands were located, instituted proceedings to foreclose its lien for taxes upon the lands. Thereupon, Mr. Metcalfe demanded of Mr. May that he pay the taxes against the lands. Mr. May, in turn, demanded money of Slater for that purpose. Slater refused or neglected to advance any money for this purpose, the attention of respondents was called to this foreclosure proceeding, and, upon inquiry, they first learned that May had no title to the lands, but held only a contract for the purchase thereof, and that he had paid only \$100 thereon. They also learned that Slater had collected more than \$50,000 in money for the purchase of the land, and had paid none of the purchase price. He refused to pay the purchase price, claiming he had paid \$40,000 thereon, and refused to pay the taxes or to organize the corporation. Respondents, after learning of the fraud which had been perpetrated upon them, thereupon, in order to protect themselves against total loss of the money they had advanced to Slater, entered into negotiations with Mr. Metcalfe and Mr. May for the purchase of the lands, independent of Mr. Slater; which negotiations resulted on January 5, 1905, in a deed from said May to the defendants, except May, McGeogh, and Riegle, conveying the property to them in fee for the sum of \$52,500. The appellants, McGeogh and Riegle were advised of the purposes and objects of the other defendants in purchasing the property direct, and were invited to furnish their pro rata of the purchase price and share in the results, but they refused to do so. The evidence also shows that the whole sum of \$56,400, collected by appellant Slater from the respondents, was converted by Slater to his own use, except the sum of about \$6,000 or \$7,000, which was used in promoting his fraudulent scheme.

Appellant, Slater, upon this appeal, argues that he is an equitable owner of the lands, because (1) the title of respondents was acquired from Mr. May with whom he had a contract for the purchase thereof, which contract was known to respondents, and also because he had paid \$40,000 thereon; (2) because he had not abandoned the contract; and (3) because respondents took title direct from May before the last payment upon Slater's contract became due, and were therefore estopped by their own deeds from contending that their title is free from the equity of Slater, under the rule in *Brummett v. Campbell*, 32 Wash. 358, 73 Pac. 403. It is sufficient answer to all these positions to say that Slater's fraud, which is clearly shown upon the record, gives him no standing in a

court of equity. His acts from the beginning clearly show his fraudulent intention. He represented to respondent Gribbel, in June, 1902, that he had an option on the land. This representation was absolutely false. He had no option of any kind at that time. He probably knew that he could acquire a title at that time, but he had none then. On July 21, 1902, he could have purchased the property for \$35,000. He did not do so. Instead of that, he employed D. B. May, who knew nothing of the property and who had no money, to go to Mr. J. B. Metcalfe and purchase the property. May entered into a contract with Metcalf for the purchase of the property for \$35,000, paid \$100 down with money furnished by appellant Slater, and then, at appellant's request, entered into a contract with appellant to sell the property to him for \$100,000. This was a fraud upon the face of it. The contract recited that \$15,000 was paid thereon. This was false. With this contract as a basis, appellant collected \$36,000 more money from respondents upon false and fraudulent representations. He made no payments upon the contract, except the sum of \$100. He received and converted to his own use more than \$50,000 by these fraudulent representations, and now, when the fraud is discovered by the persons defrauded, and they turn away from him and seek to protect themselves by purchasing the land for about one-half the sum he had agreed to pay for it, he asks a court of equity to adjudge him a four-tenths owner by reason of an alleged \$40,000 payment which he never made, and to make which respondents furnished \$40,000. But for the timely interference of respondents, the whole property would have been lost to them through foreclosure of delinquent taxes, and their only recourse would have been against Slater personally. Under these conditions, the lower court certainly went as far as it was justified in going when it decreed that Slater should have a four-tenths interest in the land, upon repayment of the money loaned to him and the payment of \$21,100 additional to the respondents, being four-tenths of the purchase price which respondents finally paid for the lands. Respondents have not appealed, and for that reason only we shall not modify the decree in their behalf. Appellants, McGeogh and Riegle were invited to contribute to the purchase of the land by respondents, and share in the results, before the purchase was actually made. They declined, and outside parties were subsequently permitted to come in and assume the burden. They are, therefore, in no position to complain.

The judgment appealed from is affirmed, with costs against appellant Slater.

DUNBAR, ROOT, RUDKIN, FULLER,
TON, HADLEY, and CROW, JJ., concur.

STATE v. STRODEMIER.

(Supreme Court of Washington. Dec. 28, 1905.)

1. CRIMINAL LAW—MISCONDUCT OF JURY AND BAILIFF.

Where, in a prosecution for cattle stealing, the court ordered that the jury be kept together in charge of sworn bailiffs, the fact that one of such jurors during the trial went to a public drinking saloon out of the hotel where they were being kept, accompanied by a bailiff, without permission of the court or consent of the defendant, and there took a drink of whisky, and immediately returned in charge of the bailiff to the other jurors at the hotel, constituted such misconduct on the part of both the juror and the bailiff as vitiated a conviction subsequently had.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2254-2257.]

2. SAME—PREJUDICE.

Such acts raised a conclusive presumption of prejudice against defendant, which could not be rebutted by affidavits of jurors that the juror in question was the last to consent to a verdict of guilty.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2254-2257.]

Rudkin and Fullerton, JJ., dissenting.

Appeal from Superior Court, Douglas County; R. S. Steiner, Judge.

Henry Strodemier was convicted of cattle stealing, and he appeals. Reversed.

W. J. Canton and W. E. Southard, for appellant. W. A. Reneaw and Sam B. Hill, for the State.

MOUNT, C. J. Appellant was convicted of the crime of cattle stealing. He alleges three errors of the trial court. One of these is decided adversely to his contention in *State v. Strodemier* (Wash., filed December 6, 1905) 82 Pac. 915. Another cannot arise upon a new trial. It is therefore necessary for us to consider but one of the alleged errors. At the beginning of the trial of the case the jury was ordered kept together in charge of sworn bailiffs. While the jurors were not sitting in the jury box, they were kept at a hotel at the county seat. On the morning of January 5, 1905, before the court had convened for the day, and before the jury had breakfasted, one of the jurors, in company with one of the bailiffs, went to a public drinking saloon out of the hotel, without permission of the court or the consent of appellant, and there took a drink of whisky, and immediately returned in charge of said bailiff to the other jurors at the hotel. One or two other persons besides the bartender were in the saloon while the juror and the bailiff were there, but no conversation took place between said juror and other persons, except such conversation as was necessary to order drinks. Appellant maintains that this was such misconduct of the jury as to entitle him to a new trial. The question was presented to the trial court upon motion for a new trial, which was denied.

The court should have sustained the motion upon this ground. If the rule is established

that a juror, in company with a bailiff, may separate from the body of the jury and go to a public drinking saloon, and there indulge in drinking intoxicating liquors, without the knowledge of the trial judge or the consent of the defendant, dire results may follow. If one juror may be permitted to do such acts, the whole jury may do so, and jurors disposed to such habits may readily bring jury trials into disrespect and contempt. Public policy forbids that such acts be tolerated in the trial of causes. The fact that the juror took a drink of intoxicating liquor during the trial is not so reprehensible of itself as the fact that he went to a public drinking saloon and at such public place, in the presence of the bartender and one or two others, drank liquor, and was permitted to go there by an officer whose sworn duty required that he should not give the juror drink, except by order of the court. It is the policy of the law, in keeping jurors together and away from the public, that nothing outside of the evidence shall be permitted to influence their verdict. When they are taken, either singly or in a body, to a public drinking saloon, where people who are interested may be expected to, and frequently do, congregate to discuss the case on trial, an opportunity is afforded for undue influence upon the jury, and the spirit, if not the letter, of the law is violated. Cases, no doubt, frequently arise where, from necessity, a juror is permitted to withdraw from the body of the jury for a short period of time, and without the express order of the court or the consent of the defendant on trial. Such acts, of course, arise from necessity, and would not be held to be misconduct. But such is not the case here. The only excuse offered is that the juror was suffering from a cold and pain in the stomach. If these facts were true, no emergency is shown, and no excuse is offered for not applying to the court for an order for some remedy, which could readily have been granted without exposing the juror to the public in the unseemly manner which he took upon himself. Neither he nor the bailiff was justified in this conduct.

In order to avoid the misconduct of this juror, the state filed affidavits of several of the jurors, to the effect that the juror was the last to consent to a verdict of guilty; and it is contended for that reason that the misconduct of the juror was without prejudice. But the rule seems to be that, where misconduct is admitted, jurors cannot be heard to deny its prejudicial influence. *People v. Chin Non* (Cal.) 80 Pac. 681; *People v. Stokes*, 103 Cal. 196, 37 Pac. 207, 42 Am. St. Rep. 102; *People v. Azoff*, 105 Cal. 634, 39 Pac. 59. We think that, under the circumstances of this case, prejudice must be presumed.

The judgment is therefore reversed, and the cause remanded for a new trial.

DUNBAR, HADLEY, CROW, and ROOT, JJ., concur.

RUDKIN and FULLERTON, JJ. (dissenting). There are but two conceivable reasons why the verdict should be set aside in this case: First, because one of the jurors was separated from his fellow jurors for a few minutes, in company with a sworn officer of the court having him in charge; or, second, because the same juror entered a public saloon and took a drink of whisky during the progress of the trial. We cannot believe that the majority intends to lay down the rule that a verdict must be set aside every time a juror enters a public saloon or takes a drink of whisky during the progress of a trial. Those who are familiar with the habits of 12 men picked up from the ordinary walks of life know full well the results that would follow from the adoption of any such rule. Nor did the withdrawal of the juror from his associates, under the facts disclosed in the record, constitute a separation of the jury in legal contemplation. "The presumption will not be indulged that a separated juror was tampered with in the immediate presence of the officer having him in charge." 12 Ency. Pl. & Pr. p. 572. Even where there is an improper and unauthorized separation of the jury, according to the great weight of authority, the only effect of the separation is to throw upon the state the burden of rebutting the inference that injury or prejudice may have resulted to the accused by reason of the separation. *Id.* pp. 568-570. It is unnecessary for us to consider what the proper rule should be in this jurisdiction under such circumstances, but we refer to the majority rule for the purpose of showing that in a case like this, where there has been no separation in fact, and where it is affirmatively and conclusively shown that no prejudice resulted, a new trial should not be granted. While the conduct of the bailiff and juror is properly subject to censure and criticism, the parties to the action were in no manner responsible for their shortcomings.

We think proper punishment meted out to the juror and the officer for their contumacious conduct in disobeying the orders of the court would fully satisfy the demands of public justice, and that the new trial should be denied.

(72 Kan. 363)

GIBSON v. HAMMERBURG.

(Supreme Court of Kansas. Dec. 9, 1905.)

1. TAXATION — TAX DEEDS — FORM — EFFECT.

A tax deed which follows the form prescribed by statute is sufficient, and furnishes prima facie evidence that the tax proceedings were regular and that every step necessary to the validity of the deed was taken.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1504, 1556.]

2. SAME — DESCRIPTION — SUFFICIENCY.

A tax deed which gives a full description of a single city lot in the recital that it was subject to taxation, and in subsequent recitals as to sale, assignment of certificate, and of the conveyance of the property the lot is not re-described, but only referred to as "said property," "the real property above described," and "the property last hereinbefore described," is not void for insufficient description of the property sold and conveyed, where the deed recites that the whole lot was sold; that being the least quantity bid for the taxes charged against it.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1519, 1520.]

(Syllabus by the Court.)

Error from District Court, Montgomery County; Thos. J. Flannelly, Judge.

Action by Charles E. Gibson against Godfrey Hammerburg. Judgment for defendant, and plaintiff brings error. Affirmed.

A. L. Billings, for plaintiff in error. A. L. Wilson, for defendant in error.

JOHNSTON, C. J. In an action to recover a lot in the city of Cherryvale the result turned on whether a tax deed purporting to convey the lot, and under which Godfrey Hammerburg held, was valid on its face. The defect relied on by Charles E. Gibson, who held under a conveyance from the original owner, was that a full description of the land was not given in the granting clause of the tax deed. In the first of the tax deed, and as a part of the recital that the lot was subject to taxation, it is fully and accurately described. In the succeeding parts, reciting the sale, the assignment of the certificate of sale, the failure to redeem from the sale, and the final grant and conveyance to the assignee, the lot is referred to as "said property," "the real property above described," and "the property last hereinbefore described." There can be no uncertainty or doubt as to the property taxed, sold, or intended to be conveyed. Only one description is given in the deed, and that is complete and perfect. The whole of the parcel taxed was sold for the taxes. It was the least quantity bid for the taxes charged against it, and the whole of it was conveyed by the deed. Reference is made to *McDonough v. Merten*, 53 Kan. 120, 35 Pac. 1117, where it was said that a second description was necessary. There, however, a quarter section of land was taxed, and the deed did not show the quantity of land sold for taxes, or that what was sold was the least quantity bid for the taxes against the property. It was therefore held that the omissions were fatal to the validity of the conveyance. Here it is recited that the purchaser "having offered to pay the sum of \$7.38, being the whole amount of taxes, interest, and costs then due and remaining unpaid on said property for all of said property, which was the least quantity bid for, and payment of the said sum having by him been made to the said

treasurer the said property was stricken off to him at that price." It therefore appears that a single lot was taxed, a single lot was sold, and a single lot was conveyed, and the appropriate references to the lot as first described in the deed designates the property sold and conveyed with "ordinary and reasonable certainty," and that is all that is required. *Haynes v. Heller*, 12 Kan. 381; *Dodge v. Emmons*, 34 Kan. 732, 9 Pac. 951.

There is a further contention that the deed is bad because it does not show the notice of tax sale, that a certificate of sale was given, and that the certificate was presented to the county clerk preliminary to the execution of the deed. While these details are mentioned in the statute, they are not prescribed in the statutory form of deed. Where the statute prescribed the form of a deed, a compliance with that form is sufficient. *Hobson v. Dutton*, 9 Kan. 477. The deed in question closely follows the statutory form, and, being good on its face, it furnishes prima facie evidence that the required notices were given, that the proceedings were regular, and that every step necessary to its validity was taken. There is, further, a recital in the deed, as prescribed by the statute, that the sale was made in substantial conformity with all the requisites of the statute. *Duncan v. Gillette*, 37 Kan. 156, 14 Pac. 479, is cited as an authority that the recital of the facts above stated are essential to the validity of the deed. In that case the deed was made under a special statute, providing for a resale of lands bid in by the county and which remained unredeemed for five years after the first sale without any one offering to purchase the same for the taxes, penalties, and charges. The statute did not prescribe the form of the deed in such cases, and hence it was held that the deed should show compliance with the special authority under which it was issued and that the essential steps prescribed by that statute had been taken.

The court ruled correctly in holding that the tax deed was valid on its face, and hence its judgment must be affirmed. All the Justices concurring.

HAM v. BOOTH et al.

(Supreme Court of Kansas. Dec. 9, 1905.)

1. TAXATION—TAX DEED—VALIDITY.

A tax deed is not void for failing to give the residence of the assignee of the certificate of sale, where such assignee is a foreign corporation and the recital states that it is a corporation organized and existing under the laws of a designated state.

2. SAME—DESCRIPTION OF LAND.

In the beginning of the tax deed the tract of land was accurately described, and there was a recital that, as it could not be sold for the taxes charged against it, the county treasurer bid it off for the county. In subsequent recitals as to assignment of the certificate of sale and of the conveyance the first description was referred to in plain terms, without redescribing

the land. *Held*, that the deed is not void for failing to repeat the description or for indefiniteness of description of the land conveyed.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1519, 1520.]

3. SAME—FORM OF DEED.

A substantial compliance with the form prescribed by statute for the execution of tax deeds is sufficient.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1504.]

(Syllabus by the Court.)

Error from District Court, Rooks County; Chas. W. Smith, Judge.

Action between W. B. Ham and Henry Booth and others. From the judgment, Ham brings error. Affirmed.

W. B. Ham, in pro. per. Peters & Bowersock and O. O. Osborne, for defendant in error.

JOHNSTON, C. J. This action involves the title to a quarter section of land in Rooks county. W. B. Ham claimed it under a regular chain of conveyances from the United States down to himself, and Henry Booth asserted title under a tax deed to James F. Houlihan and a transfer from Houlihan to himself. There is no dispute as to the validity of any of the conveyances on either side, except the Houlihan tax deed, and the case turns upon whether that instrument is void upon its face. The district court held it to be prima facie valid, and this court is of the same opinion. The deed conforms so closely to the form prescribed by statute that a recital of the same at length is unnecessary, and hence special reference will be made only to the part claimed to be defective. It recites the assessment of the taxes upon the land, describing it in detail; the default in the payment of the taxes; the exposing of it to public sale for taxes in conformity to the statutes; that it could not be sold for the taxes charged against it, and therefore it was bid in by the county; and the assignment of the tax certificate and of the interest of the county in the property "to the Eastern Banking Company, a corporation organized and existing under the laws of the state of Connecticut." Then followed a recital of an assignment to Houlihan, the payment of subsequent taxes, and the final grant and conveyance of the land to him. It is argued that the deed is faulty in failing to give the residence of the assignee, the Eastern Banking Company. Assuming that a statement of the residence of the purchaser and assignee is a requisite part of a tax deed, as the plaintiff plausibly contends, the question remains whether it is not substantially done in this case.

The statute prescribes the form of a tax deed and provides that it shall be substantially followed. A literal compliance, however, with that form, is not required. A departure from the statutory phrase will not invalidate the deed, if the idea in the prescribed re-

ital is fairly included and stated in other words. *Bowman v. Cockrill*, 6 Kan. 311; *Mack v. Price*, 35 Kan. 134, 10 Pac. 521. The deed, instead of stating that the assignment was made to the Eastern Banking Company, of a certain county and state, recites that it was made to "the Eastern Banking Company, a corporation organized and existing under the laws of the state of Connecticut." In effect this was a statement that the company resides in the state of Connecticut. A corporation is an artificial being which exists only in contemplation of law, and its residence, so far as it can be said to have one, is in the state which creates it. It may exercise a permissive right to do business in other states, but may not migrate to another sovereignty. Its home, its residence, as has been often held, is in the state of its creation, and the recognition it receives elsewhere is accorded under the rules of interstate courtesy and comity. *Williams v. Metropolitan Street Railway Co.*, 68 Kan. 17, 74 Pac. 600, 64 L. R. A. 794, 104 Am. St. Rep. 377; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 10 L. Ed. 274; *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; 1 *Clark & Marshall on Private Corporations*, 356; *Thompson on Corporations*, § 688. Since a corporation is a creation of the state, its residence may be said to be a state residence, and the naming of a county or principal place of business is not important for the purpose under consideration. A substantial compliance with the statutory form is sufficient, and the purpose of the tax law respecting residence is subserved when there is a recital in the deed of the state in which the corporation was organized and now exists.

Another objection made to the deed is that only one description of the land is contained in it. That is the description first given of the quarter section, and in reciting the sale and conveyance of the land appropriate reference is made to the first description, which appears to be accurate and complete. There was but a single tract taxed, and, as it could not be sold for the taxes charged against it, the county treasurer bid it off for the county. As the county is not a voluntary or competitive bidder, it necessarily took the entire tract. *Larkin v. Wilson*, 28 Kan. 513; *Mack v. Price*, supra. There being no division of the property in the sale, the recital of the sale, assignment, and conveyance by such terms as "said property" and "the real property above described" shows definitely that the same tract was referred to throughout the instrument, and that the description is in no sense indefinite. *Haynes v. Heller*, 12 Kan. 381; *Dodge v. Emmons*, 34 Kan. 732, 9 Pac. 951; *Gibson v. Hammerburg* (just decided) 83 Pac. 23.

It is argued that the deed does not recite the presentation of the certificate to the county clerk preliminary to the issue of the

deed, but this is not required in the form prescribed by statute. Nor is there anything substantial in the objection that the deed is not made in the name of the county. In this respect it follows the statutory form, which, as to the conveyances to which it applies, must be deemed sufficient. *Gibson v. Hammerburg*, supra.

The judgment of the district court will be affirmed. All the Justices concurring.

MISSOURI PAC. RY. CO. v. OLDEN.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. FENCES—TRESPASSING ANIMALS.

The fence law of 1868 modified the common-law rule of liability for damages done by trespassing animals, and relieved the owner thereof from all liabilities for damages resulting therefrom, except trespasses committed on lands inclosed with the legal fence described in the act.

2. SAME—HERD LAW—ADOPTION—EFFECT.

The herd law of 1872 (Laws 1872, p. 384, c. 193), where adopted, is a readoption of the common law in this respect as it existed prior to the enactment of the fence law of 1868.

3. SAME.

The fence law of 1868, which defines the kind of fence with which land must be inclosed before the owner can recover damages committed by trespassing stock, has no application for any purpose in counties where the herd law of 1872 (Laws 1872, p. 384, c. 193) has been adopted.

(Syllabus by the Court.)

Error from District Court, Jackson County; Marshall Gephart, Judge.

Action by Orlo E. Olden against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Waggener, Doster & Orr, for plaintiff in error. Hayden & Hayden and John D. Myers, for defendant in error.

GREENE, J. This was an action to recover the value of three mules and one colt alleged to have been killed by the negligence of the Missouri Pacific Railroad Company while operating its train on the Central Branch Railroad. The defendant answered by a general denial, and also alleged contributory negligence on the part of the plaintiff in permitting his animals to run at large, in violation of the herd law of 1872 (Laws 1872, p. 384, c. 193), which was in force in the county when the stock was killed. To this answer the plaintiff filed a general denial. The trial resulted in a verdict and judgment for plaintiff, to reverse which the defendant prosecutes error to this court.

When the plaintiff had submitted his evidence to the jury, the defendant demurred, making the following points: First, that the testimony did not fairly or reasonably tend to show that the Missouri Pacific Railroad Company was operating the Central

Branch Line when the stock was killed; second, that the testimony of the plaintiff established the fact that the inclosure from which the stock escaped was not fenced with a legal fence—such a fence as is provided for in chapter 40, Gen. St. 1901—and therefore the plaintiff was guilty of contributory negligence. Without setting out in full the testimony which leads us to the conclusion, we feel quite well satisfied that there was sufficient testimony to justify the court in overruling the demurrer on the first point. The stock were being pastured in a stock field, and escaped therefrom without plaintiff's fault—unless he was negligent in not maintaining the legal fence contended for by defendant—and wandered along the highway to the track of the Central Branch Railroad Company, and passed over an insufficient cattle guard upon the track, where they were killed by a passing train. The field in which this stock was being pastured was inclosed with posts, upon which were nailed three wires in some places and only two in other places. This did not constitute such a fence as is denominated as legal fence by chapter 40, Gen. St. 1901.

Plaintiff in error contends that in a herd-law county, if stock escape from an inclosure without the owner's fault, he cannot recover damages against a railroad company for killing them, unless such inclosure was protected by a legal fence. With this we do not agree. In 1868 the general fence law was passed, being chapter 40, Gen. St. 1901. The effect of this law was so to modify the common law that the owner was not liable for damage committed by his trespassing stock, except to those whose lands were inclosed with a legal fence. The act defined a legal fence, and also provided means whereby it could be determined whether a fence complied with the requirements of the statute. This law is in operation in every county in the state, except in those which have availed themselves of the herd law of 1872. The adoption of the herd law is a readoption of the common law in this respect, and the owner of cattle is liable for damages committed by them in a herd-law county, regardless of the fence law. The fence law was not intended to, and does not, furnish a rule by which to determine whether the owner of stock in herd-law counties is guilty of negligence in inclosing them. The adoption of such a rule would be equally dangerous to the railroad company and the owner of the stock. Under such a rule the owner of breachy and unruly stock might inclose them in the weakest fence provided for in the statute, and if they broke this inclosure and escaped, and went upon a railroad track and were killed, he could recover, because he had a legal fence, notwithstanding he might know the inclosure was not sufficient to restrain them. In a herd-law county one cannot recover against a railroad company

for damages to stock if he permits them to run at large, or if he places them in a pasture inclosed with a legal fence which he knows or has reason to believe will not restrain them, and they escape therefrom. The care and diligence that every man is required to exercise in the protection of himself or property is ordinary care, in view of all the surrounding circumstances. If the stock killed were the ordinary farm stock, and the owner had the pasture inclosed with an ordinary fence, such as is generally required to restrain that kind of stock, and they escape without his fault, he is not guilty of negligence, and is not guilty of permitting the stock to run at large, and he may recover, regardless of the fence law. This is the rule adopted in this state. *Missouri Pacific Ry. Co. v. Johnston*, 35 Kan. 58, 10 Pac. 103; *Osborne v. Kimball*, 41 Kan. 187, 21 Pac. 163; *A. T. & S. F. R. Co. v. Riggs*, 31 Kan. 622, 3 Pac. 305; *K. P. Ry. Co. v. Wiggins*, 24 Kan. 588.

The mules were killed February 28, 1902, and the trial was had in September, 1903. On the trial the plaintiff introduced a witness named Ray, who testified that in September, 1903, he had made shipments from Effingham, on the Central Branch Line, and had received bills of lading therefor purporting to be issued by the Missouri Pacific Railroad Company, one of which he produced, and it was offered and introduced in evidence over the objection of the defendant. It is insisted that this was error. The contention is made that presumptions do not operate retrospectively, and that the fact that the defendant was operating this line of road in September, 1903, was not a circumstance which could be considered by the jury as tending to show that it operated the line 18 months previous, or in February, 1902. The admission of this bill of lading was not prejudicial to the defendant, in view of the testimony of Mr. Waggener, one of the defendant's attorneys. He testified as follows: "Q. Do you know how freight bills or bills of lading were made out for freight shipped over what you call the Central Branch Company? A. Yes, sir; I know how some are made out. Q. Is it not a fact they were made out on the blanks of the Missouri Pacific Railway Company? A. That is my judgment. Q. You understand, then, in the matter of receiving and shipping freight, the business was done in the name—so far as the public knew anything about it—in the name of the Missouri Pacific Railway Company? A. In 1899 or 1900 the Missouri Pacific Railroad Company had a lease of the Union Pacific Railroad Company. The Central Branch portion of it was foreclosed, and the Central Branch Railway Company organized and purchased this property. Since that time these blanks that has been in the offices of the Central Branch while the Missouri Pacific operated it were used. Q.

Those were the blanks of the Missouri Pacific Railroad Company? A. Yes; had that name on it. Q. So that all contracts were made on Missouri Pacific blanks? A. As I understand all contracts of shipment that have been made, those I have seen, since they got a lease on it, during all that time. Q. Since 1898? A. I think so. Q. And during the year 1902 contracts for the shipment of freight over this line of railroad, which you have spoken of as the Central Branch, were made in the name of the Missouri Pacific Railway Company? A. I could not say all were. I have seen contracts of shipment over the line of the Central Branch Company that were made on the Missouri Pacific Railway Company's blanks. Q. Have you ever seen any other contracts of shipments for freight shipped over that road since 1898 that were not Missouri Pacific blanks? A. No, sir; I have not. Q. Tickets that were sold over that line of road were in the name of the Missouri Pacific Railway Company? A. I could not tell you about that. I don't know that I ever saw one but my judgment is they are. Q. And they were in the year 1902? A. I presume they were. There may be Central Branch tickets. I don't know anything about that. I never bought one over the road, and I could not tell you." That the freight bills used on the Central Branch Railroad were Missouri Pacific blanks was not controverted. Therefore no prejudice resulted to the defendant in the admission of the blank produced by Ray.

The only remaining question that requires our attention is the alleged error committed by the court in refusing to give the thirty-second and thirty-fifth instructions requested by the defendant. These instructions enumerated a number of facts appearing in the testimony, and the court was asked to instruct the jury that those enumerated would not be sufficient to justify the jury in finding that the defendant was operating the line of railroad at the time the stock was killed. The facts thus enumerated were all circumstances which, considered with the other testimony, tended to prove that the defendant was operating the Central Branch Line when the stock was killed. It would be a dangerous, if not unauthorized, practice for the trial judge to carve out of a general mass of testimony tending to prove an ultimate fact, certain portions of such testimony, and instruct the jury that the existence of the facts thus testified to would not authorize them in finding the ultimate fact. Where testimony has been introduced generally, without objection, tending to prove the existence of a certain fact, and no part of it is withdrawn by instructions, the jury should consider the whole of the testimony in arriving at a conclusion. Evidence offered in a case is offered in its entirety, and should be so considered by the jury. The court

cannot bisect the evidence and instruct the jury that one part is not sufficient for the purpose of establishing the cause or defense. For this reason no error was committed by the court in refusing to give the instructions referred to. Complaint is made of some of the other rulings of the court, but they are not of sufficient importance to require discussion.

The judgment of the court below is affirmed. All the Justices concurring.

CHICAGO, R. I. & P. RY. CO. v. WHEELER.

(Supreme Court of Kansas. Nov. 11, 1905.)

TRIAL — ISSUES — ENLARGEMENT — ACQUIESCENCE.

Under the facts of this case it is held that the defendant did not acquiesce in an enlargement of the issues by plaintiff's evidence, and had the right to require that no issue except that presented by the pleadings be submitted to the jury.

(Syllabus by the Court.)

On rehearing. Reversed.

For former opinion, see 79 Pac. 673.

BURCH, J. After listening to a reargument of this cause, and reconsidering it in the light of such argument, the court is satisfied with the conclusions stated in its former opinion, reported in volume 79 of the Pacific Reporter, at page 673. Even if the words "as herein more specifically mentioned and described" related generally to the facts constituting the plaintiff's cause of action, still but one negligent act on the part of the defendant was described, and that was the failure to give the statutory warning.

On the reargument it was suggested that the issues were enlarged by the conduct of the parties at the trial, but a careful examination of the record shows that the defendant at all times protected its rights to have the controversy kept within the limits fixed by the pleadings. The plaintiff in presenting his case did seek to expand his charge of negligence by proving the speed of the train. This effort the defendant vigorously opposed by objections to the testimony before it was given, and by motions to strike it out after it had been admitted. The court, however, approved the plaintiff's course, and refused to exclude the evidence from the consideration of the jury. With a new issue thus thrust upon it against its will, the defendant undertook to make the best of the situation by showing a proper management of the train, taking into account its speed; but, by a request for an instruction, it again sought to limit the jury's inquiry to the single issue presented by the petition. Under these circumstances it cannot be said that the defendant accepted the new issue tendered by the plaintiff's evidence, or consented that it should be tried, or acquiesced in its submission to the jury.

The defendant acted all the time under the coercion of the court's adverse rulings. It was not obliged to rest its fate upon its unavailing objections to the improper evidence. It still could oppose the irrelevant facts with exculpatory evidence, upon the same principle that permits a defendant to answer after his demurrer to the petition has been overruled; and the final protest to the submission of the alien matter to the jury entirely precludes any charge either of inconsistency or of waiver.

If it should be conceded that the jury based its verdict upon the negligence charged in the petition, the judgment must nevertheless be reversed. The jury found specially that the plaintiff's agent in charge of the injured cattle saw the approaching train when it was a half mile distant from him. This being true, the failure to sound the whistle 80 rods from the crossing could not have been the proximate cause of the injury.

The judgment is reversed, and the cause remanded. All the Justices concurring.

ZINKEISEN v. LEWIS et al.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. APPEAL—NECESSARY PARTIES—DEFAULTING PARTIES.

Parties shown by the record to have made default in the trial court are not necessary parties to an appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1819.]

2. MORTGAGES—FORECLOSURE BY ACTION—SALE—INADEQUACY OF PRICE.

Inasmuch as the law prevailing when a mortgage was executed prior to 1893 vested in the purchaser at mortgage sale regularly conducted an absolute right to receive a deed, it was error to refuse confirmation, even on payment of the full amount of the judgment and costs, on the ground of inadequacy of price, of which there was no evidence, except that three months later the mortgagors offered to pay twice as much to save the property.

Error from District Court, Anderson County; C. A. Smart, Judge.

Action by Carrie Zinkelsen against Ozro H. Lewis and another to foreclose a mortgage. An order confirming the sale was vacated, and plaintiff brings error. Reversed.

See 80 Pac. 44.

W. W. Padgett and Flower, Peters & Bowersock, for plaintiff in error. J. G. Johnson and N. L. Bowman, for defendants in error.

PER CURIAM. An objection is made to the consideration of this case on its merits because several persons who were parties below have not been made parties to this proceeding. As these persons are shown by the record to have made default in the district court, their presence here is unnecessary. Carrie Zinkelsen obtained judgment against Ozro H. Lewis and Sarah A. Lewis, foreclosing a real estate mortgage executed prior to

1893. An order of sale was issued, under which the property was sold to the plaintiff for \$500 on October 19, 1903. On December 31, 1903, the sale was confirmed and a deed ordered. On January 29, 1904, the defendants filed a motion to set aside the confirmation and sale, for the reason that the amount for which the land had been sold was grossly inadequate, and that they had deposited with the clerk of the court an amount sufficient to pay the judgment and costs, about \$1,005. The court thereupon vacated the order of confirmation, which had been made at the same term, and set aside the sale. The plaintiff refused to accept the amount of the judgment, and now prosecutes error, insisting upon her right to a conveyance of the property.

No irregularity in the sale was alleged or shown. There was no evidence even that the amount of the bid was inadequate, except as this might be inferred from the fact that about three months later the defendants offered to pay twice as much to save the property. Under the law as it existed when the mortgage involved was made the sale, having been regularly conducted, vested in the purchaser an absolute right to receive a deed, and the court had no discretion to refuse to confirm it, even upon the payment of the full amount of the judgment and costs.

The order setting aside the sale is therefore reversed, and the cause remanded, with directions to confirm it.

YOUNG v. NEW STANDARD CONCENTRATOR CO. et al. (L. A. 1,435.)

(Supreme Court of California. Dec. 9, 1905.)

CORPORATION—REFUSAL TO TRANSFER STOCK—REMEDY—CONVERSION—DEFENSES.

In an action against a corporation for the conversion of stock by refusal to register and transfer it to plaintiff's vendee, defendant offered to show that, though plaintiff had purchased the stock at an assessment sale, it had previously been held by him as security for a note, and that he had purchased it for much less than its value because of lack of competition on the sale, owing to his statement that he intended to hold the stock as security, and that he had agreed with the corporation so to do. Held, that it was error not to admit the evidence.

Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by J. B. Young against the New Standard Concentrator Company and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Jones & Weller, for appellants. W. H. & C. L. Shinn and J. B. Young, for respondent.

VAN DYKE, J. This is an appeal from a judgment in favor of the plaintiff, and also from an order denying defendants' motion for a new trial. During the progress of the trial the action was dismissed as to defend-

ants McCabe and Doane, and judgment went against the corporation only.

The action is brought to recover damages for an alleged conversion on the part of the defendant corporation, and its refusal to register and transfer certain stock which the plaintiff claimed to own and had agreed to sell to another party. The stock involved in the controversy was transferred to the plaintiff as collateral security for the payment of two promissory notes made by E. W. Doane and James R. Townsend. An assessment of two cents per share was levied on the said stock; and becoming delinquent the stock was advertised for sale. At the assessment sale plaintiff bid in the stock, paying the assessment on the stock held by him, as well as that held by his brother, as security, and certificates were issued to both of them in their own name for the number of shares so bought. Thereafter the plaintiff claimed to have sold the stock so bid in to one Davis, and demanded a transfer on the books to him, which was refused, and by the refusal of the corporation to make the transfer, it is alleged in the complaint, the defendant thereby converted the stock to its own use.

The evidence at the trial showed that at the time of such sale upon the delinquent assessment there was some sort of an agreement made between the plaintiff and his brother with some of the officers of the corporation in regard to the disposition of the stock, in the event that they were allowed to purchase it in. The plaintiff on cross-examination stated that the stock originally pledged to him as collateral he acquired title to under and by virtue of a sale for delinquent assessment; that is, 13,900 shares of the stock. "That represented stock that I held before as collateral security for the notes. Every certificate of stock introduced in evidence as being issued to me represented stock that had been, prior to that time, held by me as collateral security for loans. The stock that was issued on the 15th of March to J. C. Young represented stock that had been pledged to J. C. Young, my brother, by E. W. Doane and James R. Townsend, and bought by him at the assessment sale. I knew this at the time the stock was indorsed in blank by J. C. Young and delivered to me, and I also knew it at the time I served the written notice on the defendant, asking a transfer to Davis. I knew it at the time the stock was pledged to my brother, and have known of the transaction in connection with the stock ever since, up to the present time. I attended the sale for delinquent assessment at the office of the company. At the time of the assessment sale at the office of the company the question in regard to the ownership of any of this stock was not discussed with Doane or Townsend or any of the officers of the company that I recollect of; not talked over at all at the assessment sale with reference to the stock I bought at that sale; but it was talked over in reference to the

900 shares that was not sold on assessment, but was left in my hands as collateral security. I don't recollect saying at the time of the sale that I would have to buy the stock in order to protect my security, but I might have said so." Thereupon the defendant offered to prove that, in order to prevent competition in the bidding of said stock at said sale, the plaintiff stated that this was his only security for his notes, and requested to be allowed to purchase the same, and agreed to still hold it as collateral, as before, and that upon such representations others who were present at said sale ceased bidding, and the plaintiff was allowed to purchase said stock at a little over two cents a share. Upon the objection of the plaintiff the court refused to allow this evidence to be given, and the defendant took an exception to the ruling. The president of the corporation, P. B. McCabe, was asked, on behalf of the defendant, what, if any, agreement was made after the sale with Mr. Young in regard to his sale of certificates of shares issued to him, and under what circumstances they were to be transferred, the answer to which, upon objection of the plaintiff, was refused to be admitted. He was also asked, while acting as president of the company, in the office of the company, what, if any, understanding he had with Mr. Young about his holding or disposing of those shares of stock, the answer to which was also refused upon objection of the plaintiff. Defendant further offered to prove by the president of the company, McCabe, and by others, that after the sale the plaintiff requested the transfer of the stock to him, and stated to and agreed with Mr. McCabe that, in the event of the issuing of the stock to him in his own name, he would still hold it as collateral security, and in the event of the sale he would apply sufficient of the proceeds of the purchase price on his note and collateral agreement to pay the note, and, if there was any surplus left, he would leave it with Doane and Townsend, the makers of the note, and that he would not ask a transfer of the stock unless these payments were made, and at the same time he left with McCabe, the president of the company, a copy of the agreement and note. To these offers the plaintiff objected, and the court sustained the objection, and defendant excepted. Mr. Doane, one of the pledgors of the stock, testified that he told the plaintiff if the proceeds of this sale were applied on the note he would be perfectly willing to have the stock transferred. He asked the plaintiff if he intended to keep the difference between the price of the stock and the amount due on his note, and he said he did (and thereupon the pledgors notified the company not to make the transfer). Defendant further offered to show an agreement between the plaintiff and the president of the company and Doane and Townsend similar to that already stated, an objection to which offer

by the plaintiff was sustained by the court. The delinquent sale referred to took place on March 15, 1902, and on June 9, 1902, the testimony shows said stock to have been worth 50 cents per share, and there is nothing to show that the stock was not worth 50 cents per share on March 15th, at the time of the alleged understanding between the plaintiff and the officers of the corporation in reference to bidding in the stock. In fact, plaintiff testifies: "It was worth 50 cents a share then, and it is worth that now." Defendant also offered to prove that, contemporaneously with the issuance of the certificates of stock to the plaintiff, he agreed with the corporation and its board of directors that he would hold the stock as collateral security for the indebtedness of Doane and Townsend to him, and that the company was not to permit any transfer of the stock, except as a credit on the notes of the purchase price. The court also sustained an objection of the plaintiff to this offer, and the defendant excepted.

It was stipulated that the notes and collateral agreement were to be deposited with the president of the company, and the plaintiff in his notice mentions the fact that the notes were on file with the company. It would seem that this was done in pursuance of the agreement made by the plaintiff, when bidding on the stock, to prevent competition. If this understanding and agreement which defendant offered to show were had between the plaintiff and the corporation and its officers, the defendant was thereby constituted a sort of trustee, for the purpose of seeing that the proceeds of the sale of the stock were properly applied, and its refusal to transfer the stock at the request of the plaintiff, who at the time claimed to own it in his own right, and had effected the sale thereof to one Davis, as already stated, was not a conversion of the stock as alleged in the complaint and found by the court, and the defendant clearly had the right to show this, for it was one of the main issues in the case, whether the action of the defendant in the premises amounted to conversion. It is alleged in the complaint that the defendant, in its refusal to transfer the stock, converted the same to its own use, and this, which is the material allegation in the complaint, is denied by the answer. Therefore evidence was admissible to show any circumstances that would justify or excuse the refusal to transfer the stock on demand of the plaintiff, and the exclusion of the offered evidence that plaintiff agreed to continue holding the stock as pledgee after the assessment sale, and that it was agreed that the stock should not be transferred unless provision was made for the payment of the notes of Doane and Townsend out of the proceeds of the sale, was clearly error. The authorities cited by respondent do not militate against this. In *Morawetz on Corporations*, § 208, cited by respondent, it is said: "If the company refuses to recognize the real

owner, or refuses to deliver him a new certificate, he may sue the company for the value of the shares." But in *Cook on Corporations* the true rule is laid down as follows: "Where a corporation has notice that a stockholder holds his stock as trustee for another, it is bound to refuse a register of the trustee's transfer until it is satisfied the trustee has power to make the transfer. If the corporation allows the transfer, and the trustee had no power to make it, the corporation is liable to the cestui que trust." Volume 1 (4th Ed.) § 327.

For the refusal to admit the evidence offered on the part of the defendant, under the circumstances of the case, the judgment and order denying a new trial should be reversed; and it is so ordered.

We concur: SHAW, J.; ANGELLOTTI, J.

148 Cal. 274

LEISHMAN v. UNION IRON WORKS.
(S. F. 3,441.)

(Supreme Court of California. Dec. 2, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT — DEFECTIVE APPLIANCES — FELLOW SERVANTS.

Where defendant had furnished to the molding department of its foundry in which plaintiff was employed proper materials from which to construct all parts of the flasks in which castings were molded, and provided competent employes to construct and assemble them, the assembling of the parts being left entirely to the employes in such department, defendant was not liable for any defects in the construction or adjustment of such flasks negligently selected or assembled by plaintiff's fellow servants.

2. SAME—NATURE OF COMMON SERVICE.

Where defendant's carpenter shop was strictly a part of its molding department, in which plaintiff was employed, and the foreman of the carpenter shop was under control and direction of the foreman of the molding department, and it was essential that the molding flasks should be put together by the carpenter in the molding department for use by the iron molders, who were required to prepare the molds, the foreman of the carpenter shop was a fellow servant of a molder.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 486-489.]

3. SAME—STATUTES.

Under Civ. Code, § 1970, providing that an employer is not liable to an employe for losses suffered by the latter in consequence of the negligence of another employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employe, or unless the employer has neglected to use ordinary care in the selection of the culpable employe, a master is not liable for injuries to a servant caused by the negligence of a fellow servant, regardless of the grades of the employment or the fact that they are employed in different departments of service.

4. SAME—INSPECTION.

Where a master, having furnished proper materials and competent workmen to construct molding appliances, had delegated the duty of assembling the parts to employes, and was there-

fore not liable for failure to furnish suitable finished flasks, it owed no duty to its employes to inspect the flasks before they were used.

Department 2. Appeal from Superior Court, City and County of San Francisco; William R. Daingerfield, Judge.

Action by John Leishman against the Union Iron Works. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

Charles F. Hanlon, for appellant. Van Ness & Redman, for respondent.

LORIGAN, J. Plaintiff was a journeyman molder in the service of defendant. While assisting in casting an iron piston ring, he was seriously injured by the explosion of the mold in which the ring was being cast, and brought this action to recover damages for the injuries sustained. The case was tried before a jury, and at the close of the evidence the trial court granted a motion made by the defendant for a nonsuit. Judgment was entered accordingly in favor of defendant, and this appeal is taken from the judgment and from an order denying plaintiff's motion for a new trial. The only question involved on the appeal is the validity of the judgment of nonsuit.

The material facts, as disclosed by the pleadings and evidence, stated as briefly as possible, are as follows: That plaintiff was injured at the time and place mentioned in the complaint, and there was evidence tending to prove that his said injuries were of a serious character. That at the time he was injured he was an employe of the defendant, working in the iron molders' department of defendant. That he was injured while assisting in casting a piston ring. That for the purpose of casting such piston rings the employes of defendant were furnished with lumber, iron, and other material, out of which to construct the molds, in which such piston rings were cast, and out of such material so furnished said employes did, from time to time, as needed, construct such molds. That the molds aforesaid, in which such piston rings were cast, consisted of three parts, commonly called the "drag," "cheek," and "cope," fitting the one upon the other. To the bottom of the cheek was attached and bolted an iron ring or disc, known as the "plate." In the preparation of the flask it was customary to attach to the bottom of the cheek either this iron ring or disc, or a wooden substitute, called a "chuck." Each of these parts was filled with sand, rammed and tamped. In this sand, so rammed and tamped in the cheek, a pattern of the casting to be made is sunk and withdrawn, and the molten iron poured into the space made by the removal of the pattern, which iron, when cooled, makes the casting. For the purpose of making a casting, a pattern is furnished the iron molders' department, which pattern is made in, and furnished by, the pattern de-

partment of defendant, a department separate from and independent of the molders' department. For the purpose of casting a piston ring, such as was being cast at the time of plaintiff's injury, the flat iron ring or disc, commonly known as the "plate," is attached to the cheek, and these iron plates are molded and cast in the iron molders' department, from time to time, as needed, and are kept on hand for use from time to time as required. The wooden framework of the drag, cheek, and cope were made out of lumber furnished by the defendant for that purpose by carpenters, who are under the orders and subject to the control of the foreman of the iron molders' department; the carpenter shop, in which said carpenters work, being separate from and independent of the general carpenter shop of the defendant and a part of the iron molders' department of defendant. There was evidence tending to prove that the explosion of the mold, by which explosion plaintiff was injured, might have been caused by the use of a plate of improper size attached to the cheek, by reason of an unusual amount of rust upon said plate used, or by reason of improper tamping of the sand, which may have permitted the molten metal in the mold to find its way through the sand to the wooden bars of the cope. That in the making of castings in the foundry of defendant the pattern maker would prepare a pattern for each of said castings, and the foreman of the molding department would distribute daily these patterns to the molders in said department, and it would be, and was, the duty of each molder receiving a pattern to obtain from the foreman of the molding department the necessary drag, cheek, and cope with which to make the casting, and thereupon to proceed with said drag, cheek, and cope to his place of work in the molding department, and with sand on hand in the molding department to prepare the mold in which to make the casting, and, upon the completion of the mold, together with other employes of the defendant in the molding department, to proceed with and finish said casting. That it was the business of the molder receiving the pattern to secure from the foreman of the molding department the necessary drag, cheek, and cope, and, if any part thereof, or the plate upon the cheek, were not in proper order for the purpose for which intended, and for the work to be done, to call the attention of the foreman to any existing defect therein, whereupon it was the duty of said foreman to have such defect remedied. That the drag, cheek, and cope in use at the time of the accident were constructed in the carpenter shop of defendant, a part of the molding department, upon the order of the foreman of the molding department, out of materials furnished by defendant to and for the molding department, and the plate attached to the cheek was attached by the carpenter. At the time of the accident there were on hand in the molding department, and for use in said department,

for work such as was being done at the time of the accident to plaintiff, and by reason of which plaintiff was injured, drags, cheeks with plates, and copes other than the drag, cheek with plate, and cope in use at the time plaintiff was injured, which could have been used in place of the drag, cheek with plate, and cope actually used, and it was the duty of the foreman to have selected from such drags, cheeks, and copes for the job upon which plaintiff was injured such as were in order, with the proper plate, and proper for that job. The defendant did not, other than as herein above stated, furnish to plaintiff, or its other employes in the molding department, finished drag, cheek, plate, or cope with which to make the castings, but furnished to and for said department the necessary material from which to construct said appliances, and they were constructed as aforesaid. From time to time the drags, cheeks, plates, and copes in use in said department would become worn and inefficient for one kind of work, while remaining efficient for some other or different kind of work, and it was the duty of the foreman and workmen to see to it that for each particular job a proper and efficient drag, cheek, and cope was selected out of the supply on hand and used. That each molder was understood to be capable of determining the sufficiency and safety for use on the job given him of the drag, cheek, and cope furnished him, and, if in his judgment there was any defect in the drag, cheek, or cope furnished, it was his privilege and duty to call the attention of the foreman to such defect, and to procure another drag, cheek, or cope which was not defective. That the nature of the work in the molding department of defendant, in the use of drags, cheeks, and copes, was such that rust would always accumulate upon the plates attached to such cheeks, and whether or not the amount of rust upon any particular plate was such as to render the use of the cheek unsafe was a fact to be determined immediately prior to its use, and the molder using the cheek was as competent as any other employé of defendant to determine such fact; and if, in fact, the amount of rust upon any particular plate was such as to render the cheek to which it was attached dangerous, then, and in that case, it was the duty of the molder, through the foreman, to procure another cheek which was in all respects proper to use, or to remove the rust from the plate attached, with oil, of which there was always plenty at hand in the department for that purpose.

Upon the day when plaintiff was injured one Drury, a fellow molder of plaintiff, was given a piston ring to cast, and, having secured the three parts of his flask, proceeded to his place of work and prepared the mold as above described. While plaintiff was assisting him in pouring the molten metal into the mold, it exploded; plaintiff receiving the injuries of which he complains. As stated,

it is not clearly apparent from the testimony in the case to what cause the explosion of the mold was attributable. It might have been caused by the use of an iron plate of improper size attached to the cheek, or by the use of one which was in an improper and dangerous condition to be used on account of the accumulation of rust upon it, or by reason of improper tamping of the sand, which may have permitted the molten metal in the mold to find its way to the bars of the cope, and so cause the explosion without the metal having ever reached the plate at all.

With the particular cause of the accident, however, we have no present concern. The only point to be determined on this appeal is whether, upon a consideration of the entire evidence, the lower court was warranted in taking the case from the jury and deciding as a matter of law that upon no theory of the case did the evidence, considered most favorably in behalf of the plaintiff, show any liability upon the part of defendant, and would not have warranted a verdict in his favor. The theory of plaintiff on the evidence was that the accident was occasioned through the use of a defective plate attached to the cheek, and that the plate was too small for the particular casting in question, was composed of four pieces, when it should have properly consisted of but one, and, besides this, was coated with rust to such an extent that, when the molten metal reached it, the explosion occurred. His legal contention, based on this theory of the evidence, is that it was the imperative duty of the defendant to furnish the molders with appliances reasonably safe to do the work of casting, and that, in failing to have a plate of proper size and in good condition attached to the cheek of the mold at which plaintiff was working when his injuries were received, the defendant failed to discharge its legal obligation, and is liable. The lower court, in granting the nonsuit, evidently held, notwithstanding the general rule as contended for by plaintiff, that when the defendant furnished to the molding department proper materials from which to construct all parts of the appliances—the flasks—with which the casting was to be done therein, and provided competent employes to construct and attach them, the defendant had discharged all the duty it owed to the employes in such department, and was not liable for any defects in the construction or adjustment of such appliances occasioned by the employes themselves, and that, proper materials having been furnished to the employes in the molding department by the defendant for the proper construction of such appliances to be used in such department, any defects, either in construction or adjustment thereof, must be deemed to have proceeded from the negligence of fellow servants of the plaintiff, for which, under the familiar rule of law, the defendant could not be held liable. We are

satisfied that, under the evidence, the trial court applied to it the proper rule of law, and correctly granted the motion for nonsuit.

There can be no doubt but that the settled rule is that an employer must provide his employes with safe appliances with which to do the work for which they are engaged, that he must keep such appliances in reasonably safe condition, and that this is a personal obligation which cannot be delegated so as to relieve the employer from liability in not having done so. But there is no positive duty incumbent upon an employer to furnish such appliances to do the work as completed instruments. He may supply sufficient and suitable materials to the employes themselves out of which the appliances with which they are to work are to be constructed and adjusted by them, in which case the general rule that safe appliances shall be furnished by the employer—that is, that efficient and complete appliances shall be furnished by him—has no application. His obligation to his employes as far as furnishing such appliances is concerned, is satisfied when he furnishes suitable materials with which to construct them, and, under the terms of the contract of employment, either express or implied, the employes themselves are to do the constructing. In that event, the employer is not liable for an injury through a defect in the construction or adjustment of such appliances. Upon this subject it is said, in *Callan v. Bull*, 113 Cal. 603, 45 Pac. 1020: "The rule which requires the master to provide a safe place and safe appliances for the servant is applied when the place in which the work is to be done is furnished or prepared by the master, as in the case of a ship or a mill or a factory, or when the machinery or other appliances with which the servant is employed to work are furnished by the master; but it has no application when the place at which the work is to be done, or the appliances for doing the same, are to be prepared by the servant himself. If the appliance is furnished by the master for the purpose of enabling the servants to perform the work in which they are to be engaged, he is required to see that it shall be reasonably safe for that purpose; but, if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation. 'The rule does not apply to a case where several persons are employed to do certain work, and by the contract of employment, either express or implied, the employes are to adjust the appliances by which the work is to be done.' *Burns v. Sennett*, 99 Cal. 363, 33 Pac. 916." In *Kerrigan v. Market Street Ry. Co.*, 138 Cal. 511, 71 Pac. 622, it is said: "Where certain persons are employed to do certain work, and by the contract of employment, either express or implied, such employes are to construct and adjust the appliances by which the work is to be done, the employer

to furnish proper material and the employes to construct and adjust such appliances as in their judgment are necessary, the employer is not liable to such employes for any defect in the construction or adjustment of such appliances."

Now, it appears clearly from the evidence that the flasks necessary for making castings were not furnished as complete appliances by defendant. It did not assume to do so, and it is obvious that under its contract of employment with the employes, in the molding department of its business, it was not required that they should be so furnished, but, on the contrary, that they should be constructed by the employes of that department themselves. To that end it furnished good and sufficient material—lumber and iron. It is not questioned but that the employes whose duty it was to construct the flasks were competent workmen. No complaint is made that the carpenters in the molding department did not properly put together the woodwork of which the flask consisted, but only that the plate adjusted by them, and which was cast by the iron molders themselves, whose duty it was to cast it, was not a proper one to be used in making a particular casting. As, however, the defendant furnished not only the lumber and competent carpenters, but the pig iron for the making of these plates, and competent iron molders, as the plaintiff himself was, to cast them for use on the flasks, it is evident that, under the rule stated above, the defendant failed in no duty it owed the plaintiff, and that assuming the injury to plaintiff was occasioned as claimed by him, still it proceeded from the neglect of fellow employes to properly construct and adjust the flask from materials furnished the molders' department for that purpose.

It is claimed, however, by plaintiff that the carpenter shop was a separate and distinct shop or department from that portion of the molding department in which plaintiff was engaged, and that the foreman of the carpenter shop was not a fellow servant with plaintiff in the construction and adjustment of the flask in question. But it appears from the evidence in the case that this is not true in point of fact. The foreman of the carpenter shop, or, as under the evidence he might more properly be designated, the "boss carpenter," was not in the control of an independent department. The carpenter shop was strictly a part of the molding department, and its foreman was under the control and direction of O'Neill, the foreman of that department. O'Neill had control and supervision of the entire molding department, including therein, as a part thereof, the carpenter shop. It was as essential, in efficiently performing the work of casting, in which the molding department was exclusively engaged, that the flasks should be put together by the carpenter in that department for use by the iron molders therein,

as it was that the latter should prepare the molds in them and do the casting. The only work that was done in the carpenter shop was for the benefit and in aid of the molding department, particularly in the construction and adjusting of these flasks. And the making of these flasks was as much a part of the work of the molding department as was the making of the castings. But, were this not so, the department rule, relative to which counsel for appellant cites numerous decisions from other jurisdictions, does not obtain in this state. Our Civil Code (section 1970) lays down this general rule: "An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé, or unless the employer has neglected to use ordinary care in the selection of the culpable employé." In construing this section it was early said by this court that: "The law of this state respecting this subject, as set forth in the Code referred to, recognizes no distinction growing out of the grades of employment of the respective employés, nor does it give any effect to the circumstance that the fellow servant, through whose negligence the injury came, was the superior of the plaintiff in the general service in which they were in common engaged, and the alleged distinction in this respect insisted upon by the appellant's counsel, founded, as he claims, on the general principles of law and the adjudged cases, requires no examination at our hands." *McLean v. Blue Point Gravel M. Co.*, 51 Cal. 258. To the same effect are *Congrave v. Southern Pacific R. R. Co.*, 88 Cal. 361, 26 Pac. 175; *Davis v. Southern Pacific R. R. Co.*, 98 Cal. 13, 32 Pac. 646; *Noyes v. Wood*, 102 Cal. 392, 36 Pac. 766; *Livingston v. Kodiak Packing Co.*, 103 Cal. 264, 37 Pac. 149; and *Donovan v. Ferris*, 128 Cal. 53, 60 Pac. 519, 79 Am. St. Rep. 25. Within this rule, as declared by the Code, and construed by the authorities, the foreman of the carpenter shop was a fellow servant of the plaintiff. They were both in the employment of defendant in the molding department, both under the control of the general foreman of that department, O'Neill, and both engaged, not only in the general business of defendant, but in the particular business in which the molding department was exclusively engaged—casting. And the same rule applies to the foreman O'Neill, in as far as it is claimed that the defendant should be held responsible for his asserted negligence in failing to inspect the flask, the explosion of which occasioned the injury. If the positive duty rested upon defendant to supply completed and finished

flasks to the molding department, and inspect them as necessity for doing so arose, and the foreman O'Neill represented the defendant, as its vice principal, to discharge these duties of supply and inspection, his neglect would be no doubt that of the defendant. But, as we have seen, no such positive duty of furnishing the flasks in the completed state devolved upon the defendant. It furnished, as it had a right to do under the rule above stated, only the materials for such purpose, the task of constructing the flasks to be performed by its employés. Having furnished such materials, and competent workmen to construct the flasks, defendant fully discharged its duty to its employés. As it was not bound to furnish finished appliances, but discharged its duty by furnishing adequate materials for that purpose, it logically follows that it was not required to inspect the appliances after construction. The construction and inspection of such flasks were simply details in the proper execution of such work after ample provision made for its being safely done, and as to such details the foreman and the workmen in the department were fellow servants. *Noyes v. Wood*, 102 Cal. 392, 36 Pac. 766. The other cases cited immediately preceding bear also directly upon this point and illustrate the application of the rule.

We do not think any further discussion of this matter is necessary, nor to particularly consider additional points urged by respondent in support of the judgment of nonsuit, namely, that the evidence shows that there were on hand in the molding department, at the time the flask in question was selected, other flasks, which, taken in their entirety, were in good condition, and that, if any improper selection was made by the foreman or other employés, the defendant was not liable for such error in judgment; further, that the molder Drury was capable of determining, and should have inspected to ascertain, whether the flask in question was sufficient and safe, and that his failure to do so and to call the attention of the foreman of the department to the defective plate, or substitute a chuck therefor, or remove the rust from it with the oil at hand for that purpose, was negligence of a fellow employé of plaintiff, for which defendant was not responsible.

Whatever merit there may be in these points, we do not discuss, because under the settled rule of law which we have mainly considered, and which was the principal question discussed by counsel, defendant having furnished the materials out of which the appliances for use in the molding department were to be constructed, and the employés in that department being required to construct them from the materials so furnished, the safety appliance rule urged by appellant has no application, and the defendant was not liable for any injury resulting to plain-

tiff in such department from a defect in the construction and adjustment of such appliances by his fellow employes.

Under this rule of law, applied to the evidence in the case, the lower court properly granted the motion for a nonsuit, and the judgment and order appealed from are therefore affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

148 Cal. 234

MENNER v. SLATER et al. (L. A. 1,549.)
(Supreme Court of California. Dec. 5, 1905.)

CONSPIRACY—WHAT CONSTITUTES—DOING LAWFUL ACT.

Where an attachment was dismissed before judgment for insufficiency of the affidavit, the attachment defendant had a right to sell, and the deputy sheriff who levied the attachment and the keeper of the property pending the attachment had a right to buy and sell to others, the attached property, and their act in joining in so doing before the rendition of judgment for plaintiff was not an actionable conspiracy for which plaintiff could recover damages resulting from her consequent inability to collect her judgment out of the property.

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Ednah J. Menner against John R. Slater and others. From a judgment for defendants, plaintiff appeals. Affirmed.

G. A. Gibbs, for appellant. J. C. Willett and Lee, Scott, Bailey & Chase, for respondents.

McFARLAND, J. A general demurrer to the complaint was sustained and judgment rendered for defendants, and from this judgment plaintiff appeals.

The purpose of the action is to recover of defendants the sum of \$4,165 damages for an alleged conspiracy entered into by them to prevent plaintiff from collecting a certain judgment against defendant Horton for the above-mentioned amount of money. The main averments of the complaint are as follows: It is averred that plaintiff commenced an action against defendant Horton to recover of him damages for violation of certain contracts existing between him and plaintiff; that during the pendency of said action she had an attachment issued and levied upon certain personal property formerly belonging to the Putnam Furniture Company, a corporation, but alleged to belong at the time of the attachment to Horton; that said attachment was afterwards, and before judgment in said action, on motion "dismissed, upon the ground of insufficiency of the affidavit"; that after the discharge of the attachment, Horton sold the property for \$2,000 to the defendants Slater and

Crossman, who afterwards, and before judgment in said action, sold it to one Goodspeed. It is averred that the property was of the value of \$6,000, and that afterwards plaintiff recovered judgment in said action against Horton for \$4,000. There is also something in the nature of an averment that Horton has no other property, which respondents claim to be insufficient as an averment of that fact; but for the purposes of this appeal we will consider it as sufficient. It is also averred generally that the above acts constituted a fraudulent conspiracy to prevent plaintiff from having her judgment against Horton satisfied on execution out of said property. It is also averred that the writ of attachment above mentioned was placed in the hands of defendant Slater "as deputy sheriff," and was levied by him on the property, and that defendant Crossman was appointed by Slater as keeper of the property. The foregoing—leaving out of view certain general phrases which add nothing to the facts alleged—is a sufficient statement of the contents of the complaint for the purposes of this opinion. Respondents contend that many things claimed to be averred are not averred, and, particularly, that, under any view, there is no averment of any damage that is not too uncertain and conjectural to be considered; but, under our view, it is not necessary to discuss these contentions.

It is obvious that appellant had no lien of any kind on the property in question at the time it is alleged to have been sold by Horton to the other defendants. The attachment had been discharged. There was no judgment, and, of course, no execution lien. The appellant was merely a general creditor of Horton. She was in no position to claim any priority of right to the property. She had no lien to lose. Horton was, therefore, free to sell, and the other defendants free to buy, the property, for a valuable consideration; and a lawful act done by one person does not become unlawful because participated in by another person. An actionable conspiracy exists only where there is an unwarrantable combination of two or more persons to do an unlawful thing. We see nothing in the point made on the attempted averment that Slater was, in fact, a deputy sheriff. After the discharge of the attachment his functions as the officer who levied the attachment, if he was such officer, were ended. And so it is with respect to the keeper. It must be remembered that the purpose of this action is merely to recover damages for an alleged wrongful act. For these reasons the demurrer was, in our opinion, properly sustained.

The judgment appealed from is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

148 Cal. 287

CLYNE v. EASTON, ELDRIDGE & CO. (S. F. 3,120.)

(Supreme Court of California. Dec. 5, 1905.)

1. ATTACHMENT—DEBTS—NOTICE.

A notice of attachment of "credits and effects" belonging to the defendant in the attachment suit creates no liability of the garnishee for a debt due to the defendant.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, § 230.]

2. SAME—EVIDENCE OF ATTACHMENT OF INDEBTEDNESS—CONCLUSIVENESS.

A pencil entry by the garnishee's bookkeeper on the margin of the account of the attachment defendant, and the statement of its president that the debt was attached as an excuse for refusing further payments, was evidence that the debt had been attached, but not conclusive evidence.

3. SAME—EFFICACY OF NOTICE—ESTOPPEL.

The refusal by a garnishee of further payments to the defendants in the attachment suit on the ground that the debt had been attached, and thereby securing an advantage to itself, cannot avail plaintiff as an estoppel to deny the efficacy of the notice, especially when the garnishee denies any indebtedness to the defendants in attachment, and an action by them is barred by limitations.

4. SAME—OBJECTIONS TO SHERIFF'S RETURN—RELEVANCY.

A garnishee is not required to appear in the attachment suit, and has nothing to do with the sheriff's return, unless it should be false in some particular which would subject him to liability beyond that warranted by the facts; and in a suit to recover an alleged indebtedness to the attachment defendants at the date of the attachment, where the garnishee relies on the sheriff's return as containing a true statement that he attached credits and effects, and not debts, he may properly object to the sheriff's return when offered in evidence as irrelevant.

5. SAME—SERVICE OF ATTACHMENT—LIMITATIONS.

Under Code Civ. Proc. § 544, providing that all persons having in their possession credits or other personal property belonging to defendant at the time of service of an attachment, unless such property be delivered up or transferred, or such debts be paid to the sheriff, shall be liable to the plaintiff for the amount of the credits, property, or debts until the attachment is discharged or any judgment recovered against him is satisfied, the running of the statutes of limitations in favor of a debtor is not interrupted by making him a garnishee, as such section applies only where the garnishee admits his indebtedness to the defendant in attachment or his possession of specific property of defendant.

6. PRINCIPAL AND AGENT—AGREEMENT—CONSTRUCTION.

Where a subsequent agreement for the sale of land superseded a former agreement under which defendant had incurred all items of expense charged in the account to that date, and provided that all excess received over a named sum and all crop returns now in hand, or due on account of crops growing on the land for the year 1893, shall belong to defendant as compensation, no expenses incurred by defendant, nor any payment to or on account of the vendors prior to the second agreement, can be charged as a credit against its indebtedness arising on the subsequent sale of the land.

7. SAME—PERFORMANCE.

Where, under an agreement for the sale of land, defendant was to liquidate incumbrances, pay a named sum to the vendors, and retain the excess, by procuring a conveyance

to its clerk, it became bound by an implied agreement to pay off the incumbrances, with interest, and pay the vendors the stipulated sum, unless there was a subsequent modification of the agreement.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by James Clyne against Easton, Eldridge & Co. Judgment for plaintiff, and plaintiff appealed from a part of an order directing a new trial of the issues as to which findings were vacated, and defendant from the part which denied a new trial of the remaining issues. Affirmed as to so much of the order appealed from as granted a new trial, and reversed as to so much of the order as denied a new trial of the other issues.

Rehearing denied January 4, 1906.

R. E. Houghton and Houghton & Houghton, for plaintiff. Jesse W. Lillenthal and Frohman & Jacobs, for defendant.

BEATTY, C. J. The trial of this cause in the superior court resulted in a judgment for the plaintiff. Defendant moved for a new trial, and its motion was granted as to some of the issues, but denied as to the others. Both parties appeal—plaintiff from that part of the order which directs a new trial of the issues as to which the findings are vacated, and defendant from the part which denies a new trial of the remaining issues. The record is, of course, the same on both appeals, and they have been submitted together.

The salient facts of the case are that the defendant, a California corporation, prior to the 7th day of June, 1893, had written authority from Linnie W. Goodyear and her husband, H. C. Goodyear, to sell on commission 1,244.31 acres of land belonging to Mrs. Goodyear. The land was heavily incumbered by a first mortgage to the German Bank and by a second mortgage to one Kahn. The authority to sell provided for a sale of the land in separate tracts at a fixed minimum of price, and defendant was to receive a commission of 2½ per cent. of the price so fixed, and also one-half of any excess received from sales of the property over and above the fixed price plus the expenses of surveying, platting, and advertising, which expenses it is clear from the whole tenor of the writing were to be borne by the defendant as a part of its undertaking to make the sales. The effort to dispose of the land upon the terms of this authorization having failed, it was superseded on the 7th of June, 1893, by a new one in the following terms:

"Whereas, on the 25th day of January, 1893, the undersigned entered into a contract with Easton, Eldridge & Company for the sale of certain real estate in the county of Solano, state of California; and, whereas, owing to the condition of the mortgages, it is absolutely necessary to sell the land as a whole: Now, therefore, it is agreed, and Easton, Eldridge & Company are hereby au-

thorized to sell the land, viz.: 1,244 and $\frac{31}{100}$ acres, more or less, for such sum as shall liquidate the present mortgage indebtedness, and in addition pay us the sum of twelve thousand dollars, and all excess received over and above that, as also all crop returns now in hand or due on account of crops growing on the land for the year 1893, shall belong to the said Easton, Eldridge & Company, and shall be held by them as a part of their compensation under this agreement of sale. Witness our hands this 7th day of June, A. D. 1893. [Signed] Mrs. H. C. Goodyear. H. C. Goodyear. Witness: [Signed] Geo. Easton."

Acting under this authority and some alleged oral modifications thereof, the defendant during the year 1893 sold the entire tract in two parcels, and out of the proceeds satisfied and discharged all the incumbrances thereon, including the mortgages above mentioned, and some other liens. The \$12,000 claimed by the Goodyears, however, had not been paid in full, and there was a dispute between them and the defendant as to the balance remaining due upon the account, when, on the 10th day of August, 1894, the plaintiff in this action commenced an attachment suit in Solano county against Mr. and Mrs. Goodyear to recover, with interest, the sum of \$6,805 due upon their promissory notes. Summons and attachment were duly issued in said suit, and on August 11th the attachment was placed in the hands of the sheriff of San Francisco for service. No return was made thereon until March 29, 1897—at which date the following paper was filed in the office of the county clerk of Solano county:

"Office of the Sheriff of the City and County of San Francisco. By virtue of the annexed writ, I duly attach all moneys, credits, and effects belonging to the defendants named in said writ, or to either of them, by serving upon each of the hereinafter named parties, personally, in the City and County of San Francisco, at the times set opposite their respective names, a copy of said writ, with a notice in writing notifying each of said parties, respectively, that such moneys, credits, and effects of said defendants, or either of them, was attached, and not to pay over or transfer the same to any one but myself. Statement demanded. The answers were as set opposite their respective names. Names of the parties served as aforesaid: Easton & Eldridge & Co., through G. Easton (Sec.); time of service, Aug. 11th, 1894, at 11:00 o'clock a. m.; answers, 'No funds.' Henry B. Shaw, Aug. 11th, 1894, at 11:15 a. m.; no answer. [Signed] John J. McDade, Sheriff, by J. J. McTiegan, Deputy Sheriff."

After said writ of attachment was so served upon the defendant herein, on the 11th day of August, 1894, an entry was made in the margin of the ledger account, kept by said Easton, Eldridge & Co., in connection with the transactions under the contracts above mentioned, as follows: "Attach-

ed August 11, 1894." And thereafter said Easton, Eldridge & Co. refused to make further payments on account of such transactions to H. C. Goodyear, or Linnie W. Goodyear, giving as the reason for such refusal, that it had been enjoined by the courts from paying over any more money. In the meantime Clyne had recovered a judgment in his attachment suit against the Goodyears for \$7,532, with accruing interest. The date of said judgment was December 13, 1895, but execution thereon was not issued until June 28, 1897. This writ was served on the defendant herein on July 15, 1897. In response to the accompanying notice and demand, defendant denied any indebtedness to the Goodyears, and, subsequently, upon supplementary proceedings duly taken, appeared by its president before a referee appointed by the superior court of Solano county, where it again denied all indebtedness to the Goodyears exceeding \$50, denied possession of any of their property, and also pleaded the statute of limitations (section 339, subd. 1) as a separate defense to any claim in their behalf. Upon the coming in of the referee's report to that effect, the court made an order in the case of Clyne v. Goodyear authorizing the institution of this action for the recovery of the alleged indebtedness of defendant to the Goodyears at the date of the attachment in said suit. In pursuance of this order, the original complaint was filed on the following day, July 30, 1897, but the case was not tried until the year 1899, and the pleadings as finally amended were filed after the trial. In his second amended complaint the plaintiff alleges, among other things, that on the 11th day of August, 1894, when his writ of attachment in the action of Clyne v. Goodyear was served on the defendant corporation, it was indebted to the Goodyears in the sum of \$6,910.28, and that said debt was attached by the service of said writ. The defendant by its answer to said second amended complaint denied that the sheriff attached any debt due to the Goodyears. It also denied the existence of any debt at the date of the attachment, and along with other separate defenses (account stated and laches) pleaded the statute of limitations (sections 312, 325, and subdivision 1 of section 339, Code Civ. Proc.) in bar of the action. Upon these and other material issues the findings were adverse to the defendant.

In disposing of the plaintiff's appeal, we have to consider only the particular issues to which the order granting a new trial was limited, and which relate exclusively to the question whether the debt of the defendant to Mrs. Goodyear was really attached in August, 1894, as alleged by plaintiff and denied by defendant. These issues vitally affect the plea of the statute of limitations. For whatever may have been the amount of defendant's indebtedness to Mrs. Goodyear, resulting from the sale of her

lands, it is certain that it accrued prior to the alleged garnishment on August 11, 1894, and it is conceded that an action for its recovery by her would have been barred by subdivision 1 of section 339, Code Civ. Proc., within two years from that date. It is also conceded that there could have been no liability of the defendant to any creditor of the Goodyears by virtue of an attachment or execution levied after the debt had become barred as to them. The appeal of the plaintiff therefore must fail unless the evidence in the case shows without substantial conflict that the debt was attached as alleged. The appellant to sustain his contention upon this point relies upon two items of evidence: First, The return of the sheriff above quoted; and, second, an admission of the fact by the defendant under circumstances estopping them now to deny it. As to the first item, it will be observed that the notice served with copy of the writ made no mention of debt or indebtedness specifically, and had no application to the indebtedness of the defendant unless it was included in the more general term "effects." The contention of the plaintiff is that the statute, being remedial, should be liberally construed for the advancement of the remedy, and that a notice of attachment of credits and effects should be held a sufficient garnishment of a debt. The defendant cites in opposition to this view, the cases in which it has been held by this court that proceedings by attachment being special and statutory, the provisions of the statute must be strictly followed in order to acquire any rights thereunder. *Gow v. Marshall*, 90 Cal. 567, 27 Pac. 422, and cases there cited; *Rudolph v. Saunders*, 111 Cal. 233, 43 Pac. 619; *Beltaire v. Rosenberg*, 129 Cal. 164, 61 Pac. 916. In view of these authorities, it cannot be doubted that the established rule in this state is to exact a strict compliance with the law, and that rule was applied in *Gow v. Marshall* to a case almost exactly the counterpart of this. There the notice of attachment mentioned only credits, and it was held upon a critical examination of the various sections of the Code relating to this matter, and upon very satisfactory reasoning, that the attachment created no liability on the part of the garnishee for a debt due to the defendant in the attachment suit. The only difference between that case and this is that while that notice of attachment mentioned credits only, the notice in this case also contained the word "effects." But this difference would seem to be immaterial for both *Rood* (on Garnishment) and *Shinn* (on Attachment) agree that the attachment and garnishment laws make a fundamental difference between custodians of the debtor's property, which includes his effects, and his debtors. *Rood* on Garnishment, § 50; *Shinn* on Attachment, § 600. In the section last cited it is said: "The liability of a

person to be charged as garnishee on the ground that he has property, money, or chattels, credits, and effects in his hands or under his control, is distinct from his liability on the ground of indebtedness to the principal defendant, and when process is issued on an affidavit specifying one of these grounds only the garnishee cannot be charged with liability on the other ground." Of course, these writers were referring more particularly to the proceedings under the laws of other states, regulating what is there variously denominated garnishment process or trustee process, but those proceedings, though differing in detail from our proceeding by attachment, are so far analogous as to make the distinction there recognized between the liability of a debtor and of a custodian of goods or effects, a safe precedent here. We think that upon this view of the matter, it must be held that the sheriff's return, so far from proving an attachment of the debt of defendant to Mrs. Goodyear, must, upon the presumption that it stated the truth, be regarded as evidence, and very persuasive evidence, that the debt was not attached.

As to the admission of the defendant, consisting of a pencil entry by one of its bookkeepers on the margin of the Goodyear account in defendant's ledger, and of the statement of its president that the debt was attached as an excuse for refusing further payments, that certainly was evidence that the debt had been attached; but it was not conclusive evidence. It may have been nothing more than the expression of an erroneous opinion as to the effect of the service of the notice which the sheriff says he served. As to the argument that the defendant, by refusing further payments to the Goodyears, upon the ground that the debt had been attached, and thereby securing an advantage to itself at their expense, is now estopped to deny the efficacy of the notice, it may be said that in a conceivable case these facts might work an estoppel in favor of the Goodyears; but it is not apparent how such estoppel can avail this plaintiff in view of the facts appearing in this record. A great deal of the argument of appellant on this branch of the case is devoted to the proposition that the defendant has no concern in disputing the validity of an attachment, the regularity of which has at all times been conceded by the Goodyears. This argument ignores the fact that the defendant denies any indebtedness to the Goodyears, and that an action by them is barred by the statute of limitations. The right to interpose this plea is a valuable right of which the defendant cannot be deprived by the admission of a third party, and especially of a party whose interest is adverse. If the debt was not attached, the plea of the statute is a perfect defense to the action, and for the purpose of that defense the defendant is interested and deeply concerned in contesting the

issue. The Goodyears, on the other hand, are interested in having it established that the debt was attached; for if so, and if, as contended, the service of the writ stopped the running of the statute in favor of the plaintiff, he may now recover the debt, and what he recovers will satisfy pro tanto his judgment as against the Goodyears to their manifest advantage.

The plaintiff urges still another objection to the right of defendant to question the attachment of the debt. It is said that no objection to the sheriff's return was ever made prior to the motion for a new trial, and cases are cited in which it has been held that a garnishee waives all objections to the sheriff's return which he does not make when he appears and other cases which deny his right to interpose technical objections to the mode of service of the writ. These cases are not in point, because they arose under the laws regulating trustee process, and garnishee process in other jurisdictions where the garnishee is required by the process to appear in the action and answer to the court. Under our attachment law, a garnishee is not required, and has no right to appear in the action. The only answer he makes is to the sheriff at the time of the service of the writ, and that relates only to the property actually attached which he has in his possession or under his control. He has nothing to do with the return of the writ, unless it should be false in some particular which would subject him to a liability beyond that warranted by the facts. In this case, the defendant does not object to the return. On the contrary, it relies on the return as containing a true statement of what the sheriff did, i. e., that he attached credits and effects, but did not attach the debts. Defendant's real objection was made in the only manner and at the earliest time it could be made. Its answer to the original complaint is not in the transcript, but by the amended pleadings the issue as to the attachment of the debt is distinctly raised by allegation on one side and denial on the other. And at the trial when the sheriff's return of the writ was offered in evidence defendant objected that it was irrelevant. It is said that this was not the proper objection; that the real objection to the return, if any, was that it was incompetent. But this is not so. Conceding that the evidence may have been incompetent, that was an objection which the defendant could waive, as it did by failing to make it, but this waiver made the objection of irrelevancy all the more pointed, made it mean, in other words, that, waiving all other objections, this return has no tendency to prove an attachment of the debt. The present position of the defendant as to this matter is therefore the same position it has maintained from the beginning, and it follows from what has been said, that the part of the or-

der of the superior court, from which the plaintiff has appealed, must be affirmed.

This conclusion, however, does not dispose of all the questions arising upon the plaintiff's appeal, for the defendant contends (and in view of the further proceedings involved in the order for a new trial, the question cannot be left open) that whether the debt of defendant to the Goodyears was or was not attached in August, 1894—that even conceding the efficacy of the attachment in that respect—the order granting a new trial should still be affirmed, upon the more radical ground that this plaintiff's cause of action was barred by the same lapse of time that barred an action by the Goodyears themselves; or, in other words, that the running of the statute of limitations in favor of a debtor is not interrupted by making him a garnishee. This is really the most important, as it is the most difficult, question in the case; for its determination, in favor of respondents, would seem to put an end to the present controversy, and however it may be determined, our conclusion will remain a precedent of vital importance for future cases. The plaintiff claims that this question (if, since the adoption of the civil practice act, it has ever been a question) was set at rest by the decision of department two of this court in *Carter v. Los Angeles National Bank*, 116 Cal. 374, 48 Pac. 332. The Code provision relied on is contained in section 544 of the Code of Civil Procedure, which reads as follows: "All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant, at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged, or any judgment recovered by him be satisfied." The construction which the plaintiff contends this section requires, and which he says this court has adopted, is that the liability of a garnishee to the defendant in an attachment suit—such as it is when the writ is served—is never barred as to the plaintiff in the attachment. If this be so, it must be conceded that it puts a garnishee at a great disadvantage as compared with other alleged debtors, and this without any fault or complicity on his part. Though the alleged claim of the defendant in the attachment may be barred the day after the garnishment, he nevertheless remains liable to an action by the garnisher on the same claim as long as he holds an unsatisfied judgment against the defendant in the attachment. This is the conclusion to which a literal reading of the statute inevitably leads, and it admits of no qualification or compromise.

A conclusion so fraught with injustice to innocent parties may well induce a doubt whether the language of the statute is to be taken literally; and, in considering whether it will bear a more liberal and equitable construction, we find nothing in Judge Temple's opinion in *Carter v. Los Angeles National Bank*, *supra*, to sustain the opposite view. All that he says touching this matter is contained in a single paragraph at the close of the opinion: "As to the statute of limitations, if the garnishee is entitled to the plea as against the defendant in the attachment suit, he can plead it. The liability created by the garnishment is never barred. Of course, the garnishee can plead any defense he would have against his creditor, and also that the attaching creditor's debt has been satisfied, or that he failed to recover judgment, or that it had been reversed or has been barred. These last defenses might also have been made by the intervener. But the liability which arises from the attachment, as something entirely distinct from these, is not barred." This language was used in deciding a case in which the claim of the attachment debtor against the garnishee was not barred at the commencement of the action, and was an answer to the contention of an intervening claimant of the fund in the hands of the garnishee that the liability created by the garnishment was barred. This being the case, it was quite natural for the court to say that the liability created by the garnishment, as something distinct from the original liability of the garnishee, is never barred.

But in making this entirely correct statement, in response to the claim there asserted by the intervener (and not by the garnishee against whom an action by his creditor was not barred), it will be seen that the court took pains to add the qualification that, of course, the garnishee could plead any defense against the garnisher that could be pleaded against his creditor. So far from sustaining the position of plaintiff, this decision is distinctly adverse. The cases cited by plaintiff from other jurisdictions afford us no aid in construing our statute. Generally they sustain the statement in *Drake on Attachment* (section 672) to the effect that in his action against the garnishee the garnisher can claim nothing which the original creditor could not claim if suing in his own behalf; and upon this principle it would seem to follow that the plea of the statute might be interposed against the garnisher whenever it could be interposed against the original creditor. In none of the cases to which we have been cited do we find anything in conflict with this view. Of course, in those jurisdictions where service of trustee or garnishee process has the effect of making the trustee or garnishee a party to the action the statute ceases to run in his favor after service, because the claim against him is then in suit. In this dearth

of authority upon the particular point in controversy we have left for consideration only the language of the statute (section 544, Code Civ. Proc.) as affected by cognate provisions of the Codes. We think, in view of the general provisions of the statute of limitations (Code Civ. Proc. § 312 et seq.), and of its conceded policy, the Legislature could not have intended to exclude from its equal benefit every person who happens to be made a garnishee in an action between other parties, and that the section in question was intended to apply to those cases only in which the garnishee admits his indebtedness to the defendant in the attachment or admits his possession or control of specific property of the defendant. In such case he can discharge his admitted obligation by paying the debt to the sheriff or delivering possession of the defendant's property. This it is not only his privilege but his duty to do, but if he chooses to retain possession of the defendant's property, or to withhold payment of a sum admitted to be due, he thereby makes himself by his own act the trustee of a fund or of specific property in custodia legis, and in that character liable to account to the party entitled whenever called upon. The language of the section, no less than the reason for making the distinction, lends support to this view; for, according to its terms, the continued liability of the garnishee is made a consequence of his failure to pay his debt or deliver the defendant's property. But the alternative of accepting such liability or delivering property or making payment is not open to a garnishee who denies any indebtedness or disputes the defendant's title to any property in his possession or control, and when he takes that position in response to the writ and notice—as the defendant in this action did—his right to invoke the protection of the limitations act would seem to stand on the same plane with that of any other alleged debtor, and such is our opinion. As an alternative position to the claim that the liability of the garnishee is never barred, the plaintiff argues that by the garnishment a new statutory liability is created, upon which an action may be commenced at any time within three years after it accrues. Code Civ. Proc. § 338. But this position cannot be sustained. A contract liability is not changed or converted by garnishment into another sort of liability. Its sole effect is to work a contingent transfer of the alleged indebtedness from the creditor to the garnisher without any change in the nature of the liability.

Our conclusion upon the whole matter is that whether or not the writ and notice served on defendant in the suit of *Clune v. Goodyear* effected a garnishment of its indebtedness to them, or either of them, the statute which had begun to run in their favor continued to run, and that the right to maintain this action was barred before the original

complaint was filed. The only inconvenience that could result from this construction of the statute is this: It might happen, and in many cases no doubt would happen, that a judgment in favor of an attaching creditor could not be obtained until after the statute had barred an action against the garnishee; and if the right of the attaching creditor to sue the garnishee does not accrue until he gets a judgment against the defendant in the attachment suit he would be deprived of all benefit of the statutory remedy unless the latter chose to commence an action for his benefit. The point does not call for decision in this case, but in answer to this argument against our construction of section 544, it may be said that there appears to be no very weighty reason for holding that the garnisher might not commence an action against the garnishee for the protection of his contingent interest in the debt or property attached, before he obtains a judgment. It is certain that after garnishment the claim of the original creditor against the garnishee itself becomes contingent, and yet we have held that his right of action is not suspended. *Glugermovich v. Zicovich*, 113 Cal. 64, 45 Pac. 174. If his creditor may sue upon a contingent liability we see no reason for holding that the garnishee could object to a suit by the garnisher upon the same sort of liability upon the same obligation. The right being the same the remedy should be the same; and the right being admitted, the general provisions of the Code should be sufficient to provide a remedy. In any action by the garnisher against the garnishee before judgment in the attachment suit the creditor would, of course, be a necessary party, and the judgment would afford the garnishee complete protection. *Glugermovich v. Zicovich*, *supra*. Upon this view of the law the statutory remedy is fully preserved without any impairment of the right of garnishees, and a view which gives full effect to the remedy at the same time that it preserves the rights of all parties should commend itself to the favorable consideration of the courts. But, notwithstanding our conclusion, that upon any view of the facts as disclosed by the record before us the action was barred, we cannot on this appeal, or on the defendant's appeal, remand the cause with directions to the superior court to enter a judgment for the defendant. All we can deal with is the order granting in part and denying in part, the motion for a new trial.

It seems unnecessary, however, in view of the points decided, to enter upon any detailed discussion of the questions presented by the defendant's appeal. This involves a construction of the original and substituted authorizations to defendant to sell the land, and the amount and character of its indebtedness or liability to the Goodyears upon the completion of the sale, and the credits to which it was entitled for payments to

and on account of Mrs. Goodyear. The second agreement, dated June 7, 1893, by its express terms, supersedes the former agreement under which the defendant had incurred all the items of expense charged in its accounts up to that date, and we construe the words "all crop returns now in hand" to mean the balance of rents theretofore collected by defendant over and above its expenditures to that date. This balance and any further collections, for the year 1893, were to belong to defendant as part of any surplus of proceeds of sale of the land over and above the sum necessary to pay off the existing incumbrances on the land (including the interest necessarily accruing during the reasonable time required for effecting the sale, which the parties must have taken into consideration in making their agreement), and the \$12,000 to be paid to Mrs. Goodyear. Upon this construction no expense incurred by defendant, nor any payment to or on account of Mrs. Goodyear prior to the second agreement, can be charged as a credit against its indebtedness arising upon the subsequent sale of the land. We hold, further, that when, in pursuance of the authorization of June 7th, defendant procured a conveyance of the land from Mrs. Goodyear to its own clerk it became bound by an implied agreement to pay off the incumbrances with accrued interest, and to pay Mrs. Goodyear \$12,000, unless by valid subsequent agreement she had consented to make her claim for that sum dependent upon the amount actually collected by defendant upon the securities accepted by it in part payment of the purchase price. There is no finding, and we think no sufficient allegation in the answer, that she consented to any such modification of the written authorization. What has been said covers every substantial point made by defendant in support of its appeal, except the claim that, according to the evidence, it should have received credit for one or two payments on account of Mrs. Goodyear which the court disallowed. We think that on the uncontradicted evidence the court should have allowed an item of \$220 paid Montgomery and \$171.14 taxes. There are, perhaps, some other small items which should have been allowed, and for this error, affecting as it does the amount of the judgment, we think that part of the order denying a new trial should be reversed.

It is ordered that so much of the order appealed from as grants a new trial be affirmed, and so much thereof as denies a new trial of other issues be reversed.

We concur: McFARLAND, J; HENSHAW, J.; LORGAN, J.

SHAW, J. I concur in the judgment, and in all of the opinion of the Chief Justice, except the part thereof to the effect that where a garnishee, in his answer to the sheriff, admits that he is indebted to the

defendant, the service of the garnishee process in such cases interrupts the running of the statute of limitations on the debt, and, in fact, prevents its again running until the attachment is discharged or the plaintiffs' debt paid. The provision of section 544, Code Civ. Proc., which is said to have this effect, applies alike to cases where the garnishee owes a debt to the defendant and to those where he has in his possession personal property belonging to the defendant. Where the garnishee has property which he admits he holds as custodian of the defendant, the statute of limitations does not run, and cannot begin to run, so long as he admits that he holds as such custodian, nor until, in some manner, he asserts a claim thereto adverse to the defendant. The admission in the answer to the sheriff in such cases, therefore, would of itself be evidence that the statute had not begun to run. But where a matured debt exists at the time of the service of the garnishee process, the statute of limitations has already begun to run against it, and an admission that the debt still exists does not, ordinarily, stop, or interrupt, the running of the statute. There are strong grounds for holding that section 544 was not intended to give any greater effect in this respect to an admission contained in an answer to the sheriff on garnishee process, than in ordinary cases, and that the full meaning of that section, so far as this point is concerned, is that, after the service of garnishee process upon a third person, the garnishee, if he keeps the property, or does not pay the debt to the sheriff, shall thereafter be liable to the attachment plaintiff, in the same manner, and to the same extent that he was theretofore liable to the defendant, but no farther, and that this transfer of liability continues, subject to its original limitations and qualifications, until the attachment is discharged or any judgment in the main action in favor of the plaintiff satisfied, in which case the liability to the attachment plaintiff ceases, and the liability to the defendant continues, if not then barred.

As this question is not involved in the case, I do not think any opinion should be expressed concerning it.

We concur in the foregoing: VAN DYKE, J.; ANGELLOTTI, J.

148 Cal. 303

PEOPLE v. SALMON. (Cr. No. 1,220.)

(Supreme Court of California. Dec. 6, 1905.)

LEWDNESS—ADULTERY—NOTORIOUS COHABITATION.

Where defendant, a married man, lived in adultery with his brother's wife, but under such circumstances that the community in which he lived believed that they were married and their adulterous relation was kept secret, he was not guilty of living in open and notorious adultery, in violation of St. 1871-72, p. 381, c. 276, § 2,

providing that, if two persons, each being married to another, live together in a state of open and notorious cohabitation and adultery, each is guilty of a felony.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Lewdness, § 3.]

In Bank. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

A. B. C. Salmon was convicted of living in a state of notorious cohabitation and adultery with one Daisy I. Salmon, and he appeals. Reversed.

W. R. Leeds and Davis, Rush & Willis, for appellant. U. S. Webb, Atty. Gen., and L. B. Wilson, for the People.

HENSHAW, J. The information jointly charged A. B. C. Salmon and Daisy I. Salmon with the crime of living together "in a state of open and notorious cohabitation and adultery," each at the time being married to a designated person other than the codefendant. The defendant was convicted, and appeals from the judgment and from the order denying his motion for a new trial. The evidence may be taken as establishing that the defendant Salmon was, as charged, a married man, and that Daisy I. Salmon was not his wife, but was the wife of another man; that the defendants came from New Jersey to the city of Los Angeles, where they were not known, and rented a room in a lodging house on South Olive street in that city, where they lived together as husband and wife under the name of Salmon. The conduct of the Salmons while there is told in the evidence of Mrs. Hall, who conducted the lodging house. She says: "I never knew that there was anything wrong between the defendant, A. B. C. Salmon, and Mrs. Daisy I. Salmon while they were at my place. They never lived at my place in open and notorious adultery, not that I knew anything about. They never lived in my place in a notorious state of any kind. They were very quiet. They were quiet, peaceable, gentlemanly and ladylike. Nobody was shocked by their being at my place that I know of. Nobody took any exception to their being there. If I or my sister had known there was any such thing as an adultery charge against them, or that they were guilty of living in an adulterous relation, we would not have permitted them to have stayed there."

The question thus presented is whether the charge in the information, which embodied the offense of the law, is established by this testimony. The statute upon the subject is entitled "An act to punish adultery," and provides, in section 2, that: "If two persons, each being married to another, live together in a state of open and notorious cohabitation and adultery, each is guilty of a felony." St. 1871-72, p. 381, c. 276. It will be noted that this statute does not punish secret adultery, which, from the moral aspect alone, is as grave an offense as

known adultery. The object of the law, as pointed out by the decisions of all of the states where like statutes are found, is to prohibit the public scandal and disgrace of the living together of persons of opposite sexes notoriously in illicit intimacy, which outrages public decency, and has a demoralizing and debasing influence upon society. It is designed, as the Supreme Court of Iowa phrases it, "To prevent evil and indecent examples, tending to corrupt the public morals." *State v. Marvin*, 12 Iowa, 499; *Searls v. People*, 13 Ill. 597; *State v. Crouner*, 56 Mo. 147. In this state the distinction is drawn in *People v. Gates*, 48 Cal. 53, where the conviction was for the same offense, and this court reversed the case, saying that, while the evidence tended to show that the defendant committed adultery with the woman named in the indictment, there was not the slightest proof of a living with her in a state of notorious adultery. "The offense consists in living in a state of open and notorious cohabitation and adultery. The notoriety is as material in making out the offense as is the fact of adultery committed." So it is the publicity of the offense, the demoralizing and debasing influence of the example that the law designs to prevent. *State v. Marvin*, 12 Iowa, 506; *State v. Johnson*, 69 Ind. 87. Adultery is, as is well understood, sexual intercourse of one spouse with any one other than the other spouse. In this case the evidence may be taken as establishing that the defendant committed adultery, since it was shown that in all respects he occupied to Daisy Salmon the relationship of husband. But during all the time that they so lived in the house of Mrs. Hall, no one in the community ever even suspected that defendant's intercourse was adulterous. Notoriety is the state or character of being well known, usually (and always when applied to crime) in an unfavorable sense. It is often found with words of similar import, such as "open" and "flagrant." Can it be said that a person, whose adulterous relationship is not only not known, but not even suspected, is guilty of the open and notorious adultery made punishable by our law? It certainly cannot. Having regard to the very design of the law, which is to prevent an affront to society by such notorious practice, having regard to the uniform decisions of the law, that where the adulterous relationship is kept secret, even if it be continuous, the crime is not made out, it must be answered that the evidence fails to establish the essential of notoriety, without which this particular offense is not proved. The two kinds of cases most commonly found in charges of this kind are when John Doe and Jane Roe, known in the community not to be husband and wife, maintain an open, flagrant, and notorious sexual relationship without pretense of marriage or do the same thing under pretense of marriage, where the community knows the facts, and knows therefore that the pretense is

false. In both of these cases there is the same affront to social decency and to the marital relation which is the basis of it. In this case, however, no such affront was put upon society. The couple were by all supposed to be married, and comported themselves with all the respect due to the marriage relation and to society. The moral delinquency may have been the same, but their conduct did not constitute a violation of the penal laws of the state.

The judgment and order appealed from are reversed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.; McFARLAND, J.; LORIGAN, J.

(148 Cal. 334)

PEOPLE v. COOK. (Cr. 1,227.)

(Supreme Court of California, Dec. 14, 1905.
On Rehearing, Jan. 12, 1906.)

1. CRIMINAL LAW—CONDUCT OF TRIAL—EVIDENCE IN CHIEF—PROOF OF MOTIVE.

The fact that the prosecution has established a prima facie case of murder does not preclude it from going on to prove motive in its case in chief.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1609-1614.]

2. SAME—EVIDENCE—DISTINCT CRIMES.

While the prosecution may not introduce evidence of distinct offenses for the purpose of showing defendant's bad character, yet evidence which is relevant to any material fact cannot be excluded because it may prejudice defendant by proving him guilty of distinct crimes; but, in order to render such evidence admissible, it must have a direct tendency to prove the motive or intent or some other material fact.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 830-834; vol. 26, Cent. Dig. Homicide, §§ 372, 373.]

3. SAME—QUESTION FOR COURT.

Whether evidence of a distinct crime is relevant to any issue in a criminal case is a question for the court.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1701.]

4. HOMICIDE—EVIDENCE.

In homicide, evidence of criminal relations between defendant and his daughter was admissible, when connected with proof that defendant was extremely jealous of attentions paid by any one to his daughter, and that deceased had been paying such attentions.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 830-832; vol. 26, Cent. Dig. Homicide, §§ 326-328.]

5. CRIMINAL LAW—RECEPTION OF EVIDENCE—MOTIONS TO STRIKE.

Where an offer of evidence of distinct crimes is connected with an offer of other proof which makes the distinct crimes relevant, the failure to make good the offer of connected proof does not render the ruling admitting the evidence erroneous, in the absence of a motion to strike.

6. WITNESSES—IMPEACHMENT—CONTRADICTORY STATEMENTS.

Under Code Civ. Proc. §§ 2049, 2052, providing that a party producing a witness may contradict him, and may show that he has made inconsistent statements, the prosecution

may question a witness called by it who denies the very fact which he is called to prove as to previous contradictory statements made by the witness.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1267-1273.]

7. HOMICIDE—EVIDENCE—ARMS OF DECEASED.

In homicide, where there is evidence that deceased had threatened to kill defendant, testimony that deceased, on the day of the homicide and only a few hours before the killing, was armed with a large knife, in addition to a rifle, was admissible to support the issue of self-defense.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 416.]

8. SAME—LETTERS OF DEFENDANT.

In homicide, where the existence of illicit relations between defendant and his daughter, to whom deceased was paying attention, was sought to be established as a motive for the crime, letters indicating the existence of such illicit relations, directed to defendant's daughter and delivered by defendant while in jail to messengers and intercepted by the sheriff, were admissible, regardless of the sufficiency of the evidence of handwriting.

9. SAME—INSTRUCTIONS—EXTRINSIC CRIMES.

In homicide, where the prosecution introduced evidence showing the existence of illicit relations between defendant and his daughter, to whom deceased was paying attention, in order to show a motive for the crime, a requested charge that, although such relations existed between defendant and his daughter, defendant would not thereby be deprived of the right of self-defense, nor the right of indulgence the law allows for a killing in sudden quarrel or in the heat of passion, and that whether or not defendant had at some previous time committed another crime different from that for which he was being tried could not be considered as a reason for convicting him of the crime charged, should have been given, notwithstanding the giving of a brief general charge on the same subject.

10. CRIMINAL LAW—TRIAL—REQUESTS FOR INSTRUCTIONS.

A rule of court requiring requested instructions in civil cases to be presented before the conclusion of the argument does not justify a refusal to consider requested instructions presented in a criminal case after argument and after other instructions had been read.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2008.]

11. SAME—ARGUMENTS OF COUNSEL—DEPARTURE FROM FACTS.

In homicide, the theory of the prosecution was that deceased was paying attentions to a daughter of defendant with whom defendant was carrying on incestuous intercourse, and that defendant killed deceased from motives of jealousy. Defendant's counsel stated in support of defendant's character that he had prosecuted a certain man for raping a certain girl, whereas there was no evidence on which to base his argument. The district attorney in reply argued to the jury that the man whom defendant had prosecuted was engaged to be married to defendant's daughter, and that defendant possibly wanted to get him out of the way, and therefore instituted the prosecution. This argument was also not based on any evidence in the case. *Held*, that the argument of the district attorney was improper, and was not excused by the remarks of defendant's counsel which brought it forth.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1681.]

McFarland, J., dissenting in part. Shaw and Ingellotti, JJ., dissenting.

On Rehearing.

12. SAME—INSTRUCTIONS—REFUSAL OF REQUESTS—SUFFICIENCY OF GIVEN INSTRUCTIONS.

It is not error to refuse instructions requested by accused, where the points to which they are directed are fully covered by other instructions given at his request.

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

L. B. Cook was convicted of murder, and appeals. Reversed.

Charles F. Craig and J. W. Preston, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Deputy Atty. Gen., for the People.

BEATTY, C. J. The defendant was convicted of murder of the first degree and sentenced to be hanged. He appeals from the judgment and from an order denying his motion for a new trial. The Attorney General objects to any consideration of the appeal from the order, upon the ground that it does not appear from the bill of exceptions that a motion for a new trial was made, or that it was denied, or that the order, if made, was excepted to. This is all true, but it is also true that the clerk's minutes of the proceedings upon the arraignment of the defendant for judgment show that he then moved for a new trial, that his motion was overruled, and that he reserved an exception to the order. The minutes of the court do not show the particular grounds of the motion, but in other respects the case is the same as in *People v. Ward*, 145 Cal. 736, 79 Pac. 435, where this point was somewhat considered, though not decided. It is unnecessary, however, to dwell upon this feature of the case, for the appeal from the judgment presents every question that could have been raised on an appeal from the order, except that of the sufficiency of the evidence to sustain the verdict; and it would avail the defendant nothing if he could urge that question, because it is clear that the evidence (the whole of which is shown to be included in the bill of exceptions) was sufficient to establish prima facie a case of murder of the first degree.

For the purpose of disposing of the questions presented by the appeal from the judgment, it will be convenient to state some of the leading features of the case as disclosed by the evidence. For some time prior to the 15th of July, 1904, the defendant and a number of other men, including the deceased, had been employed by one Albers in peeling tan bark at a place known as "The Outlet," in Mendocino county. Of the localities mentioned in the evidence, it seems that the camp of Albers, where the work of peeling bark was conducted, was up in the canon. Descending the canon, the trail passed the house of Pomalek—one of the workmen, and a witness for the people—and at a distance of from 150 to 300 yards further down reached the house of one Rafaelo, where the de-

defendant, with his 15 year old daughter, Ida, was temporarily residing. The deceased, Max Krieger, and the defendant, had been working together for a short time, and down to the day of the homicide were, outwardly at least, on not unfriendly terms. On July 15, 1904, defendant and Pomalek were working together at the camp; but Krieger, who had been celebrating his birthday, was drinking and partially intoxicated. During the morning, he, in company with two companions, appeared at the Rafaelo cabin, where Ida Cook was alone and engaged in preparing her father's midday meal. She testifies that Krieger entered the kitchen, took gross liberties with her person, and made most indecent proposals to her. Whatever may be the truth as to the conduct of Krieger at that time, it appears to be unquestioned that it was disagreeable and offensive to the girl. Mrs. Pomalek, who happened to come to the place while he was there, heard from the outside enough of the conversation in the back room to induce her to expostulate with Krieger, whose demeanor and language convinced her that it was not a fit place for the girl, so that finally she persuaded her to go over to her house on pretense of going for eggs. As the girl did not return, Krieger followed after her, but was informed by Mrs. Pomalek that she was up at the camp with her father, whereupon he left. When, shortly after noon, defendant and Pomalek came down for their dinner, the girl met her father at Pomalek's and told him in Pomalek's presence how Krieger had been acting. She testifies that, when Krieger was soliciting her to have sexual intercourse with him and taking indecent liberties with her person, she threatened to inform her father, upon which he said: "I am not afraid of the old son of a bitch. I will kill him." Of course, there is no direct corroboration of her testimony as to the worst of Krieger's alleged misconduct when they were alone; but she is corroborated to a certain extent by Mrs. Pomalek and by circumstances. Mr. Pomalek was called as a witness for the people to prove threats by the defendant. He testified on his direct examination that defendant had no pistol in the morning, but brought one with him in the afternoon, and was so mad he could hardly work; that he said that Krieger had been down to the house bothering his little girl; that he felt like going down to the camp and shooting him down before the men and the children; and that he repeated this two or three times. He further testified that he advised defendant not to shoot anybody, and that he cooled off and towards evening seemed to forget all about it. At the time defendant was saying these things, Pomalek says he stated in that connection that he had been told by his daughter that Krieger was going to fix him, and that was the reason he had got the pistol—that "if the over-

grown brute came around he would give him all he wanted." On his cross-examination Pomalek testified that during the four or five days he had worked with defendant he had manifested no ill feeling towards Krieger until the afternoon of the shooting, and that he had himself heard the girl tell her father about Krieger's misconduct and his threats to fix him (defendant). When they were returning to camp after dinner, defendant had Rafaelo's pistol and said: "He's going to fix me, and I am going to be ready for the overgrown brute."

That same afternoon, shortly before 6 o'clock, Krieger again made his appearance at Rafaelo's house. He had been drinking, but the testimony of two witnesses (Sowers and Whitcomb), who happened to be there when he arrived and went away with him, is conflicting as to the degree of his intoxication. According to the former he was staggering drunk, needing assistance to enable him to go up the trail towards Pomalek's. According to the latter he was quite able to take care of himself, and this is corroborated by Rafaelo. Ida Cook was at the house when Krieger arrived, and Rafaelo and Mrs. Pomalek came a few minutes later. It does not appear that he interfered with her at that time, except to express his displeasure on account of her telling Rafaelo that he had been there drinking his wine. But when Mrs. Pomalek went away—as she did in a few minutes—the girl again went with her to her house, and remained there until her father came down on his way home, when she joined him and they passed down the trail together. They were talking, but no one overheard what was said. She testified that all she told her father at this time was that Krieger had been at the house again. Almost immediately after starting down the trail from Pomalek's, defendant and his daughter met Krieger, Sowers, and Whitcomb coming up the trail from Rafaelo's. The evidence of Sowers, Whitcomb, and Ida Cook is conflicting as to what then happened; but in some important points it agrees. Sowers, Whitcomb, and Krieger each had a rifle. Cook accused Krieger of being down at his house where his girl was, and Krieger denied it. Cook drew his pistol, and Krieger made some motion that induced Sowers to seize his rifle and disarm him. Krieger then advanced upon defendant, and defendant shot him, inflicting a wound which caused his death in a few minutes. Sowers says that, when the parties met, Krieger was drunk and he was assisting him along; that defendant had his hat off and was "white in the face"; that when he took Krieger's rifle from him he made a drunken stagger towards defendant; that he caught him and drew him back, and at the same moment defendant fired. Whitcomb says Krieger was not drunk; that he needed no assistance; that he advanced upon defendant

(who was commanding him to stand back) in a determined manner, with his hands up as if he meant business; that Sowers did not pull him back. On the question of Krieger's intoxication, Whitcomb was corroborated by Rafaelo and Ida Cook, and by the latter as to the defendant's repeated command to Krieger to stand back before he shot. There was, it will thus appear, evidence in the actual circumstances surrounding and immediately preceding the shooting from which the jury would have been warranted in finding either murder in the second degree or manslaughter, if not self-defense, and this state of the evidence has a material bearing upon most of the points to be considered.

There remains to be stated, however, the peculiar and most important feature of the case. The district attorney offered to prove, and was by the court permitted, over the objection of the defendant, to introduce evidence tending to prove, the existence for some months previous to the homicide of an incestuous relation between the defendant and his daughter. The theory upon which this evidence of an independent crime was offered and admitted was that it pointed to a motive on the part of the defendant to murder Krieger. It was suggested that defendant may have feared that Krieger either knew, or, if he should succeed in winning the favor of the girl, would discover, the criminal intercourse of father and daughter, and would expose their guilt. It was more strongly argued that defendant's jealousy of any one who sought to ingratiate himself with the girl, whether by honorable or other advances, would prompt him to seek his rival's life.

The exception to the admission of this evidence gives rise to the first question to be considered. The defendant contends that the evidence was wholly inadmissible, and even if admissible was no part of the people's case in chief. The position he takes is that when, by direct evidence of an unlawful killing, the prosecution has made out a *prima facie* case of murder, the people have no right to add proof of a motive on the part of the defendant to seek his victim's life, unless in rebuttal of some affirmative defense. If this were a sound proposition, it would be difficult to show how this defendant was or could have been injured by admitting at the beginning of the trial evidence which must have come in at the close. But the proposition is clearly untenable. The prosecution in a criminal case is not obliged to rest upon evidence which merely establishes the guilt of the defendant *prima facie*—upon evidence, that is to say, which is merely sufficient in law to sustain a verdict of guilty. The guilt of the defendant must be proved beyond a reasonable doubt in order to secure such a verdict, and the district attorney not only may, but ought to, introduce all proper evidence at his com-

mand tending to establish the guilt of the defendant, in order to overcome any doubts or scruples of the jurors. And this is especially true of a trial for murder, where proof of an unlawful killing, in the absence of evidence indicating express malice (deliberate purpose to kill), would only establish a case of murder in the second degree.

Regarding the other ground of objection, the rule that a defendant in a criminal cause can be tried for no other offense than that charged in the indictment or information is universally recognized, and it is equally well established that in order to convict the defendant of the particular offense charged the prosecution is not allowed to introduce evidence of other offenses for the mere purpose of showing that he is a bad man, and therefore more likely to have committed the offense than if he had borne a good character. The prosecution is not even allowed under our law to attack his character by evidence of general repute, except in rebuttal of evidence on that point first introduced by him. But when some distinct offense is so connected with the crime charged in the indictment that proof of the former, in connection with other evidence, would sustain a probable inference of guilt as to the latter, such distinct offense may be proved, as, for instance, to show a motive on the part of defendant to commit the crime charged, or the intent with which an equivocal act has been done, such as passing a counterfeit bill, or receiving stolen goods. The general rule and its exceptions are very elaborately discussed in the opinion of Justice Werner in the celebrated case of *People v. Molineux*, 168 N. Y. 290, 61 N. E. 286, 62 L. R. A. 193, where many of the principal authorities are cited. The result of the discussion, I think, may be summed up in the proposition that evidence which is relevant to any material fact in issue in a criminal case cannot be excluded because it may prejudice the defendant by proving him guilty of other crimes than that for which he is on trial. *People v. Walters*, 98 Cal. 141, 32 Pac. 864. The rule as thus stated has been applied in a number of cases decided in this court, of which the following are examples: *People v. Lane*, 101 Cal. 513, 36 Pac. 16; *People v. Wilson*, 117 Cal. 688, 49 Pac. 1054; *People v. Valliere*, 123 Cal. 576, 56 Pac. 433; *People v. Brown*, 130 Cal. 594, 62 Pac. 1072. These were all cases in which the prosecution was allowed to prove distinct offenses for the purpose of showing a motive on the part of the defendant to commit the crime charged in the information. But, in order to render evidence of this character admissible, it must have a direct tendency, in view of the surrounding circumstances, to prove the motive or intent or other material fact, and whether it is relevant or not is a question for the court; and in several instances this court

has reversed convictions for the admission of evidence of distinct offenses, upon the ground that such evidence had no tendency to prove the charge laid in the information. *People v. Lane*, 100 Cal. 379, 34 Pac. 856; *People v. Wright*, 144 Cal. 165, 77 Pac. 877. In *People v. Lane* it was held that evidence of a distinct substantive offense cannot be received unless there is some clear connection between the two offenses, by which it may be logically inferred that, if guilty of one, he is also guilty of the other.

These cases, and the decisions everywhere, clearly sustain the position of the Attorney General that if the fact of incestuous relations between the defendant and his daughter, in view of the other facts in evidence, did furnish the ground for a logical inference that he desired to put Krieger out of the way, and was willing to murder him in order to bring about that result, then proof of such relations was admissible. On the other hand, the same authorities show with equal unanimity that, if the alleged relation between defendant and his daughter had no tendency to establish a motive on the part of defendant to put Krieger out of the way, and therefore avail himself of some pretext for provoking an affray in which he might kill him, the evidence in question was irrelevant, as it was necessarily prejudicial in the highest degree. It becomes necessary, therefore, to examine the grounds upon which it is contended that a motive on the part of defendant to murder Krieger may be inferred from the assumed fact of the incestuous relation with his daughter.

The first of the two grounds suggested by the district attorney, upon which he argued the relevancy of the testimony, viz., the possible fear of the defendant that Krieger might know or might find out, and as a rival for the girl's favors, might expose, defendant's criminal intercourse with his daughter, seems to have been abandoned on the appeal. No reference is made to it in the Attorney General's brief, and there is nothing in the evidence to indicate that Krieger had any knowledge of the supposed criminal intercourse, or that he had any opportunity of discovering it. But it is insisted there is evidence that the defendant was jealous of Krieger. All of this evidence is cited in the brief of the Attorney General, and I shall quote it in full. A letter written by the defendant to his daughter from the jail and intercepted by the sheriff was read in evidence. It contains a number of expressions which, in connection with other evidence introduced at the trial, go very far to prove the charge of incest; but there is nothing bearing upon the point of jealousy of Krieger, unless it is found in the closing sentences: "Remember poor papa. Kiss Tom and Jerry. Don't have anything to do with any man. Be true to me. By by." These words follow almost immediately that part of the letter in which he urges his

daughter to marry one "George" immediately in order that she may have a protector, and in order to induce George to stick to him. The only other evidence on the point is that of Pomalek, who testified that, Krieger having mentioned to him his liking for defendant's daughter, he spoke to defendant on the subject four or five days before the killing: "I says to Mr. Cook that Krieger was a pretty good-looking man, and good worker, and it would be pretty good if his daughter married him and they would be for themselves. Mr. Cook says—well, he says: 'She wouldn't go with nobody,' he says. He says: 'My child will stay with me as long as I live.' He says: 'If she marries anybody she's going to let him understand on the start that she never going to leave her papa; that she stay with her papa as long as he lives or as long as she lives.' * * * I says: It would be all right if they marry. Mr. Cook says, if he do marry, he got to live with them." The same witness, Pomalek, testified in another connection that, prior to the afternoon of the day Krieger was killed, defendant and he had appeared to be on good terms; but that evening, after hearing his daughter's report of Krieger's misconduct, defendant was violently angry and made the threats above detailed. In other words, it appears, by the evidence of this main witness for the state, that the defendant for several days before the killing, having reason to believe that Krieger was seeking his daughter in marriage, remained friendly, but became violently enraged when he heard that in his absence Krieger had pursued her with improper solicitations and indecent familiarity. To my mind this evidence, so far from sustaining the inference that the jealousy of the defendant had been aroused by any proper attentions of Krieger to his daughter (thereby causing him to seek an opportunity or pretext for killing him) has an opposite tendency—a tendency to rebut whatever inference it may be claimed is to be drawn from the mere fact of the criminal connection of defendant and his daughter. The question to be decided, therefore, seems to resolve itself into this: Where the immediate circumstances surrounding a homicide leave it doubtful whether the killing was of deliberate malice, may the prosecution always prove that the slayer was on terms of criminal intimacy with a woman to whom the slain was paying his addresses, even though there is no direct evidence of actual jealousy? Upon this precise question we are referred to no authority directly in point.

In *People v. Gress*, 107 Cal. 463, 40 Pac. 752, it was held to be error to admit evidence that the defendant had been trying to induce the wife of the deceased to leave him. But that decision is not in point here, although what was said by the court in regard to one of several alleged errors does sustain appellant's contention upon a point

that we have here overruled. It was conceded in that case that if the defendant's agency in the killing had not been admitted and had depended on circumstantial evidence, his efforts to seduce the wife of deceased would have been relevant to the question of motive, and the error in admitting it was held to consist in its admission where it was not necessary. We think this was said without due consideration of the fact that, in cases of homicide, the presence or absence of motive to kill is always material, whether the killing is admitted or denied, not only in determining the degree of the murder, if murder, but also upon the question of malice where the plea is self-defense, as in this case, or provocation and sudden passion. What was decided on this point in *People v. Gress*, we think, was erroneously decided; but what was conceded seems to sustain the proposition that any existing cause for jealousy on the part of the slayer is relevant in cases of homicide, although it may not appear that jealousy has actually resulted. Aside from this case, there is in the briefs of counsel a dearth of authority on the precise question above stated, and no very convincing argument. We shall therefore go no further than necessary to decide the precise point presented by the record, which is narrower and more technical than the matter we have been discussing. When the district attorney offered the evidence of defendant's criminal relations with his daughter, he offered to connect it with proof that he was extremely jealous of the attentions of any one to her, and that Krieger had been paying her attentions. This offer made the ruling of the court in admitting the evidence correct, and though, in my opinion, the offer was not made good, in the absence of any motion by defendant to strike out the evidence, it cannot be said that there was, as to this matter, any error in the rulings of the court.

Nor can it be said that the court erred in permitting the district attorney to cross-examine Ida Cook as to previous contradictory statements regarding her relations with her father. He had called her as a witness to prove the sexual intercourse, and she, in response to her statement to the district attorney that he had denied that there had ever been any sexual intercourse. He then asked her if she had not made a contrary statement to him within 24 hours, and she answered, without objection, that she had, and had made the same statement to others at different times and places. Cross-examined by defendant's counsel, she gave it as an excuse for her statement to the district attorney that he had threatened, if she did not admit the intercourse, to "send her to some home." She made similar excuses for her statements to others. On direct examination on the following day, the district attorney asked her in regard to other statements as to sexual intercourse with defendant, made at other times and places, and in the presence of other per-

sons. Here, for the first time, defendant's counsel interposed an objection, on the grounds, among others, that the evidence was incompetent, and that the examination had gone far enough, which objections were overruled, and the witness answered that she had made one of the statements, but denied others. This ruling of the court could scarcely be regarded as injurious to the defendant, even if erroneous; for it only added one hearsay statement to a number of others of the same character that had come in without objection, and by which the witness was as completely discredited as she could have been by the addition of one more. But the ruling was not erroneous. The case is not affected by the qualification which this court has from the beginning imposed upon the general language of sections 2049 and 2052 of the Code of Civil Procedure. The witness in this case did not simply fail to give favorable testimony for the state. Upon the point at issue her testimony was positive against the state. This court has in a number of cases held, and I have no doubt correctly held, that the mere failure of a witness to give favorable testimony for the party producing him does not entitle such party to prove that he has made contrary statements elsewhere. *People v. Creeks*, 141 Cal. 532, 75 Pac. 101, and cases cited. But it has gone no further in qualifying the language of the statute. The rule on this subject, its origin, its policy, and its limitations, are very fully discussed in the recent work of Professor Wigmore (*Wigmore on Evidence*, § 902 et seq.), and his conclusion is that under statutes similar to ours the rule is subject to no more stringent qualification than the decisions above referred to have imposed.

Defendant's counsel on cross-examination of Ida Cook asked her this question: "Do you know whether he had, in addition to a rifle, a large knife on his person?" This question referred to Krieger and to the time—about noon of the day of the homicide—when, according to the subsequent testimony of the witness, he had threatened to kill the defendant. The question was objected to on the grounds of incompetency, irrelevancy, and immateriality, and the objection was sustained, notwithstanding the offer of counsel to show that the fact was communicated to defendant. If the objection had been that it was not proper cross-examination, it would have been right to sustain it upon that ground and at that stage of the proceedings; but it was a mistake to hold that if, at the very time he was threatening to kill the defendant, and only a few hours before the fatal encounter, deceased was armed, not only with a rifle, but with a large knife, the fact was irrelevant, or that the testimony of Ida Cook was incompetent evidence of such fact. And it may be that the ruling upon the objection as made prevented the defendant's counsel from offering proof of the same fact as part of his own case, when it would clearly have been admissible as a circumstance to be weighed by

the jury in considering the action of defendant in firing upon Krieger after his rifle had been taken away, but when, according to all the testimony, he was advancing upon defendant at close quarters, and, according to some of the testimony, in a threatening manner and in disregard of repeated commands from defendant, to stand back. If this evidence had been offered at the proper time as part of defendant's case in support of his plea of self-defense, and excluded by the court on the objection as made, it would have been a serious error.

The court did not err in admitting the intercepted letters. That defendant was the author of the letters was proved by direct evidence that he had delivered them to the messengers, who conveyed them out of the jail, and the evidence of the handwriting, if insufficient of itself, was superfluous.

The defendant, at the close of the trial, requested the court to give, among others, the following instruction: "Evidence has been introduced by the prosecution in this case tending to show that defendant, prior to the shooting, had had illicit intercourse with his daughter. I charge you that, although it should appear to you from the evidence that such a state of affairs existed, nevertheless the defendant would not for that reason be deprived of the right of self-defense, either in protection of his life or the prevention of great bodily injury, nor would he be deprived thereby of the right to the indulgence the law allows for a killing upon a sudden quarrel or in the heat of passion. Whether or not the defendant had at some previous time committed another crime different from that for which he is being tried cannot be taken into consideration by you as a reason for convicting him of the crime with which he is charged." This request to instruct seems to us to have been wholly unobjectionable in point of law and strictly pertinent to the facts in evidence. It was of the highest importance to the defendant in this case, as it always is to any defendant in any case in which evidence of a distinct offense has been admitted for the purpose of showing motive to commit the crime charged, that the jury should be cautioned not to consider such evidence for any but the limited purpose for which it has been admitted, and we cannot see that the instruction as presented contained a single word beyond what the defendant had a right to request. The court, however, refused the instruction, and its refusal is justified on the ground that another instruction framed by the judge on the same point was given. It is true that the instruction given stated the law correctly; but it was brief, general, and colorless in comparison with the instruction asked, and had the effect of minimizing the importance of a consideration which could not have been stated with too much emphasis. The instruction as asked should have been given.

The defendant's requests to instruct, num-

bered 7 and 8, related to a part of the law of self-defense strictly pertinent to the evidence of his witnesses. The wording of the seventh request is perhaps faulty, but the eighth stated the proposition of law in an entirely unobjectionable form, and the refusal of the court to give it is not justified by the instructions given of its own motion. Those instructions, while entirely correct and proper, were confined to a statement of what is not self-defense, and contained only an implication of the proposition which the defendant had a right to have stated to the jury in direct terms.

The refusal of the court to allow defendant's requests to charge numbered 17 and 18 was placed partly upon the ground that they were presented too late, in view of a rule of court requiring requested instructions to be presented before the conclusion of the argument. What the terms of the rule are does not appear from the bill of exceptions; but if, as asserted by counsel for appellant, it applies only in civil cases, it did not justify a refusal to consider the requests, though presented after the argument and after the other instructions had been read. Nor was the refusal of the eighteenth request justified by reason of the instructions given. It related to the law of self-defense, and what has been said of the eighth request applies equally to it.

There remains but one other matter to be noticed: During his closing argument to the jury the district attorney allowed his zeal to betray him into the statement of a matter not in evidence, which was necessarily injurious to the defendant; and the court, upon objection to the statement and argument based upon it, justified the course of the district attorney upon the ground that counsel for defendant had referred in his argument to matters not in evidence. The following are the remarks of the district attorney, the objection of defendant, and the ruling of the court: "I say to you, gentlemen of the jury, that there is not in the history of the world, I believe, a case parallel with this case here, if you gentlemen of the jury knew the history of this Cook family in all its ramifications. Mr. Craig went outside of the record here to bolster up the character of this defendant, and told you how energetic he had been in defense of the honor of his daughters. He told you how he had caused a man by the name of Ferguson to be arrested and sent to Folsom because of raping or having sexual intercourse with this little girl Belle, who testified on the stand here. But he neglected to tell you, gentlemen of the jury, that that same man Ferguson was at that time engaged to be married to his daughter Ida when he sent him to Folsom. He did not say anything about that to you as a possible motive why this defendant wanted to get Ferguson out of the way. It was not necessary to mention that. He did not go into all those facts because, gentlemen of the jury, he did not want

to treat you fairly upon that subject. That should never have been mentioned in the case. Mr. Preston (interrupting): We desire to object to the remarks made by the district attorney relative to the question of the engagement to be married and the motive for the prosecution of Ferguson, and move that it be stricken out and the jury instructed to disregard it. The Court: I think Mr. Craig opened the way for those remarks. Mr. Preston: We except to the remarks of the court. The Court: He referred to the action of the defendant with reference to Mr. Ferguson, when there was no evidence of it, and let the door open. Mr. Preston: We object to it, and make an exception to the ruling."

It was misconduct, calling for rebuke from the court, for the district attorney to state a fact not in evidence in order to found upon it an argument that defendant had sent one man to the penitentiary from the motive of jealousy, and therefore was capable of killing another upon the same incitement. And it was no excuse for the misconduct that the counsel for defendant had referred in his argument to the Ferguson trial. In the case of *People v. Kramer*, 117 Cal. 650, 49 Pac. 842, this court said in response to this excuse for similar misconduct: "Assuming that the comments of the district attorney were not warranted by the evidence, his act would not be justified by the fact that defendant's counsel had already committed a like impropriety. The proper way to correct such an abuse of privilege on the part of either counsel is for his adversary to call it to the attention of the court and have it stopped." We cannot too strongly insist upon the observance of this admonition, as the only mode of confining criminal trials within proper limits, or conducting them with proper decorum, or—which is vastly more important—preserving the right of the defendant to be convicted only upon legal evidence addressed to the charge upon which he is being tried. Considering the nature of the collateral offense imputed to the defendant in this case, it is apparent that the evidence concerning it must have had a tendency to bias the jurors against him, and it was incumbent upon court and counsel to confine their attention to the evidence and to the only legitimate purpose of that evidence. That the statement to the jury of an incriminating fact not in evidence as the basis of an argument against the defendant by the district attorney is grave misconduct has been decided by this court in *People v. Valliere*, 127 Cal. 66, 59 Pac. 295, and in *People v. Sing Lee*, 145 Cal. 191, 78 Pac. 636. It is true that in those cases evidence of the facts used in argument by the district attorney had been ruled out by the court, and this certainly made the offense more flagrant; but that circumstance was not the ground of the decision, though it was, perhaps, the occasion for the severe terms of reprobation by which the conduct

of the district attorney was characterized in the opinion of Judge Temple in the Case of Valliere, the closing words of which we quote. "The court promptly rebuked the attorney, but that did not cure the injury. Rebukes do not seem to have any effect upon prosecuting officers, and probably as little upon juries. The only way to secure fair trials is to set verdicts so procured aside."

The judgment and order of the superior court are reversed, and the cause remanded.

I concur: VAN DYKE, J.

HENSHAW, J. I concur in the opinion of the Chief Justice and in the judgment. That opinion, however, treats only of the case as it is presented upon this appeal, while, in contemplation of the new trial which must necessarily result, it seems to me obligatory upon us to direct the trial court upon the new phases of the question which are certain to arise. Of these, the first is as to the admissibility under any circumstances of this highly injurious testimony tending to show motive. It has been said by this court: "In every criminal case proof of the moving cause is permissible, and oftentimes is valuable." *People v. Durrant*, 116 Cal. 179, 48 Pac. 75. As stated in the opinion of the Chief Justice, the admissibility or nonadmissibility of such offered evidence presents a legal question, to be determined in the first instance by the trial court, and evidence, even though injurious, is not, therefore, inadmissible if it pertinently and logically tends to show motive for the crime, and thus to solve any doubt which may exist in the case, either as to the identity of the slayer, the degree of the offense, the insanity of the defendant, or to the justification or excusability of his act. It will not, of course, be said that such evidence is admissible merely as the "foundation of an argument." It will not do even to say that such evidence should be admitted when the jury from it might draw an inference of motive. To be admissible it should be of such character as to show a logical, causal connection with the crime, moving the minds of unprejudiced jurors to the belief that it tends to establish the true motive. That evidence of the incestuous relations between defendant and his daughter was admissible in this case to show motive, as well as to throw light upon any doubtful circumstance attending the actual homicide, I am well convinced. Precisely what may be the mental process of one so degenerate it may not be easy to declare; but it is at least understandable, from the evidence in the case, that while he might not have objected to the marriage of his daughter, since she was to have lived with him, and thus have enabled him to continue the relationship, he might well have become incensed at the dishonorable solicitation of another man who was endeavoring to have sexual intercourse with her. His letters to his daughter show

that he regarded himself more as her lover than as her father, and herself more as his mistress than his daughter. And his objection might have been the same objection that has excited many another man to crime when his love affair has been interfered with; or, again, he may have feared that his daughter would have yielded, and that, in the confidences which might follow, his own bestial conduct would be disclosed. That one, or another, or both, of these considerations, were the moving impulses of his mind, seems to me beyond doubt, since no one can credit that, having debauched the girl himself, he could, in any honorable and paternal sense, be careful of her chastity or resentful of improper advances made to her by another. And if either of these views, or both, were entertained by the defendant, the fact of his relationship became proper for the jury.

Upon the assumption that the district attorney believed the statements which the girl had made to him, and, so believing, expected her to testify to them under oath, her impeachment was, as pointed out by the Chief Justice, legitimate evidence. But the situation presented upon a new trial will, in this regard, be entirely different. The district attorney cannot again be taken by surprise, and it would be highly improper, prejudicial, and erroneous to adopt upon a new trial a method which the peculiar circumstances of the first trial alone justified. It is never permissible for an attorney to offer a witness in the expectation, or with the knowledge, that that witness will testify to a given fact, merely for the purpose of establishing the contrary, by purely hearsay testimony. This would be subversive of the fundamental principles of evidence. Therefore, I think it should be pointed out that, while legitimate evidence of the incestuous relationship is admissible upon a new trial, such evidence cannot be presented to the jury by the method which the circumstances of the first trial alone made permissible.

I concur: LORIGAN, J.

McFARLAND, J. (concurring). I concur in the judgment of reversal. I concur also in the reasons given in the opinion of the Chief Justice for the reversal; but I do not concur in some other parts of that opinion. I do not think that evidence of the unlawful relation between the defendant and his daughter was admissible at all. In the first place, I do not think that it tended to show motive for the killing; and, in the second place, evidence of motive is admissible, in my opinion, only where the fact of the homicide is denied and is in doubt, and not where, as in the case at bar, it is admitted. *People v. Gress*, 107 Cal. 461, 40 Pac. 752. Moreover, in my opinion it was error to allow the district attorney to ask Ida Cook, when on the stand as his own witness, if she had not made dec-

larations contrary to the testimony which she then gave. Her declarations were purely hearsay and inadmissible. A party can show contradictory statements of his own witness only where it reasonably appears that he was taken by surprise by the testimony given by his witness, and then the contradictory statements can be given only for the purpose of setting the surprised party right before the jury, not as general evidence in the case. Suppose at another trial the district attorney, well knowing what Ida would swear to as to the incest, should again put her on the stand and ask her if she had ever had incestuous relations with defendant, and, upon her denying it, should ask her if she had not stated the contrary to other persons; Is it possible that such questions should be allowed, or would it be allowable for him to prove her declarations by others? It would be intolerable to allow the manufacture of evidence in this way. He might just as well prove her declarations in the first instance, without putting her on the stand at all.

SHAW, J. I dissent. I do not think the propriety of the admission of the evidence tending to prove the existence of incestuous relations between the defendant and his daughter should, under the circumstances of this case, have been left in doubt. That such evidence would tend to show motive on the part of the father to kill a man whom he knew to be paying attentions to her of an amatory character, whether honorable or dishonorable, seems to me too clear to admit of doubt, or justify elaborate discussion. The instruction quoted in the main opinion on the subject of the purpose for which the evidence of incest should be considered by the jury, and which was refused by the court, was, in my opinion, clearly objectionable. It purported to give a positive direction to the jury, in effect, that the evidence of incest by the defendant and his daughter could not be considered as a reason for convicting him of murder. The rule is, and it is supported by the main opinion, that if they should believe from the evidence of such incest and the other evidence in the case that the motive for the killing was to prevent exposure of the incest, or was rage or jealousy growing out of the incestuous relations, then the fact of the existence of such incestuous relations must constitute one of the reasons (using the word in a sense very common) which would impel the jury to convict him of murder.

With respect to the instructions asked after the argument, and after the giving of all the other instructions, the rule of the court referred to by defendant's counsel applies to criminal cases as well as civil, but leaves the court at liberty to give the instruction or not in criminal cases. The matter treated of in these instructions—self-de-

fense—was fully treated in other instructions given by the court, and, hence, they do not come within the rule that in criminal cases an instruction which, under the rules of the trial court, is requested too late, should nevertheless be given, if it is upon a point material to the defense and not covered by other instructions.

As to the alleged improper remarks of the district attorney in his argument to the jury, it is clear they were provoked, if not justified, by the misconduct of the defendant's attorney, who, in his argument, stated to the jury facts not in the record, relating to the same subject, and did so manifestly for the purpose of prejudicing the case of the people in the minds of the jury. I am unable to approve the view which seems to have been adopted in the main opinion, with respect to such misconduct. The commonwealth must necessarily, in its efforts to prevent and punish the commission of crime, avail itself of the agency of mere human beings, who are subject to the common weaknesses incident to humanity, and are influenced and controlled by like passions and impulses as the rest of mankind. The trial courts and the prosecuting officers, when engaged in the trial of a criminal case, must proceed with some celerity. In the argument, particularly, the district attorney is liable to be moved by sudden and ill-advised impulses, and to say things on the spur of the moment and under the provocation frequently so freely given by the opposing attorneys, which, if taken seriously and considered by the jury as part of the evidence, would be prejudicial to the rights of the defendant. And the court itself, under the pressure of the occasion, is likely to manifest some human impatience with the untimely interruption of an argument, and to overrule objections which, upon maturer reflection, it would sustain. In view of these difficulties naturally existing in the prosecution of every case, and of the further fact that such improper action is not infrequently deliberately provoked by shrewd attorneys for the defense, for the very purpose of causing a subsequent new trial or reversal, and that such motive cannot usually be exposed, it should not be the policy of this court, sitting in chambers, with ample opportunity for grave deliberation, to be swift to criticize, or declare injurious error, the action of the trial court or of the district attorneys in such matters. Under our system of criminal jurisprudence it is taken as a certainty that a properly impaneled trial jury is a fit tribunal for the determination of the question of the guilt or innocence of the defendant. This necessarily implies that these triors are capable of discerning the radical difference between the evidence and the argument, and to know the different manner in which each is to be considered by them. If not, they would be utterly unfit

for the performance of their office. The rule of practice in regard to such alleged misconduct should require the counsel for the defendant, not only to object at the time to the improper argument complained of, but also to make a formal request to the court to instruct the jury that they must disregard such argument and decide the case solely on the law and the evidence. If the court does so instruct the jury, that should be deemed the end of the matter, unless the trial court, in its discretion, believes the injury from the misconduct to be so serious as to require a new trial.

In the present case the court did not, at the time of the objection and request for an instruction concerning this particular part of the argument, either deny or grant the request. Afterwards, however, during the same argument, objection was made to another portion thereof, and a like request made for an instruction to the jury, and thereupon the court instructed the jury not to consider the remarks as influencing their verdict, and "not to be influenced by any remark of any attorney, but to decide it on the law and the evidence." This instruction was clearly intended to apply to all the previous remarks of the district attorney, and it must be presumed to have been so understood. The other instructions also repeatedly directed the jury that the several facts involved in the guilt of the defendant must be determined from the evidence, and proved beyond reasonable doubt. They were also sworn to "a true verdict render, according to the evidence." If the jury were fit to try the case at all, as they are conclusively presumed to be, they must have obeyed these clear instructions and their own solemn oath.

I desire to say, in addition, that I concur in the remarks of Justice Henshaw in his concurring opinion. I think the judgment should be affirmed.

ANGELLOTTI, J. I dissent from the judgment of reversal, and concur generally in the views expressed by Justice SHAW in his dissenting opinion. In regard to the charge of misconduct on the part of the district attorney in argument, I have no doubt that the remark complained of as to an existing engagement of marriage between Ferguson and the daughter Ida was improper; but I do not think that, under the circumstances of this case, we have the right to assume that the jury may have been at all influenced thereby, in view of the explicit instruction of the court to the jury, given during the argument, that they must not consider or be influenced by any remark of the district attorney, but must decide the case on the law and the evidence.

I concur in the views expressed by Justice HENSHAW upon the question as to the admissibility of the evidence tending to show the relations existing between defendant and

his daughter, Ida, and also in what is said by him as to the questions asked the witness Ida by the district attorney in relation to her previous statements to him and to others, and in what is said by him as to the only basis upon which such questions can properly be allowed.

On Petition for Rehearing.

BEATTY, C. J. A rehearing of this cause is denied, but it is proper to say that the petition of counsel for the people points out a mistake in my opinion which requires correction. The superior court did not err in refusing defendant's requested instruction 18. It was rendered erroneous by the insertion of the word "misdemeanor." This fault in the instruction was not adverted to in the argument upon which the cause was submitted, and escaped the attention of the court, as it seems to have done in *People v. Glover*, 141 Cal. 237, 238, 74 Pac. 745, where a similar instruction was said clearly to express the law. In that case, as in this, however, the attention of the court was directed exclusively to other questions affecting the ruling complained of, and this particular fault in the wording of the instruction overlooked. The law on the point is correctly stated in *People v. Hecker*, 109 Cal. 461, 42 Pac. 307, 30 L. R. A. 403. It is proper, also, to state that for another reason there was no error in refusing to give either the eighth or eighteenth instruction requested by defendant. The points to which they were directed were fully covered by instructions 9, 10, and 11, given at request of the defendant. This fact was pointed out in the brief of the Attorney General, but by some inadvertence in preparing the opinion my attention was confined to the instructions given at the request of the people, which, as stated, merely pointed out the limitations of the right of self-defense.

As to the question of the right of the people to prove the incest without evidence aliunde of actual jealousy, the point, though not decided in my opinion, seems to be clearly decided by a majority of the court in favor of the people.

148 Cal. 311

HAUGHAWOUT v. RAYMOND et al.
(L. A. 1,460.)

(Supreme Court of California. Dec. 11, 1905.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—RESOLUTION OF INTENTION.

A resolution of intention for a public improvement may be aided by reference to the plans and specifications.

2. SAME—ANNEXATION OF SPECIFICATIONS—NECESSITY.

A resolution of intention for a public improvement referring to the specifications and plans is not insufficient because the plans and specifications are not physically annexed to it.

3. SAME—CREATION OF SPECIFICATIONS—ORDINANCE.

It is not necessary that the specifications for a public improvement should be created by ordinance, instead of by resolution.

4. SAME—BOUNDARIES OF ASSESSMENT DISTRICT—OBJECTIONS.

The failure of a property owner to object to the boundaries of an assessment district at the time that he is given a right to object by statute amounts to a waiver, and he is concluded by the decision of the council.

5. SAME—ENGINEER'S ESTIMATE—FAILURE TO FURNISH.

Since the statute merely requires that the city engineer shall furnish an estimate of a public improvement if required by the council, his failure to furnish it does not invalidate an assessment, in the absence of any showing that the estimate was required.

Department 2. Appeal from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by W. J. Haughawout against William Raymond and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

S. O. Houghton, Leslie R. Hewitt, and Lee, Scott, Bailey & Chase, for appellants. Goodrich & McCutchen and H. J. Stevens, for respondent.

HENSHAW, J. This is an action to foreclose an assessment for the construction of a public sewer in the city of Los Angeles. Plaintiff recovered judgments, and defendants appeal upon the usual technical grounds.

Some of the questions have already been disposed of by this court in *Haughawout v. Hubbard*, 131 Cal. 675, 63 Pac. 1078. Upon this appeal the principal attack is made upon the sufficiency of the resolution of intention, which it is declared does not sufficiently describe the work. Our statute prescribes merely that it shall "describe" the work. We need not be at pains to follow the elaborate objections which appellants urge. The resolution of intention by specific reference makes the plans, profiles, and specifications a part of itself, and these, taken with the resolution of intention, are certainly sufficient to carry all knowledge and notice to the property owner which a fair construction of the street law requires. That the resolution of intention may be aided by reference to the plans and specifications is well settled. *Williams v. Bergin*, 116 Cal. 57, 47 Pac. 877; *Cohen v. Alameda*, 124 Cal. 507, 57 Pac. 377; *Grant v. Barber*, 135 Cal. 188, 67 Pac. 127. As a typical illustration of the refinement of the technical objections which are invoked against these proceedings, it may be pointed out that it is contended that the plans, profiles, and specifications cannot be used to aid the resolution of intention, because they were not physically "annexed" to it. Reliance is here placed upon *Grant v. Barber*, supra, where the word "annexed" was employed. A casual inspection of the opinion in *Grant v. Barber* will disclose that the annexation there meant was an annexation by reference, which was the only annexation in that case, as well as in the case at bar. Notwithstanding that the proceedings for street work and sewer work, like proceedings in taxation, are in invitum, and that therefore a fairly strict and

accurate compliance with all the statutory requirements is necessary, this is the limit to which any court should be expected to go in disposing of the questions which are involved. The contractor who has honestly and substantially complied with his contract, of which the property owners have received and will continue to receive the benefit, is quite as much entitled to the protection of the law as are the property owners themselves, and, upon the other hand, an endeavor—even a successful endeavor—upon the part of the property owners to defeat the just claims of such a contractor, by a resort to the extreme technicalities of the law, can, upon the whole, operate only to the disadvantage of the property owners themselves, since it necessarily tends to increase the price at which any and all future contractors will be willing to engage in work, payment for which, after having been duly performed, is met by harassment and vexatious delay, with the prospect at the end of utter failure of recovery.

The objection that the specifications should have been created by ordinance and not by resolution is answered by *Santa Cruz Rock Paving Co. v. Heaton*, 105 Cal. 162, 38 Pac. 693. The contention that benefited property was omitted from the assessment, and the whole assessment is therefore invalidated, is disposed of by the case of *Duncan v. Ramish*, 142 Cal. 686, 78 Pac. 661. So, also, and upon the same authority, is the further objection that the so-called assessment district embraced only lots fronting on the sewers, upon which proposition citation may also be made to *Savings & Loan Society v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067. Nor does the fact that the engineer did not furnish an estimate invalidate the assessment; the statute requiring merely that the engineer shall furnish an estimate to the city council, if required by it, and the record disclosing that the estimate was never required.

No other of the objections presented by appellants seems to merit special notice, and for the foregoing reasons the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

HAUGHAWOUT v. BONYNGE et al.
(L. A. 955.)

(Supreme Court of California. Dec. 11, 1905.)

Department 2. Appeal from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by W. J. Haughawout against W. A. Bonyng and others. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

S. O. Houghton, Leslie R. Hewitt, and Lee, Scott, Bailey & Chase, for appellants. Goodrich & McCutchen and H. J. Stevens, for respondent.

PER CURIAM. The points urged by the appellants in this case are identical with those heretofore considered and disposed of in *Haughawout v. Raymond* (L. A. 1,460, filed this day) 83 Pac. 53; and, for the reasons in that case given, the judgment and order here appealed from are affirmed.

148 Cal. 313

STOCKTON GAS & ELECTRIC CO. v. SAN JOAQUIN COUNTY (two cases).

(Sac. 1,065, 1,070.)

(Supreme Court of California. Dec. 14, 1905.)

TAXATION—PLACE OF TAXATION—FRANCHISE TO USE STREETS.

The franchise extended by Const. art. 11, § 19, to lay pipes and conduits or erect poles, and supply the inhabitants of a city with artificial light, is an incorporeal hereditament, or real estate in the nature of an easement, pertaining to the streets of a city wherein it is exercised, and is therefore assessable for taxation only in the county in which such city is located, under Const. art. 13, § 10, providing that all property (save property of railroads operated in more than one county) "shall be assessed in the county * * * or district in which it is situated."

McFarland, J., dissenting.

In Bank. Appeal from Superior Court, San Joaquin County; Joseph H. Budd, Judge.

Actions by the Stockton Gas & Electric Company, a corporation, against the county of San Joaquin. Judgment for defendant in both cases, and plaintiff appeals. Judgment in both cases affirmed.

Nicol, Orr & Nutter, for appellant. A. H. Ashley, for respondent. Page, McCutchen & Knight and William B. Bosley, amici curiae.

LORIGAN, J. These are appeals in two cases, which, as they involve the same main legal proposition, will be disposed of together. They are actions to recover taxes paid to the tax collector of San Joaquin county by plaintiff under protest; one to recover such taxes paid in the year 1898, the other for taxes, paid in the year 1899, upon the assessment of a franchise hereinafter to be mentioned. Plaintiff is a corporation organized under the laws of this state for many purposes, among others to manufacture, use, transmit, purchase, and sell gas for illuminating, heating, and other purposes; to purchase, generate, transmit, use, purchase, and sell electricity; to produce, conduct, use, purchase, and sell steam and steam power; and, generally, to engage in the business of producing, transmitting, and selling light, heat, and power. The place where the principal business of the corporation is to be transacted is set forth in its articles of incorporation as required by section 290 of the Civil Code, and is declared to be the city and county of San Francisco. At the time when the assessments in question on this appeal were made the plaintiff corporation was actually engaged in the business of supplying the inhabitants of the city of Stockton with gas

and electric light, using the streets of the city for that purpose, its pipes and conduits being laid therein for the distribution of gas, and its poles strung with wires erected thereon for the transmission of electricity. These assessments, made by the assessor of San Joaquin county, were of what was denominated the "franchise" of the appellant exercised in the city of Stockton, and which is described in the findings in each case as "the right and privilege of using the public streets and thoroughfares of said city of Stockton for laying down pipes and conduits therein and connections therewith, and for erecting poles therein and of running electric wires over, across, and about the same, and of making connections therewith so far as was necessary for supplying said city of Stockton and its inhabitants with gaslight and electric light, and in connection therewith to collect rates and charges for said light furnished said city and its inhabitants." In addition to the assessment upon its franchise as so described, the plaintiff was assessed each year in question upon other property in the city of Stockton, including its pipes, poles, and wires in use in, under, and upon the streets thereof. It paid all the other taxes levied without protest, but, as to the taxes levied upon said franchise, paid them each year under protest, and these actions are brought to recover back the amounts so paid. Judgments were entered in favor of defendant, and from them plaintiff appeals.

It is provided, by section 19, art. 11, of the Constitution that, "in any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual or any company duly incorporated for such purposes under and by authority of the laws of this state * * * shall have the privilege of using the public streets and thoroughfares thereof and of laying down pipes and conduits therein and connections therewith so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes * * * upon the condition that the municipal government shall have the right to regulate the charges thereof." Section 3628 of the Political Code provides that "the franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization as hereinafter provided for. Other franchises, granted by the authorities of a county, city, or city and county, must be assessed in the county, city, or city and county within which they were granted. If granted by any other authority, they must be assessed in the county in which the corporations, firms or persons owning or holding them have their principal place of business." No question is raised that a franchise is property under the terms of the Constitu-

tion and revenue laws of the state, and that it is taxable as such. The sole question relative thereto is, was the franchise assessed against the plaintiff properly assessable in the county of San Joaquin?

It is insisted by appellant that, as to a corporation organized under the laws of this state, and authorized to supply gas and electricity to cities for illuminating purposes, its corporate franchise included as a necessary part thereof, and as indispensable to the enjoyment of that franchise, the privileges extended by the constitutional provision of using the public streets and thoroughfares of cities for laying down pipes and conduits, and placing thereon electric poles and stringing wires across and over the same, and, as an incident to such privilege, the right to collect from the cities and the inhabitants thereof for gas and electricity distributed and sold therein; that the right to exercise these privileges, extended by the constitutional provision to all corporations created like the plaintiff for one of the purposes specified therein, constituted part of its formative charter; that its corporate franchise embraced and included these privileges as a grant to it of them by the sovereign authority, and that such franchise, considered as an entirety, was assessable only in the city and county of San Francisco, where its principal place of business, fixed by its articles of incorporation, was; and that the act of the assessor of San Joaquin county in assessing its franchise in that county was unauthorized and void. While we have directed attention to the contention of plaintiff, we have done so simply to state his position, and do not deem it necessary, in the view we take of the case, to particularly discuss it, though some reference may be made to it in a general way as we proceed. Nor do we feel called upon to determine other points, raised on the appeal by respondents, as to the proper construction to be placed on the phrase "principal place of business," as used in section 3628 of the Political Code—whether it means the actual place of the transaction of franchise business or the office of the corporation where business of a strictly corporate nature is transacted—nor to pass, as invited to do, upon the constitutionality of this section of the Political Code itself.

While all these propositions have been learnedly discussed by counsel, a consideration of them is unnecessary, because we are satisfied that the validity of the assessment of this franchise by the assessor of San Joaquin county must be sustained, under section 10 of article 13 of the Constitution. That section provides that "all property * * * shall be assessed in the county, city, city and county, town, township, or district in which it is situated." As this constitutional provision declares that all property (save property of railroads operated in more than one county, which it provides shall be assessed by the state board of equalization) must

be assessed in the locality where it is situated, it follows, as a franchise is property subject to taxation, that if the franchise which was assessed against plaintiff in the county of San Joaquin had a local situation in the city of Stockton, in that county, it was properly assessed there under the constitutional mandate, and could be assessed nowhere else. And if it be determined from a consideration of the authorities that a franchise, or right exercised by the plaintiff in the streets of the city of Stockton, is of a local character, it is an immaterial matter for consideration as the source from which the right or franchise sprung. It can be of no moment that the franchise is granted by the Constitution—by the state in its sovereignty. It is not the source from which it was derived that shall determine the place where it shall be assessed and taxed, but the place where it is situated. For the purpose of taxation under the constitutional provision it is not the locus of the grantor that is to be considered, but the situs of the franchise. This provision of the Constitution is but the recognition of one of the fundamental principles of taxation that property, situated in a city and county, should be taxed there for the purpose of revenue; that the property which has had the protection and benefit of municipal government shall pay its share of the expenses required to insure these advantages, apportioned on the basis of the actual value of that property. *San Francisco, etc., Ry. v. Scott*, 142 Cal. 229, 75 Pac. 575. It applies to all property. And where a franchise, or the right acquired by an exercise of it, is of a local character, it requires that it shall be assessed in the locality which is burdened with its exercise, and upon which is cast the duty of protecting the property embraced in such exercise. While the right is accorded by the Constitution to the plaintiff in common with all kindred corporations and with individuals to use the streets of a city for the purpose of furnishing illuminants to it and its inhabitants, it cannot be said that any one individual or corporation possesses this right merely by virtue of the constitutional provision. The Constitution extends a potential right to those enumerated in its provisions to avail themselves of the benefit of the franchise. But this general extension of the privilege does not invest individuals or corporations with the franchise in the streets of any particular city. It is only acquired when the constitutional grant is actually accepted; when the pipes and conduits for gas or the electric poles are laid in or erected on the streets of the city. It is then owned by any individual or corporation doing so, as an accepted franchise under the general constitutional grant, exercised in the particular city where these appliances are laid or erected. By the provisions of the Constitution all persons and all corporations organized for the purpose

of supplying these necessities are given the capacity to take the franchise extended thereunder, but they do not acquire it until they have accepted it by proceeding to its actual exercise.

While considering this constitutional grant of the right to use the streets of cities throughout the state by individuals or corporations for supplying either water or artificial light (when the city owns no public works for such purpose), it is well to remember the purpose which was sought to be attained under the provision. It was to prevent the abuses which the framers of the Constitution believed were therefore indulged in by municipal officers, who, by imposing onerous burdens and conditions upon persons desiring to compete with existing companies in such municipalities, in supplying such necessities, precluded them from doing so, and hence created a monopoly in favor of existing corporations. By providing for unrestricted competition in the supplying of these necessities, it prevented such abuses. But while this was the purpose in view, and the facility was afforded to use the streets of a city for that purpose, without the necessity of obtaining a franchise therefor from the municipal authorities, it was not intended thereby that in the exercise of such privilege whatever rights of a valuable property nature were acquired should not be subject to taxation in the locality where, through the exercise of the franchise, the corporation became invested with them. Now, is the franchise exercised by the plaintiff in the city of Stockton, or, more accurately speaking, the right or interest which plaintiff acquired in the streets of that city by virtue of its exercise, property of a local character, property—to use the term in the constitutional provision—"situated" in the city of Stockton? We think the authorities support the contention of respondent that it is; that the franchise extended by the constitutional provision to lay pipes and conduits, or erect poles and supply the inhabitants of a city with artificial light, is an incorporeal hereditament—is real estate in the nature of an easement pertaining to the streets of the city in which it is exercisable; that it is inseparably annexed to the soil out of which the profit arises, and has a local situation in the place, and that place only, where the right is actually exercised.

The principle that franchises of the character here involved are treated as incorporeal hereditaments finds ready support in the authorities. In *Bowman et al. v. Watham et al.*, Fed. Cas. No. 1,740, p. 1082, it is said: "And the only inquiry now is whether the ferry right reserved is of the same nature, in this respect, as a part of the land. In what does it differ? It is appurtenant to the soil, and constitutes no inconsiderable part of its value. As has been shown, it is

susceptible of a different ownership from the soil. It is still a right growing out of the soil, and subjects it to the servitude in whosoever's hands it may come. Although an incorporeal hereditament, in contemplation of law, it is property, real property. It passes by deed—is assets in the hands of heirs, and in all respects is subject to the laws which regulate real estate. * * *

There would seem to be no doubt that the ferry franchise, with all that belongs to it, may be taken by descent or by conveyance the same as other interests which pertain to realty." In *Dundy v. Chambers et al.*, 23 Ill. 312, it is also said: "Chancellor Kent, in his *Commentaries* (volume 3, p. 458), in treating of franchises in roads and ferries, says: 'An estate in such a franchise, and an estate in land, rest upon the same principle, being equally grants of a right or privilege for an adequate consideration.' And he calls such franchises incorporeal hereditaments. *Hilliard*, in his treatise on Real Property (volume 1, p. 1), classes a ferry franchise amongst hereditaments." And in *Gue v. Tidewater Canal Company*, 24 How. (U. S.) 263, 16 L. Ed. 635, it is said: "The property seized by the marshal is of itself of scarcely any value, apart from the franchise of taking toll, with which it is connected in the hands of the company, and, if sold under this *fiel facias* without the franchise, would bring scarcely anything; but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly worthless. Now it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under this execution. The franchise being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a *fiel facias*." In *People v. O'Brien*, 111 N. Y. 46, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684, the court said: "In speaking of the franchises of a corporation we shall assume that none are assignable, except by the special authority of the Legislature. We must also be understood as referring only to such franchises as are usually authorized to be transferred by statute, viz., those requiring for their enjoyment the use of corporeal property, such as railroad, canal, telegraph, gas, water, bridge, and similar companies, and not to those which are in their nature purely incorporeal and inalienable, such as the right of corporate life, the exercise of banking, trading, and insurance powers, and similar privileges. The franchises last referred to, being personal in character and dependent upon the continued existence of the donor for their lawful exercise, necessarily expire with the extinction of corporate life, unless special provision is otherwise made. * * *

In the former class it has been held that at common law real estate acquired

for the use of a canal company could not be sold on execution against the corporation separate from its franchise, so as to destroy or impair the value of such franchise. * * *

And by parity of reasoning it must follow that the tracks of a railroad company, and the franchise of maintaining and operating its road in a public street, are equally inseparable, in the absence of express legislative authority providing for their severance." In *City of Chicago v. Baer*, 41 Ill. 306, the court says: "Certain it is that this railway company has a franchise appurtenant to this street; that, through this franchise, it has a right of occupancy in a portion of the street, peculiar to itself, and, so far as may be necessary to run its cars, exclusive; that this right of occupancy is secured for a long term of years; that this franchise and this right of occupancy together constitute a property fixed and immovable in its character like realty, and recognized and protected by the law as fully as a fee simple in land."

From these authorities it would appear then that the franchise extended by the Constitution is of such a character that it is indissolubly annexed to the street of a city in and upon which it is exercised, and that, while an incorporeal hereditament, it is, in contemplation of law, real property, an easement appurtenant to such streets. This being so, it necessarily, as real property, has a situs in the city where it is exercised, and, under the constitutional provision with reference to the assessment of property, must be assessed there. It will be observed from these authorities which we have cited that the right to use the streets, and the right to take tolls by reason of their use, are inseparable parts of the franchise. The latter is a right arising out of the soil, a right to take a profit out of the easement acquired in the streets of the city, and the easement and the right to take a profit therefrom can be valuable only when exercised together. That these rights conjointly constitute the franchise is also the view taken by this court in *Spring Valley Water Company v. Barber*, 99 Cal. 38, 33 Pac. 735, 21 L. R. A. 416.

But, independent of the general principle announced in these authorities with reference to the nature of the right plaintiff acquired by exercise of the franchise in the streets of the municipality, it is clear from the decision in the appeal of *N. B. & N. R. R. Co.*, 32 Cal. 512, where the matter is fully considered and discussed, that the franchise exercised by plaintiff invested it with an easement therein, real property, the situs of which was necessarily local. And this is equally apparent when we examine the Civil Code. Section 801 thereof declares the servitudes which may attach to other lands, and which, when so attached, shall constitute easements, and, among others, are included, by subdivisions 4 and 6, respectively, "the right of way" and "the right of transacting

business upon land." Under section 802 of the same Code, "the right of way" is designated as among the land burdens which may be granted or held, although not attached to land. This right of way, an easement, is real property, and is distinctly and necessarily local in character, and situated in and upon land. It is clear, too, that the right to use the pipes, conduits, and poles for the transmission of illuminants to the city and its inhabitants is a right which is exercised and can be exercised only in connection with and at the situs of the right of way and location of the appliances. It is a right exercised by means of these appliances in connection with a right of way, so that a profit, which the company is authorized to take, may be made upon the sale of the illuminants which they serve to transmit. This right to so use them for this purpose is as local to the city of Stockton as are the gas pipes and the electric poles under or upon its streets, and, within the meaning of subdivision 6, above referred to, is a "right to transact business upon land," acquired in addition to the easement by virtue of the exercise of the constitutional franchise.

From all these considerations we are of the opinion that the plaintiff, in the exercise of its franchise, acquired rights of property in and over the streets of the city of Stockton of a character distinctively local to that city, and that, under section 10, art. 13 of the Constitution, above quoted, they were properly assessed by the assessor of San Joaquin county in that county.

The appeal from the judgment in each of these cases is accompanied by a bill of exceptions. It is urged therein that the trial court erred in its rulings relative to the admission of evidence. Under the pleadings and the issues raised, we think the rulings were correct.

The judgments appealed from in both cases are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; COOPER, J.

BEATTY, C. J. I concur in the judgments of affirmance, and upon all essential points in the views of Justice LORIGAN, with the sole exception that, in my opinion, his conclusion requires that the following clause of section 3628 of the Political Code must be held unconstitutional, so far as it applies in terms to franchises which have a local situs: "If granted by any other authority they must be assessed in the county in which the corporations, firms, or persons, owning or holding them have their principal place of business." The framers of our Constitution did not leave it to the Legislature to determine where property having a local situs should be assessed. That was a matter which they settled themselves by the provision of section 10 of article 13: "All prop-

erty, except as hereinafter in this section provided [i. e., railroad property] shall be assessed in the county, city, city and county, town, township or district in which it is situated, in the manner prescribed by law." If, then, the privilege of using the streets of a city for the purpose of laying and maintaining pipes for the distribution of gas is a franchise having a situs in that city, the fact that it has been granted by "another authority" (the people of the state) gives no warrant to the Legislature to say that it shall be assessed and taxed in the city or county where the holder of the franchise happens to have his principal place of business, or where he resides. The whole question to be decided, therefore, is the question whether this particular franchise has a local situs, for, if it has, it is idle to refer to the above-quoted clause of section 3628 of the Political Code as determinative of the controversy.

Upon this question of situs or no situs of the franchise in question it can scarcely be necessary to add anything to what has been said by Justice LORIGAN, but I am tempted to put the same view in a form which to me has always seemed unanswerable. Land always has a situs. The ownership of land consists in the right to use it for all lawful purposes, and that right of use constitutes its whole value. If the owner of land grants to another the right of way over it, or the right to lay and maintain pipes through it, the totality of ownership is divided into two separate interests: The original owner retains the right to use the land for every lawful purpose not inconsistent with the exercise of the privilege granted, and his grantee acquires the right to use it for the special purpose named in the grant. It is easy to suppose a case in which the value of the granted privilege or easement exceeds the value of the interest remaining in the grantor—indeed, such instances are of frequent occurrence; but, whether of greater or less value, it is still an interest in that particular piece of land, and no more of an ideal abstraction than the remaining right of the owner to cultivate the soil. The aggregate value of the two rights constitutes the aggregate value of the land, and each is assessable where the land is situated. If this is true of an easement granted in land held in private ownership, it must be equally true of a franchise to use public lands for similar purposes. The privilege is essentially the same, and the only reason for calling one a franchise while the other is denominated an easement is that the former is held by direct grant from the sovereign, while the other is the grant of a private person. The conclusion is that the right to use land within the municipal boundaries of the city of Stockton is assessable only in Stockton for city purposes, and in the county of San Joaquin for state and county purposes. The difficulty and confu-

sion which it is apprehended (according to the dissenting opinion of Justice McFARLAND) may be caused by our decision in these cases is, I think, purely imaginary, and the apprehension groundless.

There is, of course, a franchise—the franchise to have perpetual succession, etc., common to all corporations for whatever purpose organized—which is always assessable where the corporation has its principal place of business. This franchise is a pure abstraction, and, like the right to collect a promissory note or other chose in action, it has no fixed situs, but follows the person of its owner, and is assessable where the owner lives, and that, in the case of a California corporation, is the place designated in its articles of incorporation as its principal place of business. The only difficulty to be apprehended is in placing a valuation upon this, the strictly corporate franchise. But that difficulty is not new, and will neither be enhanced nor diminished by the present decision. The method of ascertaining the value of the corporate franchise, sanctioned by this court in some of its decisions, and nowhere disapproved as far as I am aware, is to take the difference between the market value of its shares and the value of its tangible property as the basis of assessment. Whatever difficulty this method involves remains, but remains without addition by reason of anything here decided. For, take the supposed case of a corporation having its principal place of business in San Francisco, and operating gasworks in several other cities. We will suppose that the market value of its shares is \$1,000,000; that its plant, consisting of furnaces, retorts, tanks, pipes, etc., is now assessed in Sacramento at \$100,000, in Stockton at \$120,000, and in San Jose at \$150,000. (For the purposes of illustration three places are as good as a dozen.) The assessor of San Francisco, even on the doctrine of the dissenting opinion, must deduct the aggregate of these sums, \$370,000, from the value of the shares, to arrive at a basis for assessing the corporate franchise. If, hereafter, in consequence of the decision of these cases the assessor of Sacramento values the local franchise at, say \$10,000, of Stockton at \$12,000, and at San Jose at \$15,000, all the additional labor imposed on the assessor of San Francisco will be to add \$37,000 to \$370,000, in order to determine the aggregate amount to be deducted from the market value of the shares. The labor will be inappreciable, and the difficulty nil.

If it be said that confusion will arise out of differences of opinion between the assessor of San Francisco and the assessors of Sacramento, San Joaquin, and Santa Clara as to the true value of the local franchises, I freely admit that such differences of opinion are quite likely to arise, but this is a difficulty which inheres in the matter under any

view of the question to be decided. If the different assessors are liable to differ as to the value of a particular interest in land, so are they liable to differ as to the value of the plant of a gas company. The difference between the two cases, if any, is a difference of degree, and not of kind, and furnishes no reason for holding that property is assessable in San Francisco when the Constitution requires it to be assessed in San Joaquin.

McFARLAND, J. (dissenting). I dissent, and think that the judgments should be reversed. Assuming, as held in *Bank of California v. San Francisco*, 142 Cal. 276, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 185—against my views—that a franchise is assessable property, that the franchises of a corporation may be legally assessed under the general word “franchise” or “franchises” without any other description, and that their value may be ascertained as declared in that case, still a franchise exists only in legal and mental contemplation, has no local situs, is indivisible, and, as said in *Spring Valley W. W. v. Schottler*, 62 Cal. 111, is “quite distinct and separate from the property which, by the use of such franchise, the respondent may acquire.” The whole of the franchises involved in this case were granted by the state. The right of the municipality to regulate the laying of the pipes, etc., is a mere power of the municipality, not a franchise of the corporation appellant. Those franchises granted by the state being mere intangible ideal things, the state has a perfect right to determine where and how they should be assessed. The state has determined that, when they belong to a corporation, they shall be assessed at its principal place of business, and, in my opinion, that clearly means the place designated as its principal place of business in the charter of the corporation. Any other rule leads to an interminable division of the franchises, which would not only cause confusion and manifest injustice, but is not warranted by any provision in the law. And if the franchise, for purposes of assessment, is to be distributed through numerous municipalities, I cannot see how the method of ascertaining its value declared in the *Bank of California Case* can possibly be applied. Of course, all tangible property which the corporation may have in any county or city is assessable there. It makes no material difference whether a franchise be considered as real or personal property. I think that for purposes of taxation it is clearly personal property, under section 3617 of the Political Code. But, whether real or personal, the franchise or “privilege to use the streets” of the city is admittedly granted by the state, and not by the city or county. Now, the provision of section 3628 is that franchises “granted by the authorities of a county,” etc., must be

assessed in the county or city in which they were granted, but "if granted by any other authority they must be assessed in the county in which the corporations * * * holding them have their principal place of business." And, as the franchises here involved were granted by "other authority" than that of the city and county, they must be assessed in the county where the principal place of business of the corporation is; so that the question, from whatever direction we approach it, always is, where is the principal place of business? And this question is in no way affected by a consideration of the different places where the franchise is being exercised, or the fact that it is not being exercised at all.

The following opinion was prepared some time ago, though not by myself, and I adopt it as clearly and forcibly expressing my views on the questions here involved:

"These are actions to recover for taxes paid to the tax collector of San Joaquin county by plaintiff under protest. The taxes were levied and assessed against plaintiff upon its 'franchise.' No question is raised that a franchise is property, within the meaning of the Constitution and revenue laws of the state, and that, as property, it is taxable. The sole question is, where shall the franchise of a domestic corporation be assessed under the laws of this state? Section 19, art. 11, of the Constitution, prescribes as follows: 'In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual or any company, duly incorporated for such purpose under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages, and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants, either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof.' The purpose of this constitutional provision, which was not found in our earlier Constitution, is well known and appears plainly from the constitutional debates. Formerly, when the granting of such franchises was left to the municipalities, it was thought that the municipalities themselves abused their powers, and by imposing most onerous conditions and restrictions upon applicants for new franchises effectively created monopolies in favor of existing companies. To remedy this the Constitution deliberately took away from

these municipalities the power to bestow these franchises, and by direct grant conferred upon corporations organized for the indicated purposes not only the franchise to be, but the franchise to do, within the corporate limits of cities which did not own their own works. That this was a direct constitutional grant does not admit of doubt, and in fact has been expressly declared by this court in *People v. Stevens*, 62 Cal. 209, and in *Re Johnston*, 137 Cal. 115, 69 Pac. 973, in which last case it is said that the sole power which a municipality now has in this regard is the power of general regulation which is expressly conferred by terms in the Constitution, and that the municipality cannot impose any additional burdens or terms as a condition to the exercise of the franchise so granted.

"Appellant in this case is a corporation organized under the laws of the state of California for many purposes specifically set forth in its articles of incorporation. To manufacture, use, transmit, purchase, and sell gas for illuminating, heating, and other purposes; to manufacture or otherwise dispose of the residual products therefrom; to sink and construct natural gas wells, and to deal in the products thereof; to produce, generate, transmit, use, purchase, and sell electricity; to purchase, use, and sell water and water rights, and wells, flumes, ditches, pipes, and conduits in connection therewith; to produce, conduct, use, purchase, and sell steam and steam power, and generally to engage in the business of producing, transmitting, and selling light, heat, and power; to purchase and sell patents and patent rights relating to the purposes above mentioned. The place where the principal business of the corporation is to be transacted is set forth, as required by section 290 of the Civil Code, as the city and county of San Francisco, state of California. We have thus a corporation organized for sundry legitimate purposes, which has declared—as the law compels it to do—the place where the principal business of the corporation is to be transacted. This place of business is declared to be the city and county of San Francisco, and this corporation derives its franchise for the supplying of artificial light to the city of Stockton, and to any or all other cities of the state, by direct grant from the Constitution. Where is this franchise to be assessed? This question would seem to find a ready answer in the language of section 3628 of the Political Code, which provides as follows: 'The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization as hereinafter provided for. Other franchises, if granted by the authorities of a county, city, or city and county, must be assessed in the county, city, or city and county within which they were granted; if granted by any other authority they must

be assessed in the county in which the corporations, firms, or persons owning or holding them have their principal place of business.' When the Civil Code prescribes that the articles of incorporation must set forth the place where the principal business of the corporation is to be transacted, and when the Political Code declares that the franchise, if granted by any other authority than that of a county, city, or city and county, 'must be assessed in the county in which the corporation, firms, or persons owning or holding them have their principal place of business,' there is the foundation of an argument, persuasive, though not, of course, conclusive, that by the uses of this phrase, 'the principal place of business,' the Legislature meant one and the same thing. The principal place of business of a corporation means, of course, the principal place for the transaction of the corporation's business, the place where directors' and stockholders' meetings are held, where the offices of the corporation are situated, for the purpose of the transfer of stock, the levying of assessments, the declaration of dividends, and for the performance of all other business strictly corporate in its character. Such, of course, is the well-settled meaning of the phrase.

But respondent contends that as this corporation is actually engaged in the business of supplying the inhabitants of the city of Stockton with light, and is using the streets of the city for that purpose, and is in Stockton collecting its revenues, for the purposes of taxation of its franchise, this should be considered its principal place of business, within the meaning of section 3628, Pol. Code; and it argues further, in support of this view, the injustice that results to a municipality when a corporation so exercising the privilege of using its streets pays to that municipality nothing for that intangible, but valuable, property called its franchise. But to this it may be answered that the revenue laws of the state, at best, are imperfect, and are frequently unjust, inequitable, and even oppressive. No scheme has yet been devised by man for an absolutely economical, just, and uniform mode of taxation. Primarily, the sovereign power is interested in seeing that all property bears its just proportion of taxation. It is to the state a minor matter whether the tax itself is collected by one or another of its agents and mandatories. We have seen that the power to grant or to refuse such franchises was, for the abuses which had crept in, absolutely taken away from municipal corporations by the Constitution itself; and it may well have been that it was this circumstance which prompted the Legislature to make provision, as it has done, for the assessment of such franchises at the principal place of business of the corporation. If municipalities had the power to grant such franchises, then, of course, the question would be a simple one, and would be solved by the very language

of section 3628; but when the people saw fit to make these franchises a matter of constitutional grant, the Legislature was at once confronted with the problem of fixing a locus for the assessment of these franchises. One corporation might be organized—as was this—for the purpose of supplying any number of cities with artificial light. Its franchise is distinctively one franchise, notwithstanding the fact that its operations might be extended to many municipalities. An obvious and important distinction, and one never to be lost sight of, exists between the franchise itself and the exercise of the franchise. The franchise is the privilege granted by the Constitution to a corporation, or to a private person, to do certain things—not as to one, but as to any number of municipalities. The franchise may be exercised in one or in many municipalities. If a corporation should be exercising its franchise in several municipalities, how, under respondent's contention, and under the present system of fixing a valuation upon such franchise, could it be assessed? Would it be divisible in the different cities? Would it be assessed in the one where the larger business was done, or where the larger profits were received? If the company sustained a loss in one municipality, and made a profit in another, in the assessment of the franchise would it be worth less than nothing in one municipality, or would its loss in that city be set off against the valuation in the city where it made a profit? These, and many more like questions, leading to inextricable entanglement and confusion, are eliminated only by giving the obvious and common-sense meaning to section 3628 of the Political Code. Assessing the franchise, not in the many cities or counties where it may be exercised, but assessing it, as the Code directs, where the corporation has its principal place of business, affords a simple, plain, and understandable solution of the whole matter; and such, we think, was the clear meaning of the Legislature."

HENSHAW, J., being disqualified, Justice COOPER, one of the Justices of the District Court of Appeal for the First Appellate District, participates herein pro tempore, pursuant to section 4, art. 6, of the supplement to the Constitution.

148 Cal. 331

CITY AND COUNTY OF SAN FRANCISCO v. OAKLAND WATER CO.

(S. F. 4,034, 4,044.)

SAME v. CONTRA COSTA WATER CO.

(Supreme Court of California. Dec. 14, 1905.)

1. TAXATION—CORPORATIONS—FRANCHISES—WHERE ASSESSABLE.

Under Pol. Code, § 3628, providing that franchises (other than railroad franchises) granted by the authorities of a county, city, etc., must be assessed in the county, city, etc., within which they were granted, and that, if granted by any other authority, they must be assessed

in the county wherein the corporations, firms, or persons owning or holding them have their principal place of business, the assessor of a city and county wherein the corporation has its principal place of business, as designated in its articles, is authorized to assess its corporate franchise only; their business and waterworks being situated elsewhere.

2. SAME—WATER COMPANIES.

The franchise actually exercised by a corporation, under Const. art. 11, § 19, of using the streets and thoroughfares of a city in laying down pipes and conduits therein, and supplying such city and its inhabitants with water, and charging rates therefor, can be assessed only where it is locally situated.

McFarland, J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Actions by the city and county of San Francisco against the Oakland Water Company and against the Contra Costa Water Company. Judgment in each case for plaintiff, and defendants appeal. Judgment in each case reversed.

Rehearing denied January 12, 1906.

Page, McCutchen & Knight and C. Irving Wright, for appellants. Frank P. Haynes (S. C. Denson and Bert Schlesinger, of counsel), for respondent.

LORIGAN, J. These appeals from judgments in favor of the plaintiff, accompanied by bills of exceptions, as they involve precisely the same question, will be considered and disposed of together. The actions were brought by the city and county of San Francisco to recover taxes upon franchises assessed against the defendants; the Contra Costa Water Company being assessed for "franchises \$750,000," and the Oakland Water Company for "franchises \$500,000." The principal place of business of both corporations, established by their articles of incorporation, is, and at all times has been, the city and county of San Francisco, and they have transacted their corporate business and functions there. The actual business of these corporations, from which their revenues are derived, is carried on in the county of Alameda, where they are engaged in supplying water to the city of Oakland and other places in that county. Their waterworks are located there, and their mains, conduits and other means for distributing water in said city of Oakland are laid in the public streets thereof, and water rates collected from persons therein using the water so distributed. Neither of these corporations has ever owned any reservoirs, mains, conduits, or other means of distributing water within the municipal limits of the city and county of San Francisco, and they have never distributed or sold any water there. These facts appear from the findings.

Various questions are presented for disposal on this appeal, which, in the view we take of the matter, do not need any discussion. While the assessments are generally

described upon the assessment roll as "franchises," the assessor of the city and county of San Francisco was authorized to assess against these defendants, under section 3629 of the Political Code, their corporate franchises only; their franchises to be corporations with all the powers and privileges exercised and to be exercised by the corporate bodies. His right to do this proceeded from the fact that the principal place of business of each of these corporations was designated in its articles of incorporation as the city and county of San Francisco.

When we examine the complaint and findings in each of these cases, it is clearly apparent that this was not the character of franchise that the assessor assessed. The franchise which he did assess was the franchise actually exercised by each of the defendants, under section 19, art. 11, of the Constitution, of using the streets and thoroughfares of the city of Oakland in Alameda county, in laying down pipes and conduits therein, and supplying such city and its inhabitants with water, and charging rates therefor. We have this day decided, in the case of Stockton Gas & Electric Company v. County of San Joaquin, 83 Pac. 54, that such a franchise can be assessed only where it is locally situated. Under the authority of that case the assessor of the city and county of San Francisco had no right or authority to assess these defendants on franchises exercised in the city of Oakland. Such assessments were void.

The judgment of the lower court in each case is reversed.

We concur: BEATTY, C. J.; VAN DYKE, J.; COOPER, J.; ANGELLOTTI, J.; SHAW, J.

McFARLAND, J. (dissenting). I dissent, and think that the judgments should be affirmed. My views on the subject are fully expressed in my dissenting opinion in the Stockton Case, and under those views the franchises involved in these cases were properly assessable at the principal place of business of the corporations, which is the city and county of San Francisco.

HENSHAW, J., being disqualified, Justice COOPER, one of the Justices of the District Court of Appeal for the First Appellate District, participates herein pro tempore, pursuant to section 4 of article 6 of the supplement of the Constitution.

2 Cal. App. 122

TURNER v. FIDELITY LOAN CONCERN (JAMES, Intervener).

(Court of Appeal, Second District, California. Oct. 31, 1905.)

1. CORPORATIONS—STOCK SUBSCRIPTIONS—LIABILITY OF STOCKHOLDERS—SET-OFF.

Where, in a creditors' suit against stockholders of a corporation to recover alleged unpaid subscriptions, facts showing an indebted-

ness by the corporation to one of the defendant stockholders for services were set up by plea containing all the elements of a quantum meruit, the court should have found the value of such services and set off the same against the stockholders' liability.

2. SAME—RESOLUTIONS—ENACTMENT.

Where the record of a directors' meeting of a corporation recited that the directors were notified, and the contrary did not appear, proof of the notice of the meeting was not necessary to sustain the validity of a resolution adopted there.

3. SAME—ISSUANCE OF STOCK—RESOLUTION—INCORPORATORS' AGREEMENT—EVIDENCE.

Where, in a creditors' suit against stockholders of a corporation to recover alleged unpaid subscriptions, it appeared that the incorporators' agreement to subscribe for stock was adopted by the corporation, such agreement was admissible in evidence as bearing on the construction and validity of resolutions of its board of directors under which the stock was directed to be issued to the subscribers.

4. SAME—PAID-UP STOCK.

A resolution adopted by a corporation's board of directors directed that the secretary and president issue to the stockholders the shares of stock subscribed by them respectively, and later another resolution was passed that, in consideration of the assignment to the corporation of certain property, 240 shares of stock should be issued to R., 239 shares to B., and in consideration of \$1 and their good will and services other shares should be issued to certain others. *Held*, that under Const. art. 12, § 11, and Civ. Code, §§ 323, 359, prohibiting the issuance of certificates not paid up, the stock issued under such resolutions should be considered as paid-up stock.

5. SAME—INCORPORATORS' AGREEMENT—ADOPTION BY CORPORATION.

Where an incorporators' agreement providing for the issuance of stock in payment for a business and for the good will and services of certain incorporators was adopted by the corporation, it became binding on it.

6. SAME—AUTHORITY OF DIRECTORS.

A resolution of directors of a corporation providing for the issuance of stock cannot be attacked because of the interest of the directors voting therefor, where they were the sole beneficiaries.

7. SAME—CONSIDERATION OF STOCK—PROPERTY—FRAUD—PRESUMPTIONS.

The issuance of corporate stock in consideration of property or services will be presumed to have been free from fraud, unless the contrary clearly appears.

8. SAME—CREDITORS' SUIT—VARIANCE.

A creditors' suit against a stockholder of a corporation, based on an alleged unpaid subscription, is not supported by findings and evidence showing that the subscription contract was executed.

9. SAME—CREDITORS' RIGHT TO SUE—STATUTES.

Civ. Code, § 322, provides that each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation, and that any creditor may institute joint or several actions against any of its stockholders for the proportion of his claim payable by each, in which the court must ascertain the proportion of the debt for which each defendant is liable and render a several judgment, etc.; section 331 provides for the levy of assessments of subscribed capital stock; section 332 declares that no assessment

shall exceed 10 per cent. of the capital stock, except an assessment for the full amount unpaid or such percentage as may be necessary to satisfy creditors; and section 349 authorizes the board of directors to proceed by action to recover the amount of the assessment. *Held*, that creditors of a corporation could not maintain an action directly against stockholders on a subscription contract, but could only enforce such liability through an assessment levied by the corporation or the court in a suit to which the stockholders are parties.

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Stephen L. Turner against Fidelity Loan Concern and others. W. S. James intervened. From a judgment against defendants H. M. Lord and O. P. Widaman, and from an order denying their motion for a new trial, they appeal. Reversed.

S. J. Parsons, for appellants. Walter Bordwell, for respondents. Lawler & Allen, for defendant Rowan. Camp & Lissner, for interveners.

SMITH, J. Appeal from a judgment against the defendants Lord and Widaman, and from an order denying their motion for a new trial. The plaintiff and interveners are creditors of the defendant corporation, on judgments of date June 4, 1901, or later, and the suit was brought to subject to the payment of plaintiff's claim the alleged subscription liability of the appellant defendants. The causes of action on which the judgments were rendered arose in the year 1901; but with regard to plaintiff's cause of action, it appears from evidence introduced by him that part thereof was in renewal of a note of the corporation to him, of date October 4, 1900, for the sum of \$500, given in lieu of a personal note of O'Bryan, who was president of the corporation. The certificate of incorporation was filed August 18, 1900. The capital stock of the corporation consists of 500 shares of the par value of \$100 each; of which the defendant Widaman and Bingham, the assignor of the defendant Lord, are named as having subscribed for 10 shares each. One Rowan, who is named as a subscriber for one share, was originally a defendant in the case; but the suit as to him has been dismissed. The other subscribers named are Raymund and O'Bryan—the former for 240 shares, the latter for 239 shares. These subscriptions together make up the full amount of the capital stock, and the subscribers are named in the certificate as directors of the corporation. The certificates of stock to Bingham and Widaman are dated in August, 1900, and were issued to them in the month of November of that year, under two resolutions of the board of directors, of date August 25, and September 4, 1900; which are as follows: "On motion, duly seconded, it was resolved that the secretary and president be and they are hereby authorized to issue to the stockholders of this corporation the certain shares of stock subscribed by the respective incorporators, namely, to R. C. O'Bryan a

certificate calling for 239 shares, to H. A. Bingham a certificate calling for 10 shares, to Robert A. Rowan a certificate calling for 1 share, to W. B. Raymund a certificate calling for 240 shares, and to O. P. Widaman a certificate calling for 10 shares. And upon the motion of O. P. Widaman it was resolved that in consideration of the assignment, sale and delivery to this corporation of all the fixtures, safe, property and effects now used in the office of this company, that there shall be issued to W. B. Raymund 240 shares of the capital stock of this corporation, and to R. C. O'Bryan 239 shares, and in consideration of the payment to this company by O. P. Widaman, Robert A. Rowan and H. A. Bingham of the sum of \$1.00 (one dollar) each, and the further consideration of their good will, interest and services in and about the management, formation and directorship of said corporation, that there shall be issued to the said O. P. Widaman 10 shares of the capital stock of this corporation, to Robert A. Rowan 1 share of the capital stock of this corporation, and to H. A. Bingham 10 shares of the capital stock of this corporation, and the president and secretary, respectively, are hereby authorized and directed to issue such capital stock as aforesaid under the name and seal of this corporation."

The complaint alleges: That Widaman and Rowan "were subscribers to the capital stock of said defendant corporation at the time of its organization"; that they have not "paid the full amount of their subscription * * * or any portion thereof"; and "that each of said defendants is indebted to said defendant corporation on account of his subscription," Widaman in the sum of \$1,000, Rowan in the sum of \$100; that since the organization of the corporation the defendant Lord "has become and is now the owner of 10 shares of stock" therein; that "there is due, owing and unpaid on account of said 10 shares of stock to the said corporation the sum of \$1,000, no part of which has ever been paid by the defendant Lord, or by his predecessors in interest of the said 10 shares of stock." The prayer of the complaint is, in effect, that the court ascertain the amount of indebtedness from each of the defendants Lord, Widaman, and Rowan to the corporation on account of their subscription, and that plaintiff have judgment against each of them for the amount due to the plaintiff on his judgment against the defendant corporation, not to exceed the amount due from each of said defendants to the defendant corporation. The allegations and prayer of the complaint in intervention are substantially similar, except that it is alleged in the latter that the defendants are the only stockholders liable for unpaid subscriptions; but this allegation is negated by the findings. There was a demurrer to the complaint, which was overruled.

The answers of the defendants deny the alleged indebtedness, and plead specially, in effect, that the stock was issued as paid-up

stock, to the defendant Widaman and to Bingham, the predecessor of the defendant Lord, in consideration of services rendered and to be rendered. But on the answers of the two defendants—as on the allegations of the complaint, and on the evidence and facts found—their cases differ in detail. As to the defendant Widaman, the cause of action is on his alleged subscription to the capital stock, as evidenced by the certificate of incorporation; and in his answer, besides denying "that he ever subscribed and agreed to pay any sum whatever for 10 shares * * * of the capital stock of the" corporation, he alleges in effect: That there was an agreement between the incorporators of the company, that there should be issued to him for certain legal services to be rendered by him the 10 shares of stock for which in the certificate he is named as subscriber; that this agreement was confirmed and adopted by the company; that the services were rendered and the stock issued to him accordingly; and that the services rendered were in excess of the nominal or par value of the stock. As to the defendant Lord, the cause of action is based on his acceptance of the stock as assignee of Bingham; and in his answer, besides denials, it is alleged that the stock was fully paid for by Bingham, and was issued to him as paid-up stock—which is in effect equivalent to the defense more specifically pleaded by Widaman; and it is further alleged that he was induced to take the stock by representations made to him by the corporation, through its proper officers, that it had been fully paid for, as to which allegation, it may be observed that it appears from his testimony that he was invited by O'Bryan, the president of the corporation, "to take the Bingham stock and act as director," and that, accepting the proposition, he took the stock supposing it to be paid for.

On the issues made by Widaman, the findings are, in effect, that he has paid no part of the sum for which he subscribed to the capital stock of the company, and there is due on account of his said subscription the sum of \$1,000; that a certificate of 10 shares of stock was issued to him "on account of said subscription." As to other matters pleaded by this defendant it is found: "(10) * * * *That the defendant Widaman did do work as an attorney at law for the defendant corporation for which the president and secretary of said corporation issued to said defendant Widaman his certificate for said shares of its capital stock; that said defendant Widaman did perform work and labor or render services to said corporation in excess of the value of said 10 shares of stock; that no contract between the defendant Widaman and the promoters of said defendant corporation, whereby said promoters were to pay the said defendant Widaman for services rendered or to be rendered by him in the organization of said corporation, was ever recognized*

by resolution of the board of directors of said corporation, or otherwise; that no such resolution was ever passed after the organization of said corporation; that said 10 shares of stock issued by said defendant corporation to the defendant Widaman were never by any authority of said corporation so issued to him as fully paid stock in consideration of the services rendered by said defendant Widaman to the promoters of said corporation; that the said defendant Widaman had not fully paid for said 10 shares of stock issued to him by said corporation at the time of the delivery thereof or at any other time; that there was due from the defendant Widaman at the time of the issuance of said stock to him the sum of \$1,000 to said defendant corporation." There is no finding as to the allegation of the answer of this defendant that the value of the services rendered by him was in excess of the par value of the stock, though there was evidence that the services were worth more than twice the par value. As to the defendant Lord, it is found that the stock held by him was not paid for, in whole or in part. Upon these findings judgment was entered in favor of the plaintiff and the intervener against each of the defendants for the sum of \$1,000, the par value of the stock.

The following are the points urged by the appellant for reversal: First. The court erred in refusing to allow the defendants to show the contract between the incorporators as to how the stock was to be issued, and for what consideration. Second. It was also error to exclude the question to Raymond: "What was the market value of that stock at the time it was transferred to Mr. Widaman?" Third. The evidence was insufficient to support the findings in various particulars. But the only specifications that need be considered are those referring to the alleged indebtedness of the defendants, and the nonpayment thereof, and to the parts of finding 10 unitalicized. Fourth. (a) The resolution of September 4, 1900, was valid and effectual to authorize the issuance of the stock to the stockholders for the consideration agreed upon; (b) it was duly passed; (c) nor can it be attacked on account of the interest of the directors, except by the corporation or a stockholder. (d) The evidence offered and excluded was admissible to explain it. Fifth. In the case of the defendant Widaman there is a material variance between the case alleged and found and the proofs.

The points principally discussed by the respondent's counsel relate to the due passage, the construction, and the validity of the resolution of September 4, 1900. It is claimed also, that these are the only questions involved; but this proposition is, we think, clearly untenable for several reasons. First. Widaman testifies that the corporation was indebted to him, at the time of the trial, for money loaned; and this seems to be confirmed

by the ledger of the company, put in evidence by the plaintiff, which, as we understand it, shows two credits of \$250 each, of dates February 21, and 28, 1901; as to one of which, at least, we can find no debit. Besides, it is found by the court that the value of the services rendered by Widaman was in excess of the value of the stock received by him; and from the only evidence in the case on the point, it appears that his services "were worth twice the face value of the stock." It is, indeed, claimed by the respondents that no "offset" or "quantum meruit" is pleaded by this defendant. But as to the first item, the evidence of Widaman was admitted without objection, and the amount of the indebtedness was brought to the attention of the court by the plaintiff, himself; and we are not prepared to say that in an equitable proceeding of this character, it was not the duty of the court to render equity in this particular to the defendant. Code Civ. Proc. § 440. But, however this may be, the facts showing the indebtedness of the corporation to Widaman for his services are pleaded; and we are of the opinion of the appellants' counsel that (if the theory of the court be assumed) the actual plea "includes all the elements of a plea of the quantum meruit and more." We are of the opinion, therefore, that, on this account, as well as on account of the bearing of the fact on the other issues, the court should have found the value of the services of Widaman, and given the fact due effect. But we are of opinion, also, that the objections of the respondent to the due enactment of the resolution of September 4, 1900, as well as of the previous resolution of August 25th, are untenable. On this point it is unnecessary to dwell on the fact that the resolution was ratified by Rowan and Bingham (who, with the others, were the only stockholders) by their acceptance of the stock; nor need we enter at length upon the question as to proof of notice of the meeting of the former date. The record of the meeting recites that the directors were notified, and it is sufficient that the contrary does not appear. *Granger v. Original Empire M. & M. Co.*, 59 Cal. 679; *Stockton C. H. & A. Works v. Houser*, 109 Cal. 9-11, 41 Pac. 809. It is also to be observed that, were the point well taken, the result would seem to follow that the certificates were issued without authority and were void; and consequently the grounds for plaintiff's action, at least as against Lord, would seem to be lacking. We have to consider, therefore, only the questions of the construction and of the validity of the resolutions of the board; and on both these questions we think the evidence as to the agreement of the incorporators should have been admitted. For not only would the excluded evidence have an important bearing upon the question of construction, but it is clear from the evidence (whatever construction we may put upon the resolutions) that the agreement between the corporators

(whatever it may have been) was adopted by the corporation; and, indeed, otherwise the plaintiff's suit against Widaman would be without foundation to rest on.

As to the construction of the resolution, reading it in connection with the previous resolution of August 25th, and the evidence introduced and offered, we think there can be no doubt it must be construed as claimed by the appellants, and that the stock was issued as paid-up stock; and, it may be added, this construction is confirmed by the consideration that otherwise the issue of the certificates would have been illegal (Const. art. 12, § 11; Civ. Code, §§ 323, 359; *Kellerman v. Maier*, 116 Cal. 424, 48 Pac. 377; *Ewing v. O. Mining Co.*, 56 Cal. 652), which is not to be presumed.

As to the validity of the transaction, the question is to be considered from two points of view, namely, with regard to the corporation, and with regard to subsequent creditors. As to the corporation no serious question can arise. By the adoption of the incorporators' agreement, that agreement became the agreement of the corporation. *San Joaquin L. & W. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *Scadden Flat Co. v. Scadden*, 121 Cal. 33, 53 Pac. 440, and cases cited *infra*. Nor can any objection be urged to the resolution on the score of the interest of the directors. For here the directors, though trustees, were the sole beneficiaries, and in this double capacity were fully empowered to act. *Chater v. S. F. Refining Co.*, 19 Cal. 246; *Shorb v. Beaudry*, 56 Cal. 450; *Cornell v. Corbin*, 64 Cal. 200, 30 Pac. 629; *Kohl v. Lillenthal*, 81 Cal. 397, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520; *Behlow v. Fischer*, 102 Cal. 214, 215, 36 Pac. 509; *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377; *Hunt v. Davis*, 135 Cal. 34, 66 Pac. 957; Civ. Code, §§ 323, 324. As to the creditors of the corporation, the principles by which their rights are to be determined are sufficiently simple, though, it must be confessed, they are somewhat obscured by the immense multiplicity and varying character of the authorities. The relation of the judgment debtor to the creditors of a corporation is simply a particular case of the general case of a creditor seeking to collect his debt from the debtor or his debtor by attachment or other proceeding authorized by law. In no case is there any privity between the creditor and the debtor's debtor (*Matteson, etc., Mfg. Co. v. Conley*, 144 Cal. 483, 77 Pac. 1042); but whatever rights the former may have come to him through the intermediate debtor, and the general principle is that they cannot be other or greater than his. In this the case differs from that of the statutory liability of the stockholder, where the direct relation of debtor and creditor is established between the stockholder and the creditor by the statute. Civ. Code, § 322. There are exceptions, or apparent exceptions, to the general

rule in cases of fraud, actual or constructive, as to creditors, and there are cases where the stockholder may be estopped from showing the real nature of the contract or agreement between him and the corporation; and, it may be admitted, the latter principle and that of constructive fraud have been extended in their application with extreme liberality in favor of creditors, and, perhaps, with some disregard of the rights of innocent individuals. Hence, it may be said of "unpaid subscriptions to stock" that "these may sometimes be collected by creditors when the corporation itself has released them, or in some way deprived itself of that right." *Vermont Co. v. Declez Co.*, 135 Cal. 583, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143. But we see nothing in the agreement between the corporation and the defendants here to take the case from the application of the general rule, or to give to the creditors of the corporation any greater rights than the corporation itself had. Here, from the circumstances of the case, it may be inferred that the principal parties to the transaction were Raymond and O'Bryan, and the relation of the others to them merely that of employés. Nor do we see anything in the nature of fraud in the terms of their employment. As to Widaman, especially, it affirmatively appears that the consideration rendered by him was in excess of the value of his stock, and, upon the evidence, that it was even in excess of its par value. To such a transaction no possible objection can be made. As to Bingham, if this cannot be said, at least the contrary does not appear, and until the contrary is shown the presumption is that the transaction was fair. Code Civ. Proc. § 1963, subds. 1, 19, 20, 33, 39. Here also the general presumption was confirmed by the consideration that otherwise the issue of the certificate would have been in contravention of constitutional and statutory provisions (authorities, *supra*), and, in the absence of circumstances tending to inform him better, his assignee might justly rely on this presumption. The case, therefore—as to both defendants—comes within the application of what is said in *Kellerman v. Maier*, 116 Cal. 422, 423, 48 Pac. 377, which is to the effect that it is legitimate for the corporation to dispose of its stock for full value received in land or property, or, as in this case, in services. Nor is there anything in the decision in *Vermont Co. v. Declez Co.*, *supra*, affecting this position. All that is there held is that the issue of stock for part of its nominal value, or, in other words, the sale of stock at less than par, is not permissible. But, assuming this to be the law, the case considered in *Kellerman v. Maier* in the passage quoted, and the present case, come within the distinction expressed on page 586 of 135 Cal., page 1059 of 67 Pac. (56 L. R. A. 728, 87 Am. St. Rep. 143), where it is said: "Had the case been the usual one where a

road is constructed for a fixed sum of money and a definite amount of stock, it might, perhaps, have been held that the stock was fully paid; but the stock was given for a definite sum of money, and it was contended that it was the usual case of selling stock below par, and that no contract with the corporation could release the stockholder from his liability to creditors." The decision, therefore, does not affect the case of Widaman; nor, in the case of Bingham, does it appear "that the transaction was not fair, and that a reasonable equivalent was not given for the stock"; nor is there anything here to show or to lead us to suspect that there was a mere "simulated payment of such subscription," or that there was "any device short of an actual payment in good faith."

This disposes of the various points made by the appellants' counsel, except the last point of the appellant Widaman, which is that there is a material variance between the case alleged and found, and the proofs. This point—though perhaps by itself insufficient for reversal—is well taken. The action against Widaman is based upon the subscription, and from the findings and the evidence it appears that the contract of subscription (whatever may have been its terms) was executed. The judgment, therefore (if it could be otherwise supported), would have to rest simply, as in the case of Lord, upon the contract implied (as held in Vermont Co. v. Declez Co.) to pay the full par value of the stock.

For these reasons, the judgment and order appealed from must be reversed. But there are other questions involved, antecedent to those discussed by the counsel, which must be determined with a view to the further proceedings in the case. These are: (1) Can an action be maintained by a creditor of a corporation upon a stockholder's liability otherwise than through the medium of an assessment by the corporation, or by the court itself in the suit? (2) Assuming this question to be answered in the negative, will it be necessary in a creditors' bill against a corporation to make the stockholders parties? (3) Or, assuming the first question to be answered in the affirmative, can a suit be maintained by a creditor against a stockholder on his subscription liability without making all the stockholders parties, or excusing the absence of missing stockholders?

The first and second of these questions will be considered together: Under the Constitution and statutes of this state, it is settled that there are two methods of proceeding by creditors of a corporation to collect their debts, to wit: (1) "Each stockholder may be compelled to pay to the corporation assessments to the full amount of his subscription to the capital stock of the corporation for the payment of creditors;" and (2) he will "be individually liable to each creditor for such

proportion of his claim as the amount of stock held by such stockholder bears to the whole of the capital stock." *Sacramento Bank v. Pacific Bank*, 124 Cal. 150, 56 Pac. 787, 45 L. R. A. 863, 71 Am. St. Rep. 36; *Kimball v. Richardson-Kimball Co.*, 111 Cal. 395, 43 Pac. 1111. With regard to the latter remedy, it is expressly provided by section 322 of the Civil Code that the action can be maintained by a creditor against a stockholder for his proportion of the debt "only." This seems clearly to imply that no action can be maintained by a creditor against a stockholder on his subscription liability directly; and hence, the right of a creditor to maintain an action of the kind now before us would seem to be denied by the express provision of the statute cited. This conclusion, we think, would be right, and the first question might very well be thus disposed of; but there are grounds upon which it may be rested independent of the statute.

As to the equitable remedy, until recent times the principles governing it and the mode of procedure were equally well defined: A suit may be maintained by the creditor of a corporation on behalf of himself and other creditors against the corporation to subject its assets to the creditors' lien. *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944; 2 Story's Eq. Jur. § 1252. Among these assets the unpaid subscriptions of stockholders are to be regarded as part, and with reference to these the court will either compel the corporation to assess the stock in the amount necessary for the payment of its liabilities, or it will itself make the assessment; and in this proceeding — unless a personal judgment against a stockholder be sought—it will be unnecessary to make all the stockholders parties, the assessment, whether by the corporation or by the court, being conclusive upon them. *Salmon v. The Hamborough Co.*, 1 Cases in Chancery, 204, cited, *Thompson on Liability of Stockholders*, § 16; *Glenn v. Saxton*, 68 Cal. 353, 9 Pac. 420; *Glenn v. Williams*, 60 Md. 93. Stockholders, however, under the ordinary rules of equity procedure, may be made parties, and as to those who have been served, or who appear, several judgments may be entered against them for the amounts for which they are assessed. Code Civ. Proc. §§ 379, 382, 387, 389; Story's Eq. Jur. §§ 64k, 65; *Harmon v. Page*, 62 Cal. 448. The leading case on this subject was decided in the reign of Charles II, and it seems to be agreed that the doctrine has never been extended in England beyond the rule as above stated. Nor, until recent times, has it been extended in this country. There are, indeed, some cases in which it has been held that a suit may be maintained by a single creditor directly against one or several stockholders; but this is confessedly an innovation in equity practice, and seems to have grown out of a misapprehension of the resources of the existing practice, rather than from any necessity

for the innovation. For the ordinary proceeding furnishes the most ample remedy to creditors that can be justly demanded; and at the same time—unlike the new practice—is free from being chargeable with a disregard of the rights of stockholders, and of the familiar principles upon which equity is commonly administered. This, I think, is a fair criticism of the cases alluded to, whose fault seems to be that they have left out of view the necessity of an assessment (required by every consideration of equity and common sense) to fix the liability of the stockholder; but it would be impracticable, with any due regard to brevity, to attempt to verify the criticism by a review of the cases. We will therefore confine our attention to the statutory provisions and authorities of this state, by which alone the case is to be determined.

By section 331 of the Civil Code, the directors of a corporation, after one-fourth of its capital stock has been subscribed, may levy and collect assessments upon the subscribed capital stock "in the manner and form and to the extent provided herein." By section 332 it is provided: "No one assessment must exceed ten per cent. of the amount of the capital stock," except in the cases mentioned in the section, of which one is that an assessment may be made "for the full amount unpaid upon the capital stock," or such percentage as may be necessary "to meet its liabilities, or to satisfy the claims of its creditors." And by section 349, upon delinquency in the payment of the assessment, the board may elect to waive further proceedings under the statute and "to proceed by action to recover the amount of the assessment," etc. These provisions of the code enter into and constitute the terms of the contract. *Union Savings Bank v. Leiter*, 145 Cal. 702, 79 Pac. 441. Hence, in the absence of an express agreement to the contrary, the promise of the stockholder is only to pay the amount of his subscription upon assessment, and until then no cause of action arises. *Union Savings Bank v. Leiter*, supra; *Welch v. Sargent*, 127 Cal. 81, 82, 59 Pac. 319; *Shively v. Eureka Co.*, 129 Cal. 293, 61 Pac. 939; *Ventura Ry. Co. v. Hartman*, 116 Cal. 260, 48 Pac. 65; *Glenn v. Saxton*, 68 Cal. 357, 358, 9 Pac. 420; *Harmon v. Page*, 62 Cal. 463, 464; *Cal. Sugar M. Co. v. Schafer*, 57 Cal. 396. It would seem to follow, therefore, that until the levy of assessment, either by the directors of the corporation, or by the court in lieu of the directors, no cause of action can arise either in favor of the corporation or its creditors; and also that, except in the manner indicated—that is to say, by an assessment either by the directors, or in the creditors' suit—no suit can be maintained by a creditor on the subscription liability directly against one or several stockholders. Nor is this an immaterial limitation upon his liability. For not only is the stockholder entitled to the interposition of the directors of the corporation, who are

trustees for him, as well as for creditors, and whose duty it is to see that unequal burdens are not imposed upon him (*Union S. B. v. Leiter*, supra), but he is also protected by the statutory provisions of the law, which forbid him to be assessed, without an assessment of the other stockholders. Nor is the case differenced where the court makes the assessment. For here the court simply performs the functions of the corporate officers, and becomes itself a trustee of the stockholders, as well as of the creditors. It would seem, therefore, even if the case be assumed to be otherwise for the plaintiff, that the judgment was nevertheless premature. There should have been an inquiry as to the amount necessary to be assessed, and an assessment against all the stockholders, whether present or absent.

On the other hand, there are some cases in this state in which it has apparently been held that a direct judgment in favor of creditors against several stockholders is admissible (*Baines v. Babcock*, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 157; *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777; *Walter v. Merced Academy Ass'n*, 126 Cal. 586, 59 Pac. 136; *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319; *Tulare Savings Bank v. Talbot*, 131 Cal. 45, 63 Pac. 172); and this, as we have seen, is correct provided there first be an assessment. But the actual decisions go further, and the judgments were affirmed, though there had been no assessment. But in none of these cases was the question as to the necessity of an assessment considered, nor was the attention of the court directed to the statutory provisions and the authorities above cited, nor was the question of their effect considered. In *Baines v. Babcock*, supra, indeed, the general question is discussed in the briefs, and, in the brief of counsel for the appellants *Babcock* and *Collett*, very elaborately and ably. But the question as to the proper mode of procedure and the necessity of an assessment was not considered by the court. Nor in the actual case was there any very pressing necessity that it should be. For, out of the 2,500 shares of the stock of the corporation, 2,317 were represented by the defendants, and it was alleged in the complaint that the remaining 183 shares were "mostly held in small amounts by nonresidents or insolvent persons." But, however this may be, the question actually considered by the court was whether the objection to the nonjoinder of the latter could be sustained, and it was held, in effect, that the nonjoinder was excused. Upon the question under consideration here, all that is said is: "It is well settled that a judgment creditor, who has exhausted his legal remedies against a corporation, may maintain an action against its stockholders to recover, for the benefit of all creditors who may desire to come in and be made parties, the amount due upon unpaid subscriptions for stock, when the corporation neglects or

refuses to collect the same." And it is further said: "The contention of appellants that this equitable remedy is superseded in this state by section 322 of the Civil Code, and that the only personal liability of the stockholder is that fixed by that section, is not tenable, and was so held by this court in *Harmon v. Page*, 62 Cal. 448." But referring to the case cited, it appears that all that was held there was that the jurisdiction of equity to entertain a creditors' bill against the corporation and stockholders to subject the assets of the corporation to the lien of the creditors was not divested by the personal liability imposed upon the stockholder by statute, and that the question under consideration was not there in any way involved. Nor is the language of the court in the principal case to be considered as going beyond the authority cited.

The case of *Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 885, is also cited by the court, and, though not cited to the point now under consideration, it apparently goes beyond the point for which it was cited, and probably had some influence on the mind of the court. The case, however, was an Illinois case, where by statute it is expressly provided: "Each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him, to be collected in the manner herein provided." And it is further provided: "Whenever any action is brought to recover any indebtedness against the corporation, it shall be competent to proceed against any one or more stockholders upon the stock owned by them respectively, whether called in or not, as in cases of garnishment." See *Alling v. Ward* (Ill.) 24 N. E. 551, where the statute is cited, though not fully. Accordingly, though the statute is not expressly referred to, the decision is placed upon the ground that: "A creditors' bill merely subrogates the creditors to the place of the debtor and garnishees the debt due to the defendant corporation. It does not change the character of the debt attached or garnished." This was precisely in accord with the Illinois law, and must be considered as having reference to that only. And it is the more requisite thus to construe the decision, because, if the proposition should be regarded as asserted generally, it would not be supported by any of the authorities cited—unless, perhaps, by the Georgia case cited from *Wood's Reports*, which does not seem to have been very carefully considered. Nor, however construed, can the decision be regarded as authority in this state, where there are express statutory provisions covering the whole subject of attachment, which it is said are to be regarded as "a substitute for a creditors' bill." *Matteson, etc., Mfg. Co. v. Conley*, 144 Cal. 485, 77 Pac. 1042.

For these reasons we are satisfied that in this state creditors of a corporation can maintain a suit directly against a stockholder

for his statutory proportion of the corporation indebtedness, only; and that to enforce his subscription liability otherwise than by means of a suit against the corporation, and an assessment, would not only be an unnecessary, and therefore unwarranted innovation upon the established equity practice, but it would also be in direct contravention of the provisions of section 322 of the Civil Code, and of the decisions of the Supreme Court in *Union Savings Bank v. Leiter*, 145 Cal. 693, 79 Pac. 441, and the numerous other cases cited *supra*. This conclusion is also confirmed by the decision in *Welch v. Sargent*, 127 Cal. 73, 59 Pac. 819, where it is held that a stockholder cannot pay the debt of a corporation in discharge of his liability upon an unpaid subscription to the stock, which, it is said, "is an asset of the corporation" and "payable to the corporation and no one else." It can hardly be that a cause of action can exist against one which he is not at liberty to pay. And, as in this state, it seems, paid-up stock may be assessed by the corporation (*Santa Cruz Ry. Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661, 802; *Vermont Co. v. Declez Co.*, *supra*), it is difficult to preceive, if such an action can be maintained, why it should be limited to the unpaid subscription.

On the other hand, reverting to the third question, if we could assume that a suit could be maintained by a creditor against a stockholder without the intervention of an assessment by the corporation, or by the court, then it would be clear that all the stockholders should be parties, "at least so far as they can be ascertained," or, as practicable (*Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 885, cited; *Baines v. Babcock*, 95 Cal. 590, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158, *supra*); and that none could be omitted "unless some valid excuse is shown for not bringing them in" (*Thompson on Liability of Stockholders*, §§ 353 et seq.; *Code Civ. Proc.* §§ 379, 389). But assuming that the obvious necessity (in the absence of an assessment) of bringing in all the stockholders before judgment can be rendered against one (*Code Civ. Proc.* §§ 379, 382, 389) may be thus qualified, the rule can have no application to the present case. For here, though it appears that one of the stockholders (O'Bryan) absconded some four or five years ago, it does not appear that he cannot now be found; and it affirmatively appears that the other stockholders (Rowan and Raymond) were present. No reason appears, therefore, why they should not be joined, and under the provisions of the Code cited they should be. By joining Raymond only, the trust fund subject to the claims of the plaintiff and intervener would be increased by more than \$24,000, or, in other words, would be multiplied 13 times, and a very small assessment upon each share would be sufficient to satisfy the claims sued on. And even should the judgment be against them jointly for the amount due, and the smaller stock-

holders have to pay the judgment, they would be assured of their right to contribution from the others. Under these circumstances, to impose the whole debt on two small stockholders, to the exclusion of the principal debtors, would not be justified by any principle of equity with which we are acquainted. In this connection, it will be proper to say we are not satisfied of the correctness of the proposition of the court, in *Hatch v. Dana*, supra, that "the liability of a stockholder for the capital stock of the company is several, and not joint"—at least, as applicable to this state. After the assessment it is "several." But before that the liability is only contingent, and can hardly be said to be either joint or several; though in its characteristics it more nearly resembles obligations of the former kind.

For the reasons given, the judgment and order appealed from must be reversed, and further proceedings had in accordance with the views expressed in this opinion.

I concur: ALLEN, J.

GRAY, P. J. I concur specially in the reversal of the judgment and order. I do not think there is any analogy, however, between this case and the case of a creditor seeking to collect his debt from the debtor of his debtor by attachment. I am strongly of the opinion that the creditors may sue the stockholders of a bankrupt corporation directly and without any effort to compel an assessment by the corporation, and believe that the liability of the stockholders to such creditors is several as well as joint, and that it is not necessary to join all the stockholders in such a suit. *Walter v. Merced Academy Association*, 126 Cal. 582, 59 Pac. 136.

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TURNER v. FIDELITY LOAN CONCERN
et al. (JAMES, Intervener). (L. A. 1,433.)
(Supreme Court of California. Dec. 29, 1905.)

APPEAL—DIVIDED COURT—LAW OF THE CASE.

The decision of certain questions by a District Court of Appeal, with a view to further proceedings in the case, only concurred in by two of the justices of such court, does not constitute "the law of the case" for further proceedings.

In Bank. Action by Stephen L. Turner and another against the Fidelity Loan Concern and others. A judgment against H. P. Lord and O. P. Widaman was affirmed in a District Court of Appeal (83 Pac. 62), and they apply for a transfer of the cause to the court in bank. Petition denied.

S. J. Parsons, for appellants. Walter Bordwell, for respondents. Lawler & Allen, for defendant Rowan. Camp & Lissner, for intervener, James.

PER CURIAM. The petition for a transfer of the above-entitled cause to this court, after decision in the District Court of Appeal

of the Second Appellate District, is denied. In denying such petition, it is proper to say that such portions of the opinion of said Court of Appeal as are devoted to the discussion of such questions as, it is said in the opinion, "must be determined with a view to the further proceedings in the case," are concurred in by only two of the justices of said Court of Appeal, and, consequently, do not constitute "the law of the case" for further proceedings.

2 Cal. App. 47

FRUTIG v. TRAFTON.

(Court of Appeal, First District, California.
Oct. 20, 1905.)

1. APPEAL—FINDINGS—CONFLICTING EVIDENCE.

Findings of the trial court, based on conflicting evidence, will not be interfered with on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3983-3989.]

2. PAYMENT—APPLICATION—STATUTES.

Under the express provisions of Civ. Code, § 1479, a debtor has the absolute right to direct at the time of payment the obligations to which he desires the same applied.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payment, § 99.]

3. SAME—EVIDENCE—PAYMENT ON ACCOUNT.

Where defendant's merchandise account with plaintiff included not only an original indebtedness for goods sold, which was partially secured by mortgage, but also charges representing subsequent sales, remittances made by plaintiff "for credit," or "to apply on account," did not constitute a direction that the remittances should be applied in payment of the subsequent charges, as distinguished from the items secured.

4. APPEAL—NEW TRIAL—DENIAL—CONFLICTING EVIDENCE.

Where the evidence was substantially conflicting on an issue of the application of payments, the trial court's denial of a motion for a new trial on the ground that the findings were contrary to the evidence will not be interfered with on appeal.

5. MORTGAGES—SATISFACTION—JUDGMENT.

Where a mortgage was past due at the time suit was brought to compel satisfaction thereof on payment of an alleged balance, and the court found that the amount of the balance was as claimed by plaintiff, it was improper to render judgment requiring satisfaction on payment of the amount so found into court, without fixing a reasonable time for such payment.

Appeal from Superior Court, Santa Clara County; W. G. Lorigan, Judge.

Action by Harry Frutig against J. P. Traf-ton. He having died after judgment, Dola P. Traf-ton, his executrix, was substituted as defendant. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, she appeals. Modified and affirmed.

Rehearing denied November 16, 1905.

Valentine & Newby and S. F. Leib, for appellant. H. W. McComas and Charles L. Witten, for respondent.

HALL, J. This is an action to compel the satisfaction of a note and mortgage given for

\$1,000, upon the payment of the balance of \$260 alleged to be unpaid. Plaintiff had judgment as prayed for. The appeal is from the judgment and order denying defendant's motion for a new trial. The original defendant, J. P. Trafton, died subsequently to the rendition of the judgment, and the executrix of his will has been substituted as defendant. Plaintiff was a retail dealer in jewelry, and bought a bill of goods amounting to \$1,070.41, of defendant, a wholesale dealer, and with his wife gave a note and mortgage to defendant to secure the payment of \$1,000 thereof. The note bore date November 4, 1896, and by its terms was payable on or before November 4, 1901, without interest. During the next 12 months plaintiff, from time to time, purchased additional goods of defendant to the amount of \$638.10, and during the same time made payments of \$735. The court found the payments to be \$740, but no point seems to be made of this difference; for other payments were made by plaintiff of taxes on the mortgage which brought the total payments to a sum in excess of \$740, and the court found the balance to be paid on the mortgage to be \$260.

The controversy concerns the application of these payments. If credited to the note and mortgage, the findings of the court were right; but, if credited to the balance on the first bill, \$70.41 and the succeeding purchases, the findings of the court are not sustained by the evidence. Testimony was given by plaintiff and by H. W. McComas to the effect that at the time of the execution of the note and mortgage it was distinctly agreed by defendant and plaintiff and his wife that the first moneys that should be paid by plaintiff to defendant should be credited on account of the note and mortgage, although it was contemplated at that time that defendant should continue to supply plaintiff with such goods as he might need from time to time. Much stress seems to have been put upon this question at the trial, and counsel have discussed the question at length in their briefs. It is sufficient for us to say that on this question there is an absolute conflict of testimony, and therefore, so far as the findings of the court depend upon this question, we cannot interfere with the action of the trial court. We do not think the question last discussed, however, very important, for every debtor has a right to direct at the time of payment the application of such payments as he makes to such obligations as he pleases (Civ. Code, § 1479). It is contended by appellant that the evidence shows without conflict that plaintiff directed the application of the payments to current or running account, and that the payments were so applied by defendant with the knowledge and acquiescence of plaintiff. This presents the real point upon which the determination of this case hinges.

We shall first consider the evidence, as to the direction by plaintiff for the application of the payments. Plaintiff carried on his business at Gilroy, Santa Clara county, while defendant carried on business at Los Angeles, and all the payments were by check sent through the mail. There were 25 payments, varying in amount from \$20 to \$100, and each was inclosed in a letter containing a direction in substantially the following form: "Inclosed please find check for \$25 [or whatever the amount] to apply on account," save the last payment, where the direction was: "Inclosed please find check for \$25, for which give me credit." It is contended by appellant that the words "to apply on account" meant that the payment should be applied on the debt represented by the current account, as distinguished from the debt evidenced by the note and mortgage. But "the word 'account' has no inflexible technical meaning, being defined by Webster to mean a registry of pecuniary transactions, a written or printed statement of business dealings of debits and credits, and also of other things subjected to a reckoning or review." *Preston Nat. Bank v. Purifier Co.*, 102 Mich. 462, 60 N. W. 981. "An account is a list or statement of monetary transactions, such as payments, losses, sales, debits, credits, etc., in most cases showing a balance or result of comparison between items of an opposite nature, e. g., receipts and payments." *Purvis v. Kroner*, 18 Or. 414, 23 Pac. 260. See, also, 1 Words and Phrases Judicially Defined, under subject "Accounts." As we shall see further on in this opinion, the very first item in the "account" kept in the books of defendant as to the monetary transactions between defendant and plaintiff was a debit item for \$1,070.41, which included the \$1,000 evidenced by the note and mortgage, and the same item appears in the statement of account furnished plaintiff by defendant before the beginning of this litigation. We think the import of the words "to apply on account," when referring to a remittance of a named sum, and not qualified by more definite terms, is simply that the payment made is a payment in part of a debt exceeding the amount then paid. The most that can be fairly claimed by defendant in regard to the direction contained in the words "to apply on account" is that plaintiff at the time of the payments gave no direction as to which obligation the payments should be applied to.

This brings us to a consideration of the evidence in the record as to the application in point of fact by defendant of the payments as they were made. On this point we find a substantial conflict in the evidence. It is true that defendant testified that, "when these payments were made, I applied them on the goods he was buying on open account." As evidence of a mental process this testimony is not conclusive against other evidence showing what was in fact done.

Upon this point a written statement was furnished plaintiff by defendant prior to the beginning of this litigation. It is dated November 14, 1901, and the first debit item is under date of November 2, 1896, and is "Bill rendered \$1,070.41," which includes the \$1,000 represented by the note and mortgage. This item is followed by 18 debit items aggregating \$649.16, which with the first item make a total debit of \$1,719.57. The credit side of the statement begins thus: "Dec. 10, 1896, By cash, \$30," followed by 24 like items, making a total of credits in the sum of \$735, and shows a general balance of \$984.57, which is the difference between the debit items of the account and the credit items thereof. This written statement furnished by defendant to plaintiff before the litigation was begun, tended to show that the payments therein set forth were by the defendant applied to the \$1,000 represented by the note and mortgage.

Further, defendant testified in relation to this statement as follows: "This statement that has been introduced in evidence was furnished Mr. Frutig at his request. He wanted a statement that would show him how he stood. I made out the statement so as to *show him everything.*" (The italics are ours.) It in fact showed that the payments had been credited to the bill of goods for which the note was given. True, the books of the defendant were put in evidence, and the books correspond with the statement with the exception that the first item on the credit side reads, under the head of November 4, "Note and mortgage, \$1,000," but the relative weight to be attached to the "statement" and the books of defendant were for the trial court, especially as the defendant himself testified that this credit of \$1,000 for the note and mortgage was not entered until after the recordation of the mortgage, which was March 29, 1897, 4 months and 25 days after the execution thereof. In the meantime, six cash payments had been made and credited to the account, the first debit item of which was the bill of \$1,070.41. An inspection of defendant's ledger at any time prior to March 29, 1897, would have shown all payments then made credited to the item represented by the note and mortgage. The statement and the books of defendant were before the court and subject to its inspection. If there was anything suspicious or irregular in the appearance of this \$1,000 credit entry, or the contrary, it was for the trial court to pass upon it, not the appellate court.

In our examination of this case we have not overlooked the evidence tending to sustain the theory of defendant, but in our discussion of the matter we have simply called attention to the evidence tending to sustain the findings of the court. There being a substantial conflict in the evidence, we cannot interfere with the action of the lower court on the motion for a new trial. *Gilbert v. Penfield*, 124 Cal. 234, 56 Pac. 1107; *Brison v. Brison*, 90 Cal. 334, 27 Pac. 186; *Moore v. Douglas*, 132 Cal. 399,

64 Pac. 705; *Bell v. Staacke*, 141 Cal. 186, 74 Pac. 774. It is insisted that the judgment is erroneous for the reason that it provides for the satisfaction of the note and mortgage upon the payment into court of the sum found unpaid, without limiting any time within which such payment should be made. The mortgage was past due at the beginning of this action. We think the judgment should have fixed a reasonable time within which the money found due should be paid.

For the foregoing reasons, the order denying the motion for a new trial is affirmed, and the trial court is directed to modify the judgment by fixing a reasonable time within which the money found to be due must be paid, and as so modified, the judgment is affirmed; appellant to recover costs of the appeal.

We concur: HARRISON, P. J.; COOPER, J.

2 Cal. App. 43

SAN FRANCISCO PAVING CO. v.
DUBOIS et al.

(Court of Appeal, First District, California.
Oct. 19, 1905.)

1. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENTS—LEVY.

St. 1891, p. 204, c. 147, § 7, subd. 11, authorizes exception from a resolution of intent of any work already done upon the street to be improved; subdivision 8 declares that when any work is done on either or both sides of the center line of any street for a block or less, and further work of the same class is ordered to complete the unimproved portion of the street, the assessment to cover the total expense of the work shall be made only on the lands fronting the portions of work so ordered; and subdivision 7 provides that, when a subdivision street terminates in another street, the expense of the work done on one-half of the width of the subdivision street opposite the termination shall be assessed on the lands fronting on such subdivision street so terminating. *Held* that, where two streets terminated at the southerly line of a street to be improved, the assessment for work done on the southerly one-half of such street opposite the streets so terminating was properly made against the lands fronting on those streets, respectively.

2. SAME—SINGLE ASSESSMENT.

An assessment for street improvement does not cease to be a single assessment for the work done under the contract because a portion of the cost of the work done on the street improvement was required to be assessed on a district embracing lands which did not front on the street by St. 1891, p. 204, c. 147, § 7.

3. SAME—ENGINEER'S CERTIFICATE.

Where a city engineer's certificate of the completion of a street improvement gave the measurements of the special work, for the cost of which an assessment was to be made on lands liable therefor, and stated that the engineer found the work to the official line and grade, it was not defective for failure to contain an estimate of the cost and expense of the work.

4. SAME—ACTIONS—EVIDENCE—PRIVATE CONTRACTS.

In an action to recover an assessment for street improvement, certain private contracts between plaintiff and defendants, which included additional work never performed, were inadmissible.

Appeal from Superior Court of City and County of San Francisco; John Hunt, Judge.

Action by the San Francisco Paving Company against William E. Dubois and others. From an order denying defendants' motion for a new trial, they appeal. Affirmed.

Rehearing denied by Supreme Court December 18, 1905.

Charles F. Hanlon and Tobin & Tobin, for appellants. J. C. Bates, for respondent.

HARRISON, P. J. Action upon a street assessment in San Francisco. Judgment was rendered in favor of the plaintiff, and the defendants have appealed from an order denying a motion for a new trial.

The supervisors passed a resolution of intention "that granite curbs be laid on Sixteenth street, between Sanchez and Market streets, where not already laid, and that the roadway thereof be paved with bituminous rock where not already so paved," and the work for which the assessment was made was done under a contract entered into pursuant to said resolution. The improvement of Sixteenth street under this resolution for which the assessment is made is 310 feet in extent, and the assessment therefor is made upon lands of that frontage on the southerly side of Sixteenth street and upon a frontage of 80 feet on the northerly side of the street. Opening out of Sixteenth street between Market and Sanchez streets, and extending in a southerly direction to the next main street bounding the block, are Pond street and Prosper street, each being 31¼ feet in width, and the assessment for the work done on Sixteenth street opposite to these streets is assessed upon lots fronting upon them. The lot involved in this action fronts upon the northerly side of Sixteenth street, and the appellants contend that the assessment is void, for the reason that it appears upon its face that it is not made against all the land which the statute requires to be assessed for the improvement. Subdivision 11 of section 7 of the street improvement act (St. 1891, p. 204, c. 147) authorizes the city council to except from its resolution of intention "any of said work already done upon the street to the official grade." See, also, *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877. Subdivision 8 of the section declares that when any work is done upon either or both sides of the center line of any street for one block or less, and further work of the same class already done is ordered to be done to complete the unimproved portion of said street, the assessment to cover the total expenses of said work so ordered shall be made only upon the lands fronting the portions of the work so ordered. Subdivision 7 of the same section declares: "Where a subdivision street terminates in another street the expense of the work done on one half of the width of the subdivision street opposite the termination shall be

assessed upon the lands fronting on such subdivision street so terminating." Under these provisions the assessment for the work done upon the southerly half of Sixteenth street opposite to Pond street and Prosper street was properly made against the lands fronting on those streets, respectively.

Whether any portion of the work authorized under the resolution of intention had been "already done," as well as the extent to which it had been done, was a question of fact, to be determined by the superintendent of streets, subject to the right of appeal to the city council on the part of any one aggrieved by his determination. His act in making the assessment against only a portion of the frontage on each side of Sixteenth street was a declaration by him that the contract had been fully performed to his satisfaction, and is not open to controversy in any other tribunal. The mere omission from the assessment of one or more lots fronting upon the street does not of itself render the assessment void upon its face. *Buckman v. Landers*, 111 Cal. 347, 43 Pac. 1125. As Pond street and Prosper street terminate at the southerly line of Sixteenth street, the directions in section 7 of the street improvement act for assessments for work done upon the "crossings" of streets are inapplicable.

The assessment does not cease to be a single assessment for the work done under the contract, notwithstanding these provisions of the act which require the superintendent to assess a portion of the cost of the work done upon Sixteenth street upon a district embracing lands which do not front upon that street. The amount which, but for the intersecting streets, would be assessed upon that frontage of Sixteenth street is distributed over a larger area, but does not affect or enlarge the amount to be assessed against the lot described in the complaint or any of the lots fronting upon Sixteenth street.

The objection that the demand made upon the lot was for a greater sum than the defendants' share of the assessment for the work on Sixteenth street, or that it was increased by including therein a demand for work done at the intersections of Pond street and Prosper street, is not sustained by the record.

The appellants further object to the sufficiency of the engineer's certificate, on the ground that it does not state that the engineer or any one measured or surveyed the work, or had estimated the cost and expenses of the work, or that the work had been done according to the contract, plan, and specifications, or that it had been completed. The statute does not specify the character of the certificate which the engineer is to make. (*Gray v. Lucas*, 115 Cal. 430, 47 Pac. 354), but it makes it the duty of the superintendent of streets to determine whether the contractor has fulfilled his contract. The city

council may require the engineer to make an estimate of the cost and expenses of the work before passing any resolution for an improvement, but the engineer is not required to state these items in the certificate which he gives after the work is completed. The cost of the work to be included in the assessment is determined by the superintendent from the terms of the contract, aided, when necessary, by the certificate of the engineer. The certificate which was offered in evidence gives the measurements of the several species of work for whose cost an assessment is to be made upon the lands liable therefor, and states that the engineer found the work to the official line and grade. No objection was offered to the sufficiency of the certificate when it was offered in evidence, and on its face it complies with all the requirements of the statute.

The court did not err in excluding from evidence certain private contracts which the defendants had entered into with the plaintiff in May, 1897. The defendants could not oust the city council of jurisdiction to order the improvement of the street by entering into contracts of this nature, or prevent the contractor to whom a contract might be awarded by the council from enforcing an assessment for work done under such contract. If the defendants herein have sustained damage by reason of any act or omission on the part of the parties with whom they entered into the contract, their remedy must be sought elsewhere. Such damage cannot be made a defense to an action for the enforcement of the assessment. It may be added, as another reason for the inadmissibility of the contracts, that they were not for the same work as the contract under which the assessment was made, but included additional work and had never been performed.

The order appealed from is affirmed.

We concur: COOPER, J.; HALL, J.

2 Cal. App. 29

TOWLE et al. v. SWEENEY et al.

(Court of Appeal, First District, California.
Oct. 18, 1905.)

1. TRIAL—FINDINGS OF FACTS—AGREED CASE.

Though findings of fact are not necessary to the validity of a judgment in a case submitted for decision on an agreed statement of facts, the court is not thereby precluded from making such findings.

2. LIMITATION OF ACTIONS—PLEADING.

Limitations relied on must be specifically pleaded.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 678.]

3. LIMITATION OF ACTIONS—DETERMINATION OF ISSUE.

Where limitations are pleaded, the court is bound to determine the issue so raised from the facts connected with the transaction out of which the right of action arose, whether such

facts are presented in the form of an agreed statement or by evidence.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 733.]

4. SAME.

A finding in favor of a defense of limitations does not cease to be a conclusion of law by reason of being found among the findings of fact, but will be regarded according to its character, notwithstanding its misplacement.

5. MECHANICS' LIENS—BUILDING CONTRACTOR'S BOND—LIABILITY OF SURETY.

Where a building contractor's bond was conditioned that the contractors should fully pay to the person or persons performing labor or furnishing material the value of the labor or materials, and should be void if the contractors did so pay, etc., the bond was a collateral obligation, which was enforceable by materialmen only to the extent that their claim could have been enforced against the contractors.

6. SAME—CONTRACTS—LIMITATIONS.

Where materials were furnished to building contractors under an oral contract, the materialmen were barred by limitations from maintaining an action on the contractors' bond given to secure payment by them of claims for material, etc., after expiration of the time fixed for the maintenance of an action against the contractors on such oral contract.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by J. F. Towle and others against G. C. Sweeney and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Wickliffe Matthews, for appellants. W. H. Jordan, A. G. Eells, and Sheffield S. Sanborn, for respondents.

HARRISON, P. J. The firm of Gardner & Boyden, as contractors, entered into a contract with one Probert, as owner, for the erection of a dwelling house in San Francisco, and at the same time the defendants herein, as sureties, in connection with said contractors, as principals, executed a bond in the penal sum of \$1,500 to any and all persons who should perform labor or furnish materials to the contractors, conditioned that, if the said contractors "shall fully pay to the said person or persons performing labor or furnishing materials" the value of such labor or materials, said obligation should be void; otherwise, to remain in full force and effect. The plaintiffs herein furnished the contractors certain materials, which were used in the construction of the said dwelling house, and, the contractors not having paid for the same, brought the present action against the sureties to recover from them the value of the materials so furnished. The construction of the dwelling house was completed November 26, 1895, and the present action was commenced April 8, 1898. The defendants set up the statute of limitations (Code Civ. Proc. § 339, subd. 1) in their answer as a defense to the action, and the court found in their favor upon this issue, and rendered judgment accordingly, from which the plaintiffs have appealed.

1. At the trial the parties submitted the cause upon an agreed statement of facts. Thereupon the court filed its written finding of facts and conclusions of law, and entered judgment accordingly. Its finding that the plaintiffs' cause of action is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure is placed among the findings of fact, and it is urged by the appellants that, as the cause was submitted upon an agreed statement of facts, there should have been no finding of facts; and that, as the statute of limitations was not included in the agreed facts, the finding thereon must be disregarded, and was improperly considered by the court as a basis for its conclusions of law and judgment. While the findings of fact made by the court are not identical in form or language with the agreed statement upon which the case was submitted, it is not claimed by the appellants that there is any substantial variance in their effect, or that any fact found by the court, other than its finding upon the statute of limitations, is not supported by the facts stated in the agreed statement. Although findings of fact are not necessary to the validity of a judgment, where the case is submitted for decision upon an agreed statement of facts, yet the court is not thereby precluded from making such findings of fact. It may adopt the agreed statement as its own finding of facts, or it may make findings therefrom to correspond with the issues to be determined; and, as it is required to find only the ultimate facts in the case, it may find such ultimate facts from the probative facts set out in the agreed statement, as well as from evidence thereof. An agreed statement of facts is but a substitute for evidence of those facts, and in this respect differs from an "agreed case," which, under section 1138 of the Code of Civil Procedure, may be submitted for decision without any pleadings. Findings of fact must always have reference to the issues to be determined, and in considering their effect for determining the issues in a case the court may consider any provision or rule of law applicable to such determination. The statute of limitations is a provision of law rather than a fact; and, being a defense to the plaintiffs' right of action which must be specifically pleaded, it forms an issue which the court must determine from the facts connected with the transaction out of which the right of action arose, whether such facts are presented in the form of an agreed statement or by evidence. Whether a cause of action is barred by the statute of limitations is, like ownership, a mixed question of law and fact, and may be either, according to the manner in which it is presented. As a recital in the nature of a right or of a defense, it is a fact, while, as the determination of an issue in the cause pending before the court, it is a conclusion of law. *Richter v. Henningsan*, 110

Cal. 530, 42 Pac. 1077. It does not cease to be a conclusion of law by reason of being found among the findings of fact, and is to be regarded according to its character, notwithstanding its misplacement. *Savings Bank & L. Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922; *Burton v. Burton*, 79 Cal. 490, 21 Pac. 847; *Hamilton v. Delhi M. Co.*, 118 Cal. 148, 50 Pac. 378. The court, therefore, did not err in making a finding upon the defense of the statute of limitations set up by the answer of defendants, and rendering judgment accordingly.

2. Upon the facts found by the court, as well as by the agreed statement of facts, plaintiffs' cause of action against Gardner & Boyden was barred by the statute of limitations. The materials for which the plaintiffs seek to recover were furnished prior to September 19, 1895, and the present action was not commenced until April 8, 1898. The contract under which they were furnished was verbal, and its character and incidents, as a verbal contract, were not varied by reason of the bond set forth in the complaint. The obligation of Gardner & Boyden to the plaintiffs was not created by that instrument, nor is there in it any direct agreement with them on the part of Gardner & Boyden. The plaintiffs are not parties to the instrument, and the instrument itself is only collateral to any obligation that might arise in their behalf for materials thereafter furnished by them. It does not constitute a direct and independent obligation on the part of Gardner & Boyden to discharge every liability that may be afterwards incurred by them for materials, nor does it purport to vary or enlarge such liability, but merely provides that whatever obligation they may enter into for furnishing materials shall be discharged according to its terms. The condition in the instrument that it shall be void, if Gardner & Boyden "shall duly pay" the value of the materials, shows that such payment is to be made according to the terms under which the materials may be furnished. The obligation of the defendants as sureties for the payment by Gardner & Boyden for any labor or materials that might be furnished to them in the construction of the dwelling house is accessory and collateral to the obligation of their principals, and can be enforced against them only to the extent that the same obligation could have been enforced against Gardner & Boyden. *County of Sonoma v. Hall*, 132 Cal. 589, 62 Pac. 257, 312, 65 Pac. 12, 459; *Palge v. Carroil*, 61 Cal. 211; *Farmers' & M. Bank v. Kingsley*, 2 Doug. (Mich.) 403. By virtue of the principles governing the relation between principal and surety, the liability of the sureties is measured by that of the principal, and, unless the claim of the creditor can be enforced against the principal, it cannot be enforced against the surety. As his obligation is accessory to that of the principal, if the prin-

principal is not liable, he is not, for there can be no accessory if there is no principal; and the surety may avail himself of any defense to the claim that would have been available to the principal. There are certain well-recognized exceptions to this rule, but none of them exist in the present case. "It is of the essence of this contract that there should be some one liable as principal, and, accordingly, when one party agrees to become responsible for another, the former incurs no obligation as surety, if no valid claim whatever arises against the principal; whilst, on the other hand, the liability of the surety upon a claim that is good against the principal ceases so soon as such claim is extinguished." Chitty on Contracts (11th Am. Ed.) 738. In *Farmers' & M. Bank v. Kingsley*, supra, the Supreme Court of Michigan said: "It would be as difficult to conceive of a surety's liability continuing after the principal obligation was discharged as of a shadow's remaining after the substance was removed." See, also, *Brandt on Suretyship*, § 164 et seq.; *De Colyar on Guaranties*, 39; *Pothier on Contracts*, 229; *Hazard v. Irwin*, 18 Pick. 95; *Eising v. Andrews*, 68 Conn. 65, 33 Atl. 585, 50 Am. St. Rep. 75.

It follows from the foregoing that the defense of the statute of limitations which was available to Gardner & Boyden is also available to the defendants herein, and that the court properly rendered judgment in their favor. *County of Sonoma v. Hall*, 132 Cal. 589, 62 Pac. 257, 312, 65 Pac. 12, 459; *Auchampaugh v. Schmidt*, 70 Iowa, 642, 27 N. W. 805, 59 Am. St. Rep. 459; *Bridges v. Blake*, 106 Ind. 332, 6 N. E. 833. In *Whiting v. Clark*, 17 Cal. 407, and *Sichel v. Carrillo*, 42 Cal. 493, cited on behalf of appellants, the defendants, by the terms of their contract, became personally bound to the plaintiff, independent of the obligation of the principal debtor. In *Sichel v. Carrillo*, 42 Cal. 499, the court placed its decision upon the distinction between the statute of limitations, which takes from the plaintiff all remedy whatever against the principal debtor, and a statute which deprives him merely of a particular remedy—as in that case a remedy against the estate of a deceased person—leaving his right to other remedies unaffected thereby.

The judgment and order are affirmed.

We concur: COOPER, J.; HALL, J.

2 Cal. App. 61

NEWELL v. BRILL.

(Court of Appeal, Second District, California.
Oct. 24, 1905.)

1. MECHANIC'S LIENS—FORECLOSURE—ACTIONS—VARIANCE.

Where a complaint to foreclose a mechanic's lien alleged that the contractors agreed to do all the work and furnish all the materials to complete the plumbing work, according to the plans, for \$614, and the claim of lien recited that the work and materials necessary to do

the "plumbing work" were to be furnished, according to the plans, for \$614, a variance between the complaint and the contract, which required the contractors to do the "gas-fitting and plumbing in the building" for \$614, was not fatal under Code Civ. Proc. § 1187, requiring the claim of lien to contain "a statement of the terms, time given and conditions of the contract," etc.

2. SAME.

Where, in a suit to foreclose a mechanic's lien, nothing was allowed on account of extra materials, an alleged variance between the complaint and lien and the contract, relating solely to extra materials, was immaterial.

3. SAME—EXTRA WORK.

Where a mechanic's lien recited that during the progress of the work defendant ordered certain extra work and agreed to pay therefor the reasonable value of the materials furnished and labor performed, which was the sum of \$21.84, such allegation sufficiently showed that the order and agreement for such extra work, etc., was that of the defendant.

4. SAME—PLEADING—NEGATIVE PREGNANT—PROOF.

Where, in a suit to foreclose a mechanic's lien on an assigned claim, defendant's denial of the assignment was pregnant with the admission thereof, it was not necessary for plaintiff to prove the assignment.

5. SAME—PROPERTY—DESCRIPTION.

Where, in a suit to foreclose a mechanic's lien, the house subject to the lien was described, and the decree directed a sale only of the building and land on which it was situated, it was not material that the land necessary for the occupation of the building was not described.

6. SAME.

Where, in a suit to foreclose a mechanic's lien, the complaint referred to the claim of lien for a description of the property, and the claim contained a sufficient description thereof, the complaint was not objectionable for failure to contain a sufficient description.

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by W. D. Newell against William Brill. From a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Rehearing denied by Court of Appeal, November 23, 1905; by Supreme Court, December 22, 1905.

W. C. Batcheller, for appellant. Jones & Weller, for respondent.

GRAY, P. J. The plaintiff had judgment herein foreclosing a mechanic's lien, and the defendant appeals from the same and from an order denying him a new trial.

1. The contract of plaintiff's assignors, Newell Bros., provided that the firm would do the gas-fitting and the plumbing in the building for \$614. The complaint alleges that the Newell Bros. "agreed to do all of the work and furnish all materials necessary to complete the plumbing work in said building, according to the plans agreed upon between said parties," for an agreed price of \$614. The claim of lien recited that the work and materials necessary to do the plumbing work were to be done and furnished, "according to the plans and specifications agreed upon between said claimants

and said William Brill," for \$614. It is claimed that there was a material variance between the agreement above quoted on the one hand, and the claim of lien and the complaint on the other. We do not think this claim should be upheld. The mechanic's lien law is remedial, and should be liberally construed, with a "view to effect its objects and to promote justice." Code Civ. Proc. § 4. It may be true that the business of a gas-fitter is something separate and distinct from that of a plumber, and yet it must be admitted that there is a close kinship between the two occupations, so close, in fact, that in reading the complaint, and also the claim of lien, and noting that they both fix the price of the work and materials used in the plumbing at exactly the same figure that both the plumbing and the gas-fitting were to be done for under the terms of the contract, and that one firm was doing the whole of this work, it would be difficult to think otherwise than that the word "plumbing," as used in the lien and complaint, was intended to embrace all the work and materials mentioned in the contract. We do not think any person was, or could be, misled by the omission of the word "gas-fitting," and therefore are of opinion that this did not constitute a fatal variance, but that there was a substantial compliance with that part of section 1187, Code of Civil Procedure, which requires in the claim of lien "a statement of the terms, time given, and conditions of his contract."

2. Nor is there any material variance between the allegations of the complaint and lien, on the one hand, and the contract, on the other, in respect to the extra work and materials to be furnished. At the trial the complaint was amended by striking out the reference to "other materials." This was done, apparently, for the reason that there was no evidence of any "extra materials" having been furnished. As nothing was allowed in this connection on account of extra materials, and as the variance complained of related only to those extra materials, we can see no force in appellant's complaint in this regard.

3. The objection that the \$21.84 item might have been furnished by some one other than Newell Bros. to some one other than Brill, so far as the allegations of the claim of lien show, is without merit. The allegations of the complaint, as well as the evidence and findings, are to the effect that this extra work was done on the building at the request of Brill by the Newell Bros., and that Brill agreed to pay for the same. Reading the whole claim of lien together, it is apparent from it, also, that this extra work was done for Brill by plaintiff's assignors, and that is all that is necessary. The case in this respect is unlike the case of *Maders Flume Co. v. Kendall*, 120 Cal. 182, 52 Pac. 804, 65 Am. St. Rep. 177. In that case the

claim entirely failed to state the name of the person for whom the materials were furnished, and it was held that section 1187, Code of Civil Procedure, requiring such statement, was not complied with; but here the claim reads as follows: "That thereafter, * * * and during the progress of said work under said contracts, the said William Brill ordered certain extra work, and agreed to pay therefor the reasonable value of the materials furnished and labor performed; that the reasonable value of said labor and materials so done and furnished was and is the sum of \$21.84." It is reasonably plain that the above expression "so done and furnished" means done and furnished in accordance with the order and agreement of William Brill previously referred to, and from this the "name of the party" for and to whom it was furnished appears.

4. The attempted denial, in the answer, of the assignment to and ownership of the claim in plaintiff, is pregnant with an admission of those facts, and it was unnecessary, therefore, to introduce any evidence on the subject of the assignment.

5. It is claimed that there is an uncertainty of description in the complaint as to the property sought to be charged with the lien, and that the property convenient for the use and occupation of the house is not designated. The house is certainly described, and the case should not be reversed because it does not appear how much land is necessary for its occupation. *Sidlinger v. Kerkow*, 82 Cal. 45, 22 Pac. 932. The decree directs the sale only of the building and the land on which it is situated. *Sachse v. Auburn*, 95 Cal. 651, 30 Pac. 800. Besides, the claim of lien contains an accurate description of the lot, "together with the building thereon," upon which the lien is claimed, and a reference to this may be had to obviate uncertainty in other directions. It is alleged in the complaint that the claim of lien contains a description of the property sufficient for identification, and this allegation is borne out by an inspection of the claim referred to. The complaint was therefore sufficient in the matter of description.

Some other objections are urged, but after examination we consider them of not sufficient importance to warrant a discussion.

The judgment and order appealed from are affirmed.

We concur: SMITH, J.; ALLEN, J.

REED v. SEHON.

2 Cal. App. 55

(Court of Appeal, Second District, California.
Oct. 23, 1905.)

OFFICERS—ELIGIBILITY—OTHER OFFICE—RETIRED ARMY OFFICER.

Rev. St. U. S. §§ 1245-1259 [U. S. Comp. St. 1901, pp. 885-889], provide for the retirement of army officers. Section 1259 authorizes the assignment of retired officers to duty at the

Soldiers' Home, and by subsequent enactments retired officers may be detailed for service with the militia of the several states or in colleges and military schools, and in time of war may be employed on active duty other than in command of troops. Act March 2, 1903, c. 975, 32 Stat. 927, 932 [U. S. Comp. St. Supp. 1905, p. 194]; Act April 23, 1904, c. 1485, 33 Stat. 259; Act Nov. 3, 1893, c. 13, 28 Stat. 7 [U. S. Comp. St. 1901, p. 863]; Act Aug. 6, 1894, c. 228, 28 Stat. 235 [U. S. Comp. St. 1901, p. 864]; Act April 21, 1904, c. 1403, 33 Stat. 225 [U. S. Comp. St. Supp. 1905, p. 190]. *Held*, that a retired army officer is not, by reason of such retirement, holding an office within State Const. art. 4, § 20, making any person holding any lucrative office under the United States ineligible to any civil office of profit under the state.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Army and Navy, § 27; vol. 37, Cent. Dig. Officers, § 43.]

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Contest by D. C. Reed against John L. Sehon over the office of mayor of the city of San Diego. From a judgment in favor of contestor, contestee appeals. Reversed.

Rehearing denied by Supreme Court December 22, 1905.

J. B. Mannix, H. S. Utley, Hunsaker & Britt, and E. W. Britt, for appellant. Stearns & Sweet and F. W. Stearns, for respondent.

SMITH, J. This is a contest of the election of defendant to the office of mayor of the city of San Diego, on the ground of ineligibility. Code Civ. Proc. § 1111, subd. 2. The special ground assigned is that at the time of the election "the defendant held and now holds an office in the army of the United States, to wit, the office of first lieutenant of infantry * * * retired with the rank of captain," etc. The principal question involved in the case is whether the position of the defendant as retired officer is a "lucrative office" within the meaning of section 20, art. 4, of the Constitution of this state; or, rather, whether it is an "office," for, if so, it is undoubtedly lucrative. The court held that the case came within the application of the constitutional provision, and judgment was entered annulling and setting aside the defendant's election. The appeal is from the judgment.

The provision of the Constitution referred to, and the provisions of the Revised Statutes of the United States [U. S. Comp. St. 1901, pp. 885-889] referring to retired officers, are as follows:

"Sec. 20. No person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under this state: provided, that officers in the militia, who receive no annual salary, local officers, or postmasters whose compensation does not exceed five hundred dollars per annum, shall not be deemed to hold lucrative offices."

"Sec. 1245. When any officer has become

incapable of performing the duties of his office, he shall be either retired from active service, or wholly retired from the service by the President, as hereinafter provided."

"Sec. 1251. When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of service, and such decision is approved by the President, said officer shall be retired from active service and placed on the list of retired officers.

"Sec. 1252. When the board finds that an officer is incapacitated for active service, and that his incapacity is not the result of any incident of the service, and its decision is approved by the President, the officer shall be retired from active service, or wholly retired from the service, as the President may determine. The names of officers wholly retired from the service shall be omitted from the Army Register."

"Sec. 1255. Officers retired from active service shall be withdrawn from command and from the line of promotion.

"Sec. 1256. Officers retired from active service shall be entitled to wear the uniform of the rank on which they may be retired. They shall continue to be borne on the Army Register, and shall be subject to the rules and articles of war, and to trial by general court-martial for any breach thereof.

"Sec. 1257. When any officer in the line of promotion is retired from active service, the next officer in rank shall be promoted to his place, according to the established rules of the service; and the same rule of promotion shall be applied, successively, to the vacancies consequent upon such retirement."

"Sec. 1259. Retired officers of the army may be assigned to duty at the Soldiers' Home upon a selection by the commissioners of that institution, approved by the Secretary of War; and a retired officer shall not be assigned to any other duty."

By subsequent statutory provisions, cited in respondent's brief, retired officers may be detailed also for service with the militia of the several states (Act March 2, 1903, c. 975, 32 Stat. 927, 932 [U. S. Comp. St. Supp. 1905, p. 194]; Act April 23, 1904, c. 1485, 33 Stat. 259), or in colleges, etc., and military schools (Act Nov. 3, 1893, c. 13, 28 Stat. 7 [U. S. Comp. St. 1901, p. 863]; Act Aug. 6, 1894, c. 228, 28 Stat. 235 [U. S. Comp. St. 1901, p. 864]; Act April 21, 1904, c. 1403, 33 Stat. 225 [U. S. Comp. St. Supp. 1905, p. 190]), and in time of war may "be employed on active duty, other than in command of troops."

The defendant, prior to his retirement was first lieutenant of the Twentieth United States Infantry, and there can be no doubt that by his retirement the office he had previously held was vacated. The question, then, is whether there is another office corresponding to his position as a retired officer; and this question we think must be answered

in the negative. For, though the word "office" may be used in varying senses, the term in any proper sense implies, as indicated by its etymology, a duty or duties to be performed. Other elements, such as the public nature of the duty and its permanence, may be necessary to constitute a public office; but this element—that is, duty or service to be performed—is an essential part of the definition. Marshall, C. J., in *U. S. v. Maurice*, Fed. Cas. No. 15,747, cited, *Saunders v. Haynes*, 13 Cal. 155. The term "office" may, indeed, like other terms, be used in a sense other than the proper one, but the presumption is, unless the contrary appears, that the proper sense was intended, and here we see no reason to suppose that it was not.

It also seems clear to us that, under the provisions of the statute cited, the position of the defendant is a mere sinecure without any duties attached to it; and hence that it cannot properly be called an office. It is true that a retired officer may be detailed to perform the duties of the several offices or employments specified in the statutory provisions that have been cited, such as an officer at a soldiers' home, or as a professor, or in connection with the militia of the state, or in the military service in time of war; but these are mere offices or employments to which he may be appointed; and until they happen no service can be required of him. Nor can the mere fact that he is subject to the remote contingency of being thus employed be regarded as such a duty as is contemplated in the definition. All this is apparently implied in the expression "retired officer," which may be regarded as fairly synonymous with the words "ex-officer," or "ci-devant officer," and implies that he is no longer an officer in the proper sense of the term—just as when we speak of a brevet captain, we mean one who—unless specially assigned command by the President—is not a captain, but merely has the title. In the same way we speak of a transfer as an executed contract, meaning something which has been, but is no longer a contract as defined in the Code. Civ. Code, § 1549. We see no reason, therefore, in the language used, to attribute to the constitutional provision an intention of disfranchising a class of eminently deserving men and depriving the state of their services.

We are of the opinion, therefore, that the case does not come within the provision of the Constitution cited; and to what has been said may be added that this construction of the provision would seem to be required by the reason for its enactment, which would seem to be the obvious consideration that an officer of the state, who is presumably employed to devote himself exclusively to the duties of his office, should not be permitted to assume other duties incompatible with his own. This was the view taken of the case by the court of appeals of New

York in *People v. Duane*, 121 N. Y. 367, 24 N. E. 845, and this view is also supported in some degree by the decision of the court of claims in *Geddes v. U. S.*, 38 Ct. Cl. 428. In the case of *State v. De Gress*, 53 Tex. 387, the question involved here, and in *People v. Duane*, was decided differently, but without discussion. In other cases cited by the respondent, it was held that a retired officer was an "officer" within the sense of the several statutes involved (In re Tyler, 18 Ct. Cl. 25; In re Winthrop, 31 Ct. Cl. 35; *Franklin v. U. S.*, 29 Ct. Cl. 6; *U. S. v. Tyler*, 105 U. S. 244, 26 L. Ed. 985; *Wood v. U. S.*, 107 U. S. 414, 2 Sup. Ct. 551, 27 L. Ed. 542); and it is claimed, in effect, on the authority of these cases, that if there be an officer there must be an office. But the contention we think is untenable. The terms "officer" and "office" are, indeed, paronymous, and in their original and proper sense are to be regarded as strictly correlative. But both terms, like most other terms, are used in various senses; nor do the variations of the one always correspond with the other. Thus, it sometimes happens that the word "officer" is used without reference to the original and proper sense; and this we think was the case in the statutes involved in the cases cited, and is the case when the term is applied to retired officers.

The judgment appealed from is reversed, and the case remanded, with directions to the lower court to dismiss the proceeding.

We concur: GRAY, P. J.; ALLEN, J.

2 Cal. App. 36

WYMAN v. HOOKER.

(Court of Appeal, Second District, California.
Oct. 18, 1905.)

1. CONTRACTS—PERFORMANCE—COMPLAINT.

Where, in an action on a completed contract, the complaint alleged that the contract was fully performed on the contractor's part, and contained a copy of the contract attached as an exhibit, the complaint, in the absence of a special demurrer, was not fatally defective for failure to allege that the work was done to the satisfaction of the architect or that the latter gave the required certificate for the last payment.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1637.]

2. SAME—FINDINGS—EVIDENCE.

Where, in an action on a building contract, the written certificate for final payment, duly signed by the architect, was introduced in evidence, and it also appeared that the owner went into possession of the building, a finding that the work was accepted by the architect, and that defendant by his tenants took possession of the same and ever since occupied it, was justified.

3. TRIAL—SPECIAL FINDINGS—ISSUES.

Special finding held responsive to the issue of performance of the contract.

4. CONTRACT—AMOUNT DUE—LIENS—DEDUCTION.

Where, at the commencement of an action by a building contractor for a balance due, there remains a sum due from the contractor for

materials which constituted a lien on the property, which was paid by defendant, the amount so paid, including attorney's fees and expenses, was properly allowed as a counterclaim against the amount otherwise due the contractor, as provided by Code Civ. Proc. § 1193.

5. SAME—ARCHITECT'S CERTIFICATE—FAILURE TO PROCURE.

Where a builder completed his contract, and the owner took possession after the acceptance certificate had been executed by the architect and the contractor had done everything necessary to entitle him to a certificate for the final payment, he was entitled to recover the balance due, notwithstanding the architect's wrongful withholding of such final certificate.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1310.]

6. SAME—COMPLAINT.

Where an architect wrongfully withheld a contractor's final payment certificate after completion of the work, it was not necessary that the contractor, in the complaint to recover the balance due, should allege any excuse for failing to obtain such certificate, but he was entitled to allege and prove the full performance, and show that such certificate was wrongfully withheld.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1637.]

7. SAME—EXTRA WORK—WRITTEN STIPULATION—ESTIMATES—WAIVER.

Where extra work on a building was performed with the knowledge and consent of the owner and his agent, and they waived a written stipulation and a separate written estimate provided for by the contract, by orally agreeing to continue the work without such estimates, the owner could not thereafter repudiate the work because the estimates were not furnished.

8. TRIAL—EVIDENCE—REBUTTAL.

Where, in an action on a building contract, the architect testified that a floor in the building was defective, the contractor was properly permitted to testify in rebuttal that he did not pay his subcontractor for the floor until the architect "passed on it, said it was all right, and accepted it."

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Elliott B. Wyman against John D. Hooker. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Rehearing denied by Supreme Court, December 16, 1905.

J. W. McKinley, for appellant. Borden & Carhart, for respondent.

GRAY, P. J. This is an action to recover the sum of \$2,445.66, alleged to be due upon a certain builder's contract, and to foreclose a mechanic's lien securing the same. The plaintiff had judgment for \$1,065.57, and for costs, and a decree of foreclosure, from all of which, and from an order denying a new trial, the defendant appeals.

The builder's contract provides that the work shall be done under the direction and to the satisfaction of the architect. It further provides for payments as follows: "\$2,000 when walls are up ready to receive the trusses; \$2,000 when roof on, copings

of wall cemented and rear corrugated iron finished; \$2,127.50 when completed and accepted; the final payment of \$2,042.50 shall be made 35 days after the completion and acceptance of the work." It was also provided: "That in each case of the said payments a certificate shall be obtained from and signed by said John Parkinson, architect, to the effect that he considers the payment properly due; but no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials."

1. Appellant contends that the complaint contains no allegation that the work was done to the satisfaction of the architect, or that the architect gave the certificate as to the last payment mentioned above. The complaint did state that the contract was fully performed on the part of the contractor, and contained a copy of the contract attached as an exhibit. The answer denied this averment of performance, and there was no special demurrer to the complaint for uncertainty. The allegations of the complaint in this respect were sufficient. Code Civ. Proc. § 457; *Moritz v. Lavelle*, 77 Cal. 12, 18 Pac. 803, 11 Am. St. Rep. 229. If the appellant did not regard the complaint as sufficient in this respect, he should have demurred specially for this reason, and the defect, if it was a defect, could have been remedied by amendment. He will not be heard on appeal as to an objection of this character, as such an objection is deemed to be waived when not taken by demurrer to the complaint in the court below. Code Civ. Proc. § 434.

2. The court finds: "That the said contract and the building therein agreed to be constructed including the said additional work, was fully completed and finished by the said contractor on the 17th day of May, 1902; and was on said day accepted by the said architect named in the said contract, and that said architect then and there issued his certificate for the completion payment in accordance with said contract. That on June 7, 1902, the defendant, Hooker, filed in the office of the county recorder of Los Angeles county, a notice of the completion of the said building in the words and figures set forth in paragraph 8 of the said answer; that the said defendant, Hooker, by his tenants took possession of the said building on May 19, 1902, and have ever since occupied same." We think there was evidence to support every part of this finding. The written certificate for the completion payment, duly signed by the architect, was placed in evidence. And this certainly was some substantial evidence that the architect was satisfied with the building, and followed as it was by the owner going into possession

of the building, it was evidence also of acceptance of the building on the part of the owner, as well as the architect. It is true that the architect made some oral declaration, both before and after the giving of this certificate, showing that he was not satisfied with the building, but these declarations could hardly be taken by the trial judge as impeaching the written document certifying that the completion payment was due, which document seems to have been executed with full knowledge of the exact condition of the building. Besides, it may well have been that the "wall out of plumb," and other defects complained of by the architect, were considered, if not by the architect himself, at least by the trial judge, as the direct fault of the plans and specifications drawn by the architect, and in no way the fault of the builder. The builder was there to follow the plans and specifications, and it would be unjust in the extreme to allow the architect to interpose an objection, based on his own fault, between the builder and compensation for his work. We also think that the quoted finding was responsive to the issue already referred to, as to the performance of the contract.

3. The contract also provided that: "The contractor shall, on or before 35 days after the acceptance of the work herein contracted for, cancel and release the said work, premises, or property from all claims that may have accrued against the same in carrying out the work herein contracted for." And it is shown that at the commencement of the action some \$800 and upwards was yet due from the contractor, and constituted a lien on the property, for materials put into the building. But it was also shown that this lien was paid by defendant, and the whole thereof, including attorney's fees and all expenses connected with it, was allowed as a counterclaim, and deducted from the amount otherwise due the contractor. This was the proper disposition of the matter, as directed by section 1193 of the Code of Civil Procedure (see *Adams v. Burbank*, 108 Cal. 646, 37 Pac. 640), and is all that defendant has a right to demand. He has lost nothing on account of that lien, and as the matter has been disposed of as directed by the law, he cannot be heard to complain. It was not here agreed, as in *Holmes v. Richet*, 56 Cal. 316, 38 Am. Rep. 54, "that if any lien upon the property shall exist at the time when an installment will be otherwise due, the existence of such lien shall constitute a good and sufficient reason for the nonpayment thereof;" hence, that case is not inconsistent with the position here taken, nor is there anything inconsistent herewith to be found in the case of *Loup v. California S. R. R. Co.*, 63 Cal. 101, or in any of the other cases cited by appellant.

4. To be sure, the last payment was to be made upon the obtaining of the certificate of the architect that the amount was due.

But where it is shown, as here, that the builder had completed his contract, and the owner had gone into possession after the acceptance certificate had been executed, and the contractor had done everything necessary to entitle him to a certificate for the final payment, the defendant will not be allowed to defeat the contractor's right of recovery by a wrongful withholding of the final certificate on the part of the architect. It is not to be presumed that the parties intended that money rightfully belonging to the contractor should be forfeited upon the arbitrary will or caprice of the architect in withholding the final certificate. *Antonelle v. Lumber Co.*, 140 Cal. 315, 73 Pac. 966. Nor was it necessary that any excuse for obtaining this final certificate should be set out in the complaint. It was sufficient in that behalf to allege the performance of the contract on the part of the contractor, and thereafter to prove such performance. If he performed his contract he was entitled to the final certificate, and he could show, as he did, that it was wrongfully withheld without alleging it specifically. Moreover, it does not appear that any objection of this nature was urged at the trial, but, on the contrary, the evidence showing that obtaining the final certificate was excused by the arbitrary and inexcusable actions of the architect, came in without objection and as if it was all perfectly proper under the pleadings. The findings also support the judgment in this regard, because they show that the contractor did everything under the contract required to entitle him to the final certificate and payment of what was unpaid.

5. That the plaintiff was the assignee and owner of the claim sued on is plainly apparent from the evidence. The unaccepted order in favor of F. O. Wyman for this claim did not amount to an assignment of the same, nor did it in any way affect the subsequent assignment of the whole claim made to this plaintiff after the lien was filed. F. O. Wyman testified that there was no assignment to him, but a mere order, and as he is the chief party interested, and the only one that can be hurt by a holding that the order was not an assignment, we think his statement of the transaction and his view of what the parties intended ought to control.

6. The evidence showed that the extra work on the building was done with the knowledge and consent of defendant and his agent, and that they waived the written stipulation that a separate written estimate of extra work should be submitted, by orally agreeing to and countenancing the work without written estimates. Had it not been for defendant's consent thus given, the work would not have been thus done. He will not now be permitted to repudiate work done in the manner that he consented to, on any ground that it was not done in accordance with a previous written agreement.

7. There was no error in allowing the contractor to testify that he did not pay his subcontractor for the floor until the architect "passed on it, said it was all right and accepted it." This testimony was given in rebuttal, and tended to affect the weight of the architect's previous testimony, to the effect that the floor was defective, and was proper for this reason, if for no other. Some other objections are urged by appellant, but they are deemed not of sufficient importance to warrant special notice.

The judgment and order are affirmed.

We concur: SMITH, J.; ALLEN, J.

2 Cal. App. 88

FAY v. STUBENRAUCH et al.

(Court of Appeal, Third District, California.
Oct. 26, 1905.)

1. MORTGAGES—FORECLOSURE—CONVEYANCE TO PURCHASER—MISDESCRIPTION OF PARTIES.

One "M. Q." being a party to a suit to foreclose a mortgage, the decree misdescribed her as "A. M. Q."; but, pending appeal an order was made by the trial court reciting a clerical misprision in the decree in the insertion of the initial "A." in the name of such party, and directed that such initial be stricken out wherever it appeared therein. The decree was corrected, and thereafter affirmed, after which the property was sold by a commissioner who referred in his certificate of sale and deed to "A. M. Q." as one of the defendants. *Held*, that there was no judgment against A. M. Q., eo nomine, and the commissioner being directed to execute the corrected decree did not invalidate his acts in so doing by misdescribing one of the defendants in the title of the cause.

2. JUDGMENT—AMENDMENT—CLERICAL MISPRISION—EFFECT.

The amendment of a decree with reference to the name of a party to correct a clerical misprision therein, and make it conform to the name of the party who was in fact served with summons, did not constitute the judgment a new and different one from that originally rendered.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 632.]

3. MORTGAGES—FORECLOSURE—RETURN—DEED—IMPEACHMENT.

A commissioner appointed to enforce a mortgage foreclosure decree cannot impeach his return and deed on an application for a writ of assistance.

4. SAME—COMMISSIONER'S ACTION—COLLATERAL ATTACK.

The action of a commissioner appointed to enforce a foreclosure decree in making a return of the sale and deed pursuant thereto is not subject to collateral attack on an application of the purchaser for writ of assistance.

5. ASSISTANCE, WRIT OF—SCOPE.

A writ of assistance is a process issued by a court of equity to enforce its decree; the scope of the writ being coextensive with the court's jurisdiction to hear and determine the rights of the parties.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assistance, Writ of, § 1.]

6. MORTGAGES—FORECLOSURE—WRIT OF ASSISTANCE—ISSUES—TITLE TO PROPERTY.

On an application for a writ of assistance by a purchaser at a mortgage foreclosure sale, the title to the property cannot be litigated.

7. SAME—RIGHTS OF PARTIES.

Where, on an application for a writ of assistance by a purchaser of property under a foreclosure decree, it appeared that L. claimed title under a deed made by a party defendant to the foreclosure suit, after suit brought and the filing of a lis pendens, and that he purchased with knowledge of the pendency of the action, his tenant was estopped to plead such title to defeat the writ.

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by Susan M. Fay against Henrietta Stubenrauch and others. From an order directing the issuance of a writ of assistance, M. R. Lunt appeals. Affirmed.

W. H. Barrows, for appellant. F. L. Coombs and Percy S. King, for respondent.

CHIPMAN, P. J. Writ of assistance. Bank of Napa is the holder of a commissioner's deed under a foreclosure sale in the above-entitled action. The foreclosure suit was commenced June 18, 1899, and lis pendens duly recorded on that day. One of the defendants named in the complaint as claiming some interest in the property, was Mrs. M. Quinn. The complaint alleged that since the month of December, 1898, Mrs. M. Quinn has been, and now is, in possession of the premises. Return of summons was made showing service on Mrs. M. Quinn. The decree of foreclosure was duly made and given on April 24, 1901, and recites that all the defendants made default, and that their default was duly and regularly entered. In the decree one of the defendants was described as Mrs. A. M. Quinn (the only one of the name of Quinn mentioned). Mrs. A. M. Quinn, on May 16, 1901, appealed the case to the Supreme Court. Thereafter, and pending the appeal, Mrs. A. M. Quinn conveyed the premises to one S. P. Lunt, who leased to appellant, M. R. Lunt. Thereafter Mrs. Quinn died, and S. P. Lunt, on application, was substituted in her place and stead. *Fay v. Stubenrauch*, 138 Cal. 656, 72 Pac. 156. While the appeal was pending in the Supreme Court, an order was made by the trial court, on motion of plaintiff's attorney, "reciting that a clerical misprision had been made in the decree of foreclosure in the insertion of the initial 'A.' before the initial 'M.' in the name of Mrs. M. Quinn, the defendant in said action, and directing that such initial 'A.' be stricken out wherever it appeared therein." The decree was affirmed January 12, 1904 (*Fay v. Stubenrauch*, 141 Cal. 573, 75 Pac. 174), and the commissioner made return dated April 28, 1904, that he duly sold the property on April 24, 1904, to Bank of Napa County, and on October 27, 1904, he executed his deed as such commissioner to the bank. It appears that in his certificate of sale, and his deed subsequently executed, he states the parties to the action and refers to Mrs. A. M. Quinn as one of the defendants. The affidavit of Edward S. Bell, used at the hearing of this

petition, states that "Mrs. M. Quinn, one of the defendants in said cause, was also known as and called Mrs. Annie M. Quinn and A. M. Quinn, and is the same person named as grantor in, and who executed a deed dated May 20, 1901, to one S. P. Lunt, which said deed was recorded August 20, 1902, in Book 73 of Deeds, at page 111, of the records of Napa county." This is the deed under which said S. P. Lunt claims title. At the hearing it was shown by the affidavit of S. P. Lunt: "That at the time this action was commenced and for a long time prior thereto, one Annie M. Quinn was the owner of and in the actual possession of all of said lands (the lands in question) and then and there claimed the same in her own right and adversely to all the world and not under or in subordination to the title of any of the defendants in said action; that said Annie M. Quinn was not then or there the grantee, agent, tenant, or successor in interest of any of the said defendants, and has never at any time so been—all of which was well known to plaintiff at the time this action was commenced; that said Annie M. Quinn was not a party to said action and never appeared therein." Affiant then sets forth the fact of her having conveyed the property to him, his possession thereunder, his lease to appellant, and the latter's possession. Appellant, in a deposition used at the hearing, deposed that the land was in fact sold by said commissioner to E. S. Bell, one of the attorneys for plaintiff, and was not sold to said bank as recited in said commissioner's deed, but that said Bell was at the sale acting for plaintiff in the action, and not for said bank; that no certificate of sale was made, or return thereof until October 25, 1904, six months after the date of said sale (the certificate is dated April 26, 1904), and that said commissioner signed the return herein and executed said deed to said bank "solely at the dictation of said Bell" and without any knowledge that the bank "had any connection with the matter, save that which was then and there received by him verbally from said Bell." That "nothing whatever was then or there or ever thereafter paid to or received by said commissioner for the said property." Commissioner Gunn testified that he sold the property on April 26, 1904, at public auction, and that at said sale Edward S. Bell, an attorney at law, bid the sum of \$7,855.73 for said property, and that he "then and there declared the said property sold to said bidder for the sum so bid." He further testified that said Bell did not, until October 26, 1904, inform witness that he made said bid for any person other than himself, and that witness made the return of sale, the certificate of sale, and deed under instructions from said Bell, and from him received the receipt for \$7,813.48 (amount of judgment and interest, less costs) signed by plaintiff by her attorneys, Bell, York &

Bell, but that no money passed through witness' hands in the transaction. The return of Commissioner Gunn showed that this sum had been credited on the judgment, and plaintiff so acknowledged in her receipt attached thereto. It also appeared that the commissioner's deed was exhibited to M. R. Lunt, and possession demanded, which was refused. Upon this state of facts, appellant makes several contentions.

1. It is claimed that the judgment originally entered against Mrs. A. M. Quinn was void, because she was not a party to the action (citing *Houghton v. Tibbets*, 126 Cal. 57, 58 Pac. 318), and that it was so decided on the appeal (141 Cal. 573, 75 Pac. 174, supra). It is therefore urged that the pretended sale under said judgment, and the deed issued by the commissioner were void. This contention cannot be maintained. The judgment was corrected as above shown, and was affirmed; there was, therefore, no judgment against Mrs. A. M. Quinn, *eo nomine*. The commissioner, by order of the court, was directed to execute the corrected judgment, and no other. In doing so he did not invalidate his acts by misdescribing one of the defendants. The giving of the title of the cause was simply to identify it as the one under which he was proceeding, and the identification was sufficient.

2. The claim that the amendment of the judgment "had the effect of making a new and different judgment" is equally untenable. The purpose of the amendment was to correct a clerical misprision, and in no material respect affected the judgment; its object was to make it conform to the fact that Mrs. M. Quinn was the party defendant who was served with summons. 141 Cal., 75 Pac., supra.

3. It is claimed that the neglect of the commissioner to make prompt return of sale, and his return as finally made and deed pursuant to the sale, being contrary to the fact as shown by his testimony, rendered the whole proceeding void. We do not think the commissioner should be permitted to impeach his return and his deed in an application for a writ of assistance. Nor can appellant be heard, in this proceeding, to question the regularity of the commissioner's action by way of collateral attack upon the validity of the deed.

4. The principal point made by appellant arises out of his contention that he holds possession under S. P. Lunt, the successor in interest of Mrs. A. M. Quinn; that neither of these persons was a party or privy to the judgment, and neither of them entered into possession under any of the defendants in the action, and, therefore, neither of them can be dispossessed by a writ issued under the judgment. At the hearing, the contradicted fact appeared, and we think, properly by affidavit, that Mrs. M. Quinn and Mrs. A. M. Quinn, sometimes called Annie M. Quinn, are one and the same person, and the

complaint in the action averred that Mrs. M. Quinn was then in possession. It is true that Lunt made affidavit that Mrs. A. M. Quinn was not a party to the action; and this he might aver because no defendant by that name was known to the complaint or judgment. But this is not a denial of the fact that Mrs. M. Quinn, who was a defendant and was duly served with summons, is the same person as Mrs. A. M. Quinn, and no claim is made in appellant's brief that they were not the same. If this is not the fact it would have been a very simple matter to have so shown at this hearing. When the case was on appeal before the Supreme Court, the points decided were that the lower court had the right to correct the clerical mispulsion above noted, and that when the correction was made, the judgment stood against Mrs. M. Quinn. Nothing then appeared of record, however, to show that Mrs. M. Quinn and Mrs. A. M. Quinn were the same person, nor did the court adjudge that there were two different persons of these respective names. No such question arose. Appellant disputes the relevancy of the evidence showing this identity, and, furthermore, claims that at most it but raises an issue of fact which the trial court could not try upon this motion. The relevancy of the evidence is quite apparent. If there was but one person, and that person was a party defendant duly served with summons, her grantee, under another name, with knowledge of the action, should not be permitted to defeat the writ. The inquiry as to this fact did not raise an issue involving title. The inquiry went only so far as to show that Lunt was claiming under a defendant by another name than that applied to her in the action, and thus attempting to defeat the writ. As it now appears that Lunt claims under a deed made by a party defendant after the action was commenced, and with knowledge of its pendency, is his tenant in a position to defeat the writ by an assertion of such title, or should he not be remitted to his action where title may be tried?

This writ is a process issued from a court of equity to enforce its decree, and its power to issue the writ results from the principle that jurisdiction to enforce a decree is co-extensive with jurisdiction to hear and determine the rights of the parties—that the court may do complete justice by declaring the right and enforcing a remedy for its enjoyment. The writ has been in common use in the courts of this state, in foreclosure cases, since *Montgomery v. Tutt*, 11 Cal. 190. The proceeding to obtain possession through the operation of this writ is summary in its nature, and it has been frequently held that title cannot be litigated in this way, or the proceeding converted into a trial of title. *Landregan v. Peppin*, 94 Cal. 465, 29 Pac. 771. Against whom the writ will issue, it was said, in *Burton v. Lies*, 21 Cal. 88: "Such

writ can only issue against the defendants in the suit, and parties holding under them who are bound by the decree." See, also, *Harlan v. Rackerby*, 24 Cal. 561; *Steinbach v. Leese*, 27 Cal. 295; *Frisbie v. Fogarty*, 34 Cal. 11; *Tevis v. Hicks*, 38 Cal. 234; *Henderson v. Tucker*, 45 Cal. 647. It was held in *Enos v. Cook*, 63 Cal. 175, 3 Pac. 632, that the legal or equitable rights of persons not parties to a foreclosure suit, cannot be adjudicated upon application for a writ of assistance. In *Kirsch v. Kirsch*, 113 Cal. 56, 45 Pac. 164, the court said: "The reason for the issuance of the writ is to give effect to rights awarded by the judgment. It should not and cannot operate to establish in the one party, or to destroy in the other, any rights to the property independent of those determined by the judgment." Hence, as has been held, the execution cannot exceed the decree, the writ can issue only against a party bound by the decree. *Terrell v. Allison*, 21 Wall. 289, 22 L. Ed. 634; *Howard v. Railway Co.*, 101 U. S. 837, 25 L. Ed. 1081; *Boyd v. U. S.*, 116 U. S. 625, 6 Sup. Ct. 524, 29 L. Ed. 746. See, also, extended note to *Wilson v. Polk*, 13 *Smedes & M.* 131, 51 Am. Dec. 151; 2 *Ency. Pl. & Pr.* p. 975. In *Landregan v. Peppin*, supra, it was held that the defendant could not defeat the writ of possession by showing that since the date of the judgment he had purchased an outstanding title. The court said: "Defendant now claims a right to the possession, acquired subsequently to this adjudication. It is sufficient to say, the court cannot determine the merits of defendant's claim upon this application. This is a proceeding upon affidavits, and no question of title can be litigated in this way. This is a hearing upon a motion, and a motion cannot be converted into a trial." *Harlan v. Rackerby*, supra, was a case where the mortgagor conveyed the premises during the pendency of the suit, and the writ was refused because the purchaser had no actual or constructive notice of the suit. Clearly the writ would have issued had the purchaser taken from a party defendant or privy with notice. *Baker v. Pierson*, 5 Mich. 456.

If Lunt has a title not adjudicated in the action, the courts are open to him and he may there establish such title. This proceeding does not determine title, nor are we to be understood as deciding the fact as to the identity of the person or persons known as Mrs. M. Quinn and Mrs. A. M. Quinn. What we hold is that at this hearing this identity was shown by uncontradicted evidence and that the writ was properly issued. Should the fact be otherwise, nothing herein determined may be regarded as estopping Lunt or his grantee from so showing in any action commenced wherein title may be tried.

The order is affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

2 Cal. App. 120

HOEY v. HECHTMAN.(Court of Appeal, First District, California.
Oct. 30, 1905.)**HUSBAND AND WIFE—NECESSARIES—HUSBAND'S LIABILITY—COMPLAINT.**

Civ. Code, § 174, provides that, if a husband neglects to make adequate provision for his wife's support, any other person may in good faith supply her with articles necessary for her support and recover the reasonable value thereof from the husband. *Held*, that a complaint alleging that defendant was indebted for goods, wares, and merchandise furnished to his wife at her request, and that such merchandise was common necessities of life and necessary for her support and maintenance, was insufficient for failure to allege that the articles furnished were "necessary for her support" and that defendant had neglected to make adequate provision therefor.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by John A. Hoey against A. J. Hechtman. From a judgment in favor of defendant, plaintiff appeals. Reversed.

William M. Sims, for appellant. William B. Craig, for respondent.

HALL, J. This is an appeal from a judgment upon the judgment roll. The complaint is in seven counts identical in form; each being for goods sold and delivered. The second allegation in each count is that: "Defendant and Carrie C. Hechtman now are, and at all times herein mentioned have been, husband and wife." The third allegation of the first count is as follows: "That on or about the 22d day of November, 1902, defendant was indebted to R. G. Schroeder in the sum of \$155.70 for goods, wares, and merchandise sold and delivered within two years last past, at the city and county of San Francisco, state of California, to said Carrie C. Hechtman, wife of this defendant, at the special instance and request of said Carrie C. Hechtman, wife of said defendant, and that said goods, wares, and merchandise were common necessities of life and necessary for the support and maintenance of said Carrie C. Hechtman." The third allegation in each of the other counts varied from the above only in the name of the seller of the goods and the amount of the indebtedness. Defendant demurred to each count upon the ground that it did not state a cause of action. The demurrer was overruled, and upon failure of defendant to answer judgment was entered against him as prayed for.

The demurrer should have been sustained. The complaint does not allege a sale to defendant, and does not allege all the facts necessary under section 174, Civ. Code, to fix liability upon a husband for a sale to the wife. *Simon, Jacobs & Co. v. Scott*, 53 Cal. 76; *Nissen v. Bendixsen*, 69 Cal. 521, 11 Pac. 29. In *Simon, Jacobs & Co. v. Scott* the allegations were of a sale to the wife of the defendant, and were very similar in form to the allegations of the complaint in this case, being "that the said goods and merchan-

dise were necessary for her and the family of defendant and the maintenance of the household of defendant." The court said: "Whether the defendant is liable for the goods furnished to the wife or not, it is certain that the plaintiffs cannot recover against him their value, in the absence of an averment that they were sold and delivered to him. If she was authorized, by reason of her relation to her husband, the nature and character of the goods, and the husband's circumstances, to purchase them, the goods were in law sold to defendant, and the averment should have been to that effect." In the case of *Nissen v. Bendixsen*, supra, the complaint fully and explicitly alleged all the facts necessary under section 174, Civ. Code, to fix liability on a husband for goods sold to his wife, and the court for that reason sustained the sufficiency of the complaint, but referring to *Simon, Jacobs & Co. v. Scott*, supra, said: "In the case of *Jacobs v. Scott*, 53 Cal. 74, the complaint did not allege the facts declared by section 174, Civ. Code, to give a cause of action against the husband, and hence that case was decided in accordance with the common-law rule."

Section 174, Civ. Code, provides: "If the husband neglects to make adequate provision for the support of his wife * * * any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband." In the complaint before us it is alleged that the goods were necessary for the support of the wife, but it is not alleged that the husband had neglected to make adequate provision for her support. Both are essential. The allegation that the goods were necessary for her support refers to the character of the goods as being suitable to her circumstances and condition in life, and such allegation does not import that the husband had neglected to make adequate provision for her support. Under the statute the articles must be necessary for her support and the husband must have neglected to make adequate provision for her support. See, also, *St. Vincent's Institution, etc., v. Davis*, 129 Cal. 17, 61 Pac. 476.

The judgment is reversed, with directions to sustain the demurrer, with leave to plaintiff to amend his complaint.

We concur: HARRISON, P. J.; COOPER, J.

1 Cal. App. 740

In re SCOTT'S ESTATE.(Court of Appeal, First District, California.
Oct. 14, 1905.)**1. EXECUTORS—ACCOUNTING—REVIEW—PRESUMPTIONS.**

In the absence of the evidence on which the court disallowed certain items in an executor's report, it will be presumed on appeal that the disallowance was proper.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2248.]

2. WILLS—CONTEST—COSTS—ALLOWANCE BY SUPREME COURT—STATUTES.

Code Civ. Proc. § 1720, authorizing the Supreme Court to allow costs incurred during a will contest, refers only to costs incurred in such court or by reason of an appeal, and does not authorize the Supreme Court in its discretion to allow costs that the superior court had discretion to disallow.

3. EXECUTORS—IMPROPER PAYMENTS—INTEREST.

Where executors improperly withdrew money belonging to the estate and paid the same to a bookkeeper, they were properly chargeable with interest thereon at the legal rate from the time when the money was drawn until it was repaid to the estate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 423, 425.]

4. SAME—SALE OF ASSETS.

Where executors sold certain cooperage belonging to the estate, without order of court, for a price in excess of the appraised value in the inventory, and reported that it had been sold at the latter figure, they were liable for its value, without proof that more money was received for the total cooperage sold than was stated in their accounts.

5. SAME—COMPENSATION OF ATTORNEYS—ORDER OF ALLOWANCE.

An executor being personally liable to his attorney for the reasonable value of the latter's services, regardless of the amount allowed by the probate court, an order making an allowance to executors for attorneys' services is not conclusive on the attorneys.

6. SAME—ORDER—INSTRUCTION.

Where executors represented by different attorneys filed their accounts jointly, in which they asked for an allowance of \$7,500 as attorney's fees to the attorneys who represented two of the executors, and \$2,000 as fees for the third executor's attorneys, an order finding that the two executors should be allowed \$4,000 as a reasonable attorney's fee, and that the other executor was entitled to \$1,000 for the same purpose, did not purport to fix the reasonable value of the services rendered by such attorneys, but was a mere exercise of the court's power to make allowances out of the estate for attorney's fees.

7. SAME—SEPARATE COUNSEL—EMPLOYMENT—STATUTES.

Code Civ. Proc. § 1355, providing that, where there are more than two executors, the act of a majority is valid, did not preclude one of three executors, who honestly differed from the others, from employing counsel of his own selection and being entitled to an allowance for attorney's fees.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 457.]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Accounting by the executors of the estate of Angella R. Scott, deceased. From portions of the decree settling the account and disallowing certain items, the executors appeal. Affirmed.

See 77 Pac. 446.

Rehearing denied November 13, 1905.

A. E. Bolton, for appellants. Houghton & Houghton, for respondents Chamberlain and others. John B. Gartland, for respondent Tilton. Louis Seldenberg and R. P. Clement, for respondents Wormell and others.

COOPER, J. This is an appeal by the executors from portions of the decree settling their accounts and disallowing certain items therein.

1. The first item disallowed by the court is "Expenses of contest in the probate of will of Angella R. Scott, deceased, \$1,681.63." Under the heading "Disbursements by Executors" are set forth in the accounts several items, aggregating \$1,686.13, claimed to have been incurred for expenses in establishing the validity of the will. Upon the hearing at the settlement of the accounts the court made the following finding of fact in reference to these items: "I find that the items on the credit side of the second annual account, amounting to the sum of \$1,686.13, including \$1,560 drawn from the bank to pay the expenses of defending the will upon the contest for its admission to probate, are an improper credit, and ought not to be allowed, excepting the item, 'January 15, 1899, by publication notice of the time and place for proof of the will, \$4.50', which is allowed. Total amount disallowed on this item, \$1,681.63. And as the executors did, on the 11th day of June, 1901, without any order of court, draw from the funds of the estate deposited in the Donohoe-Kelly Banking Company's Bank the sum of \$1,560, which sum was used by said executors in part payment of the above disallowed items of costs, said executors must be charged with interest on said amount of \$1,560 at the rate of 7 per cent. per annum from the 11th day of June, 1901, to the time of the payment of said money back into the estate, or until the same is deposited in the Donohoe-Kelly Banking Company's Bank to the credit of the executors of said estate." In the decree settling the said accounts the court disallowed the above items, and surcharged the accounts with their amount. The facts connected with the above item of \$1,560 are as follows, viz.: In order to raise money to meet the expenses to be incurred in defending the will against the contest for its probate, certain devisees advanced that amount of money for such expenses, and, as shown by the finding, on the 11th of June, 1901, the executors withdrew this amount from the funds of the estate deposited in the bank, apparently for the purpose of reimbursing the said devisees, and credited themselves in their account with the payments of the items of expense. The mention of the transaction in the finding is relevant only for the purpose of fixing the amount which the executors are required to return to the estate, and the date from which interest thereon is to be paid by them. The executors have not specified any particulars in which the evidence before the court was insufficient to justify the above finding of fact, and it does not appear from the bill of exceptions that they took, or had entered of record, any exception to the order of the court in disallowing said

items. Neither is there any evidence in the bill of exceptions which in any way illustrates the character of those expenses; and the items which form by far the greater part of the amount disallowed by the court are not by their terms, as set forth in the account, *prima facie* of such a character as would require the court to allow them as a charge against the estate. Whether the executors properly incurred the items of expense set forth in their account in obtaining probate of the will was to be determined by the court upon the evidence before it in reference thereto. Error is not to be presumed, and, in the absence of the evidence before it, we cannot say that the superior court erred in refusing to allow them as a charge against the estate. Appellants contend that section 1720, Code Civ. Proc., authorizes this court to allow and order paid the costs incurred during the contest. The section as to this court refers to costs incurred here, or by reason of the appeal. It does not mean that this court has discretion to allow costs. That the lower court has discretion to disallow. The fact that some of the devisees and legatees refused to contribute to the expenses of the contest furnishes no legal reason for interfering with the order. It may be that the devisees who did contribute are the ones to whom most of the property is devised or bequeathed, and that those who refused to contribute would have received more if the will had been denied probate.

2. Appellants claim that the court erred in surcharging the executors with interest on sums amounting to \$230 drawn out of the bank for the purpose of paying a bookkeeper for the estate. The court found that \$230 had been drawn, without any order of court, from the funds of the estate in the Donohoe-Kelly Banking Company's Bank, and paid to McGowan as bookkeeper; and that "such amount was improperly paid is hereby disallowed, and the executors must be charged with interest on the several sums drawn out of said bank * * * at 7 per cent. per annum for the respective times said checks were drawn to the time of the payment of said money back into the estate." The finding of the court that the money was improperly paid is not questioned. The amount of interest charged is not computed nor stated; but conceding that the money, upon which the interest was charged, was improperly used by the executors, they are responsible for interest on it at the legal rate. The question as to whether or not the executors had the right to employ and pay the bookkeeper out of the funds of the estate is not before us.

3. The next contention is that the court erred in surcharging the accounts with \$836.88, the excess in value of 235,043 gallons of redwood cooperage over the amount returned in the account. The finding of the court as to this item is as follows: "The number of gallons of redwood cooperage sold and accounted for in this account is 235,043. The red-

wood cooperage was appraised in the inventory filed by the executors on the 9th of May, 1900, at one-half cent per gallon. The executors sold the greater part of said cooperage at one-half cent per gallon, selling some in excess of that amount, and some at seven-eighths of a cent per gallon, in various lots from time to time, without having obtained any order of the court for that purpose, and said sales were made at private sale without any notice of sale being given, and no return of sales of redwood cooperage has ever been made to this court, and no order has heretofore been made confirming said sales. The value of such cooperage at the time of sales being seven-eighths of a cent per gallon, the executors are to be charged with this cooperage at that price, and credited with the total amount of sales accounted for in said accounts. The executors are therefore to be charged with \$2,056.62, less \$1,219.75, which is the amount of said cooperage accounted for as sold, leaving a balance of \$836.88, with which the executors should be charged." After a careful examination we are of opinion that the evidence supports this finding. No order of sale was obtained before selling the cooperage. The sales were made without legal notice, and no returns of sales made, except in the accounts. The accounts do not give the names of all the various purchasers, and it was only by the diligence of the respondent's counsel that most of them were found. It was shown, contrary to the accounts, that many sales were made in excess of one-half cent per gallon as stated in the accounts. The witness Carpy testified that he had been engaged for 25 years in the wine business; that he had seen the cooperage, knew the value of that kind of cooperage, and had had a great deal of experience in buying and selling that kind of property; that in his opinion the cooperage would sell for three-fourths of a cent per gallon. The court found, and the evidence shows, that several sales were made at seven-eighths of a cent per gallon and one at two-thirds of a cent per gallon. The executors admitted that they had made sales in excess of one-half cent per gallon in the face of their verified accounts showing all sales at one-half cent. By selling the cooperage at private sale without an order of court, the executors became responsible to the estate for its value. In *re Radovich*, 74 Cal. 538, 16 Pac. 321, 5 Am. St. Rep. 466. If the sales had been made for the full value of the property, and the accounts had shown such sales correctly, giving the date of sale and the name of the purchaser in each separate case, the question would be different. We do not attach much importance to appellant's contention that it is not shown that more money was received for the total cooperage sold than stated in the accounts. It might have been very difficult for the parties contesting the accounts to make such proof; and, even conceding that the total amount of money received for cooper-

age is credited to the estate in the accounts, the executors, having sold without an order of court, are responsible for the value of the property sold.

4. Finally it is claimed that the court erred in making an order deducting from the item of \$4,750, paid as attorney's fees to Galpin and Bolton, the sum of \$750. The executors had drawn from the bank, by order of court, long before the account was settled the sum of \$5,000 to be applied as attorney's fees. The court did not direct, and in fact had no right to direct, the manner in which the \$5,000 should be apportioned between the attorneys. The two executors, however, who received the money, paid \$4,750 of it to their own attorneys, Messrs. Galpin & Bolton, and \$250 to the attorney of the other executor, before any order had been made allowing attorney's fees to either of the executors. The executors, although represented by different attorneys, filed their accounts jointly, in which they ask that the court allow them \$7,500 as attorney's fees for Messrs. Galpin & Bolton, who represented two executors, Garcia and Gerrish, and \$2,000 as attorney's fees for John B. Gartland, who represented and advised Tilton, the other executor. The court, in effect, found that the two executors who employed Messrs. Galpin & Bolton were entitled to be allowed \$4,000 as the reasonable attorney's fees incurred by them, and that the executor who employed Mr. Gartland was entitled to \$1,000 as the amount of reasonable attorney's fees incurred by him. The total amount allowed was \$5,000; and it makes no difference to the executors, as representatives of the estate, as to whom it is paid. The rule is well settled that attorney's fees are not a claim by the attorney against the estate. The administrator or executor must be allowed reasonable attorney's fees paid or incurred in the necessary management of the estate, but such attorney's fees are allowed to the administrator or executor, and not to the attorney. *McKee v. Soher*, 138 Cal. 370, 71 Pac. 438, 649, and cases cited. The executor or administrator is personally liable to the attorney employed by him for the reasonable value of the services of such attorney, regardless of the amount allowed by the probate court; the probate court not having power to adjudicate between the attorney and the executor or administrator as to the amount of the fee. *Briggs v. Breen*, 123 Cal. 660, 56 Pac. 633, 886. Therefore the order made in this case does not conclude the attorneys as to the amount of their respective fees. The executors, in their official capacity, have no interest in settling the controversy between them. The effect of the appeal as to the executors represented by Galpin & Bolton is that the court did not allow a sufficient sum to cover the reasonable attorney's fees incurred by them. If they are liable in excess of the amount allowed them by the court, they may be unfortunate; but there is no contention here that the amount of fees allowed by the

probate court was too small. While the court had no power to fix and apportion the attorney's fees, it did have the power to allow the executors represented by Messrs. Galpin & Bolton \$4,000 incurred as attorney's fees, and the executor represented by Gartland \$1,000 incurred as attorney's fees. Taking the accounts, the decree, and the findings together, we hold this to be the effect of the decree and order as to attorney's fees.

In *Estate of Brignole*, 133 Cal. 163, 65 Pac. 204, in the final settlement the court below allowed \$750 on account of legal services rendered two of the executors, and the same amount to the third executor, who had not employed the same attorney. The order was affirmed. In *Estate of Dudley*, 123 Cal. 256, 55 Pac. 897, it was held that where two sisters were jointly administratrices of an estate, and unfriendly, each employing different attorneys, the trial court properly allowed to each a reasonable sum as attorney's fees. In *Re Delaphine's Estate* (Sur.) 3 N. Y. Supp. 202, it was held that, where two executors each employed an attorney, each was entitled to be reimbursed for his attorney's fees incurred in good faith. The court said: "The deceased person must be held to have contemplated, not only the possibility of differences of opinion among his executors, but the extreme probability that such differences would arise. In such an event it surely cannot be held that one shall submit to the other; that he shall subordinate to the other his own honest conception of a proper line of policy and official duty. There can be no doubt, either, but that it is the plain duty of the executors to honestly strain after harmony in all respects affecting the welfare of the estate. On such appearing to be the history of their official acts, there can be no difficulty in disposing of any question of the expense of their administration. * * * After qualification they would stand equal before the law, and in the precise attitude that the deceased wished and expected when he named them in the will; and, except for misconduct, they could not be removed, nor their powers, as set out in their letters of appointment—the will—be limited or restricted. * * * Both executors were entitled to the assistance of good lawyers. They employed them, and promised, under the obligations of a lawful contract, to pay them proper compensation, and such compensation has been ascertained, and they have been paid. The sums so paid in this case appear to have been fully earned, and whether really the services of either or both the attorneys for the respective executors were or were not beneficial to the estate does not signify on the question under consideration. * * * I have no difficulty in holding * * * that they are each entitled to be reimbursed out of this estate for the sums paid by them, respectively, to their respective attorneys."

If appellants' contention in this case be correct, then two of three, or three of five, executors could entirely ignore the minority,

and not even allow such minority the assistance of counsel. If three executors should each honestly differ with the others, and each employ counsel of his own selection, which one would be entitled to his attorney's fees? It is true that in such cases the estate may be put to more expense for attorney's fees, but that was for the deceased to consider in making his will. Certainly a testator who appoints three friends, in whose judgment and integrity he confides, does not intend that one of them shall be ignored and denied costs which are allowed to the others. Counsel for appellants rely on section 1355, Code Civ. Proc., which provides that, "where there are more than two executors or administrators, the act of a majority is valid." The language quoted refers to the acts under the will, or in relation to the trust, as is shown by reading the entire section. It does not mean that the act of the majority can deprive one of the executors or administrators of the assistance and advice of counsel.

The order allowing the accounts is affirmed in all respects.

We concur: HARRISON, P. J.; HALL, J.

2 Cal. App. 95

GOFF v. HEALEY.

(Court of Appeal, First District, California. Oct. 27, 1905.)

COSTS—DAMAGES FOR FRIVOLOUS APPEAL.

Where, in an action on a note, defendant appealed from a judgment in plaintiff's favor, but confessed that the appeal was without merit, plaintiff having been deprived of the amount of his judgment for upwards of two years, and caused expense for costs, attorney's fees, and printing a brief, was entitled to an affirmance, with damages.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 983.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Almon B. Goff, Jr., against Benjamin Healey, as executor, etc., substituted for William Tardif. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

John J. Roche, for appellant. Frank W. Sawyer, for respondent.

HALL, J. This is an appeal from a judgment in favor of plaintiff and the order denying defendant's motion for a new trial.

At the oral argument appellant conceded that the judgment and order should be affirmed, and only opposed the request made in respondent's brief for damages for a frivolous appeal. The action was on a promissory note, alleged to have been executed by defendant to plaintiff, which was set out in full in the complaint. In his answer defendant denied the execution of the note, and also

alleged that it was without consideration. The court found in accordance with the allegations of the complaint, and that the allegations of the answer were untrue. The evidence was ample to support the findings of the court, and no claim to the contrary is made in appellant's brief, and no question is or can be reasonably raised that the complaint and findings do not support the judgment. No objections were made to the admission of evidence, and no errors of law were assigned in the statement of the case. By this appeal, which is confessedly without merit, plaintiff has been kept out of his money for upwards of two years, and been put to costs for attorney's fees and printing a brief. It is apparent that it was taken for delay.

The judgment and order are affirmed, with \$100 damages to respondent.

We concur: HARRISON, P. J.; COOPER, J.

2 Cal. App. 70

In re CULP.

(Court of Appeal, Third District, California. Oct. 25, 1905.)

1. JUDGMENT—JUDGMENT OF OTHER STATE—CONCLUSIVENESS.

Code Civ. Proc. § 1915, provides that the judgment of a foreign country against a person is presumptive evidence as between the parties and their successors in interest, and can only be repelled by evidence of a want of jurisdiction; and section 1916 provides that any judicial record may be impeached by evidence of a want of jurisdiction. *Held*, that a personal judgment of another state may be collaterally attacked on the ground that the court was without jurisdiction for want of notice, though the judgment recites due notice; such procedure not being violative of state comity or of the federal Constitution (art. 4, § 1), declaring that each state shall give full faith and credit to the judicial proceedings of a sister state.

2. PROCESS—ESSENTIALS.

If a party does not submit himself voluntarily to the jurisdiction of a court, the process requiring such appearance must be issued and served in substantial compliance with the law.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, § 4.]

3. SAME—PLACE FOR SERVICE—PERSONS WITHOUT STATE.

The authority of a court to issue and serve process is restricted to the territory of the state where issued, and the court has no power to require persons not within such territory to appear.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, §§ 15, 69, 70.]

4. DIVORCE—DECREE—CUSTODY OF CHILD—MODIFICATION—NOTICE.

Where the judge, who had rendered a decree of divorce, subsequently stated to counsel who had represented the plaintiff that, if an application should be made ordering the plaintiff to bring her child back into the jurisdiction of the court from which she had taken it, the order would be granted, such statement did not amount to notice to the plaintiff, giving the court jurisdiction over the person of plaintiff to thereafter make such an order.

Appeal from Superior Court, Sacramento County.

Habeas corpus by C. H. Culp for a writ of habeas corpus against Fantasia F. Culp to secure the custody of Willa Norine Culp. Writ dismissed.

R. C. Ross and Eugene S. Wachhorst, for petitioner. Hall & Dunn, for respondent.

BUCKLES, J. Fantasia F. Culp, against whom the writ runs, and William H. Culp, were husband and wife, and the fruit of their marriage was one girl, now 5 years and 7 months old, named Willa Norine Culp. The petitioner is the grandfather of the child, and seeks to get the custody of her through this writ. The said spouses were residents of Shawnee county in the state of Kansas. The said Fantasia F. Culp was plaintiff in a divorce proceeding against her husband in the Shawnee county district court of the Third judicial district of the state of Kansas, which court granted her a divorce on the ground of habitual drunkenness of said William H. Culp, and also gave her the custody, education, nurture, control, and care of said minor child. This decree was made April 4, 1904, and became final, so far as the divorce was concerned, under the laws of Kansas, on the 4th day of October, 1904. Under and in pursuance of this decree the said Fantasia F. Culp received the possession of said child in the state of Kansas on April 9, 1904, and ever since that date has had said child with her. Said decree contained no restriction as to the residence of the child, or of its mother, and about October 9, 1904, said mother moved from the state of Kansas to this state, bringing the said minor child with her to Sacramento.

Upon some information, it is not stated what, but without petition therefor being filed, the judge of the said Kansas court made the following order: "Whereas, be it remembered, that on the 28th day of November, A. D. 1904, in the Shawnee county district court, Third judicial district, state of Kansas, before the Hon. Z. T. Hazen, presiding justice, it being at the September term, 1904, of said court, the following proceedings, among others, were had, to wit: Fantasia F. Culp, Plaintiff, vs. William H. Culp, Defendant. No. 22,240. Now, on this 28th day of November, A. D. 1904, this cause came on to be heard on the court being advised that the minor child, named in the petition as Willa Norine Culp, had been removed from Shawnee county and from the jurisdiction of this court, and the court, being fully advised in the premises, does hereby order that the plaintiff, Fantasia F. Culp, shall on or before the 1st day of January, 1905, bring said child, Willa Norine Culp, into Shawnee county and within the jurisdiction of this court, and said plaintiff is hereby notified that, unless this order is complied with, another order will be made changing the custody of said

child, and directing other parties to take said child and bring it within the jurisdiction of this court. Z. T. Hazen, Judge."

On the 5th day of January, 1905, the judge of said Kansas court made the following order, to wit: "Whereas, be it remembered, that on the 5th day of January, A. D. 1905, in the Shawnee county district court, Third judicial district, state of Kansas, before the Hon. Z. T. Hazen, presiding judge, it being at the January term, 1905, of said court, the following proceedings, among others, were had, to wit: Fantasia F. Culp, Plaintiff, vs. William H. Culp, Defendant. Now, on this 5th day of January, 1905, upon due and proper notice to the attorney for plaintiff herein, came on to be heard the application of the defendant herein for a modification of the judgment heretofore rendered in this cause on the 4th day of April, 1904, and the court finds: That contrary to the order, decree, and judgment of this court heretofore rendered the plaintiff herein, Fantasia F. Culp, has removed her daughter Willa Norine Culp, whose custody was by said judgment committed to her, the said plaintiff, from and out of the jurisdiction of this court subsequent to the rendition of said judgment. That said Fantasia F. Culp so removed said child in absolute violation of the order of this court, and with the purpose and intent of hindering and obstructing this court in the proper care and custody of said child. That the conduct of said Fantasia F. Culp since the rendition of said judgment in this case has been such that she is no longer a fit person to be intrusted with the custody and care of said child. That the circumstances render it proper that the said order, committing the custody, control, education, and care of said child to the plaintiff herein, shall be modified and changed, and that C. H. Culp, the grandfather of said child, is a suitable person to be intrusted with her custody, control, care, and education. It is therefore ordered, adjudged, and decreed by the court that the said judgment heretofore rendered in this court on the 4th day of April, 1904, be, and the same is, hereby changed and modified in the following respects, to wit: That it be ordered, adjudged, and decreed that the custody, education, nurture, control, and care of the said Willa Norine Culp be, and the same is, hereby given to C. H. Culp, the grandfather of said child, Willa Norine Culp, and that the said plaintiff, Fantasia F. Culp, and the defendant herein, William H. Culp, either in person or by any agent, relative or representative, are, and each of them is, hereby enjoined from interfering with or disturbing said C. H. Culp in the custody, education, nurture, control, and care of said child until the further orders of this court. And the said C. H. Culp is hereby empowered and directed to take into his possession the said child, Willa Norine Culp, and provide for its maintenance, education, nurture, and control, and to keep the same within the

jurisdiction of this court, unless otherwise ordered by this court. Z. T. Hazen, Judge."

Then on the 6th day of March, 1905, the court made another order in the same matter, reciting the fact of making the order modifying the decree of April 4, 1904, and directing that the order of January 5, 1905, be "forthwith carried into effect," and further ordered: "It is therefore hereby ordered, adjudged, and decreed that to the end that said modified order, aforesaid, may be forthwith carried into effect, the sheriff of Shawnee county, Kan., forthwith proceed to take the said child, Willa N. Culp, into his custody, and that he thereupon deliver the said child over to the custody and keeping of the said C. H. Culp, her lawful custodian, according to said modified order, and that said sheriff make immediate return hereof. A. W. Dana, Judge."

The petitioner claims the recital in the judgment of January 5, 1905, "upon due and proper notice to the attorney for plaintiff herein," is a declaration of the court making such decree that notice was given, and that it conclusively establishes the fact that said court had jurisdiction to make the decree. By an inspection of the judgment of April 4, 1904, by which Fantasia F. Culp was awarded the custody of the said minor, it is seen that nowhere therein is she commended to remain within the state of Kansas, and no other order or judgment of said court is presented showing any such direction to her, and we, therefore, conclude none was made. The order of November 28, 1904, shows that the judge making such order knew she had departed from the state of Kansas, and knew, of course, that no personal service could be had on her. And in the order of January 5, 1905, which pretends to modify the original decree and give the child to its grandfather, there is no pretense that any other notice was given than to the attorney of plaintiff in the divorce proceedings. Section 645 of the Code of Kansas provides that, "When a divorce is granted, the court shall make provision for guardianship, custody, support and education of the minor children of the marriage, and may modify or change any order in this respect whenever circumstances render such change proper." It was held in *Kendall v. Kendall* (Kan. App.) 48 Pac. 940, a Kansas case, which was an application to have modified the decree in a divorce case in relation to the support of the minor children, that "this section gives the court granting the divorce a continuing jurisdiction over the guardianship, custody, support, and education of the minor children of the parties to the divorce proceedings, and it may be invoked whenever circumstances render a change of a former order proper." There was a contention at the hearing in that case as to how service of notice should be made. The service was by service, on the father, of the notice of the motion which had been made. The court said: "There is some force in the argument

of plaintiff in error that the proper proceeding is by petition and summons, and not by motion and notice. In this case however, the plaintiff in error was fully informed by the motion and notice of the order applied for. The motion was filed in the original cause, in the same court, the same judge presiding. The plaintiff in error had full opportunity to prepare his defense. He was not misled. The cause was tried on its merits." It is well to note in passing that this case was local—that is all the parties lived in Kansas and were within the jurisdiction of said court; and I apprehend that, when the court said the jurisdiction over the minor children was continuous, it could only mean continuous while they remained domiciled within the jurisdiction of the court. But it appears from this case, and the others cited therein, that the court of Kansas deems some notice necessary when it is sought to modify a decree, in order to give the court jurisdiction to render a personal judgment as would be an order modifying a decree changing the custody of a minor from one person to another.

Petitioner claims that as this is a collateral attack on the judgment of January 5, 1905, this court is not permitted to inquire into the question of the jurisdiction of the Kansas court to make it, or if such court had jurisdiction over the person of Fantasia F. Culp, for the reason that jurisdiction in that court must be presumed, and cites section 1, art. 4, of the federal Constitution, which provides that each state shall give full faith and credit to the judicial proceedings of a sister state. I do not question this authority, for even without this wholesome constitutional provision the comity of states of this union requires that each should give full faith and credit to the judicial proceedings of the other. But how can the courts of this state give such faith and credit to the judicial proceedings of courts in other states until it is known that such courts have acted within the legitimate scope of their authority? It is true that, when the jurisdiction is free from attack, then the presumption that jurisdiction was acquired and that such courts have acted within the powers granted them is allsufficient, and that the authorities all hold that way. If the state courts of Kansas, or of any other state, render an opinion or judgment they had no right or power to render, and it is attacked for want of jurisdiction, then neither the courts of that state nor of any other state are bound by it, and yet they give it all the credit and faith it is entitled to. And this rule is a reasonable one. Freeman on Judgments, § 565, lays down this rule: "Courts of record are presumed to act only in accordance with the authority vested in them by law. Their judgments will generally be treated as conclusive on the parties until the absence of jurisdiction is affirmatively shown."

The petitioner here is asserting the validity and verity of the judgment of the court of

Shawnee county, Kan., made January 5, 1905, and claiming under it to have the right here in this state to take this little girl of tender years from its mother, who has it by natural right, and by whatever force there is in the decree of the Kansas court, made April 4, 1904, and deliver it over to the grandfather; and it seems to me that, whatever may be said of the powers of this court under the writ of habeas corpus in such cases, this is an effort to enforce a foreign judgment in this court. At least the effect sought is the same. The mother is here resisting such enforcement upon the ground that the court in Kansas had no jurisdiction to make such judgment, it being a proceeding to compel her personally to perform a certain act, to wit, to turn her child over to another person, when she had no notice of the pendency of the application for such purpose—that is, to make such a judgment against her—and did not have her day in court. To maintain her position she seeks to show that the court of Kansas did not have jurisdiction to make such order. After the judgment of divorce became final she never submitted voluntarily to the jurisdiction of the Shawnee county court, and it is admitted that she never was served with notice thereafter, and that she, in fact, removed from the state of Kansas before the proceedings were instituted which led up to the judgment she now assails. The general rule in such cases is that, if a party does not submit himself voluntarily, then, before the court can rightfully exercise jurisdiction over his person, it must be authorized to require him to appear before it and submit to its judgment in that action or proceeding, and the process requiring such appearance must be issued and served upon him in substantial compliance with the law, and the authority to serve is restricted to the territory of the state where issued, and the court has no power to require persons not within such territory to appear before it. In support of this doctrine I cite Freeman on Judgments (section 120a) as follows: "Therefore any personal judgment which a state court may render against one who did not voluntarily submit to its jurisdiction, and who is not a citizen of the state, nor served with process within its borders, no matter what the mode of service, is void, because the court had no jurisdiction over his person." A very strong case showing the right to assail a foreign judgment on the ground of the want of jurisdiction comes from the Supreme Court of the state of Kansas. *Thorn v. Salmonson*, 15 Pac. 588. There the plaintiff was married to one Karl Johan Thorn in the kingdom of Sweden in the year 1852. The couple lived together as husband and wife, and six children were the fruit of their marriage. In 1862 he separated from her, going to a distant part of the kingdom, where he procured a divorce from her, without giving her any notice, although the decree recited notice by publication for the

period of one year before the judgment of divorce was rendered. In a subsequent proceeding, where both husband and wife were parties, the validity of the decree of divorce was questioned, and was determined by the highest court of the kingdom; both parties being residents there, and both being heard. At that time the man, husband, had married this defendant, Salmonson. Plaintiff here stated in that proceeding that she did not wish to disturb the marriage of her late husband to this defendant, and the Supreme Court of Sweden affirmed the judgment of divorce. The matter was then taken before his Royal Highness and was again affirmed. Thorn and his second wife then emigrated to America, and lived together as husband and wife in McPherson county, Kan., until about 1881, when he died. The plaintiff sued, asking to be adjudged the lawful widow of deceased Thorn, and entitled to his estate. The Kansas court held as follows: "While the judgment of divorce appears to have been granted by a competent tribunal, which had jurisdiction of the subject-matter as well as of the parties, and is therefore entitled to liberal presumptions, it is not so far conclusive as to preclude the plaintiff from showing that it was rendered without jurisdiction, or was fraudulently obtained. The reply specifically denies that the plaintiff was ever served with process or had her day in court. * * * If in truth there was no service, personal or otherwise, and she had never been given an opportunity to be heard, she cannot be bound nor affected by any of the orders or judgments made in these proceedings. A foreign judgment rendered without jurisdiction may be assailed in either a direct or collateral proceeding. Although the recital in the judgment that service was made raises a strong presumption in favor of the jurisdiction and of the truth of the recitals, yet the plaintiff may show by extrinsic evidence, if she can, that no service was made. Strong proof will be required to overthrow the presumption of jurisdiction raised by the recitals; but, if it is clearly shown that the plaintiff was not served with process, and did not voluntarily appear or submit to the jurisdiction of the court, the recitals are of no avail." A number of cases are cited in said decision sustaining this doctrine. It is the law of Kansas, therefore, that when a party is seeking the enforcement of a foreign judgment in that state, or seeking some benefit thereunder, the party resisting or defending may assail such judgment by showing want of service, and therefore a lack of jurisdiction to render such judgment.

Petitioner in his argument claims that, if extrinsic evidence can be received to contradict the recital of notice in the Shawnee county court's judgment, then it must appear, first, that notice is necessary under the Kansas law, and, second, that no notice sufficient in the Kansas practice was given. The ne-

cessity of notice is answered in a Kansas case decided November 8, 1902, and reported in the Pacific Reporter. *Miles v. Miles* (Kan. Sup.) 70 Pac. 631. This was an application, made two years after the decree of divorce, for a modification of the decree, so that the husband might be compelled to contribute to the support of his children, which had been awarded to the custody of the mother. In that case, quoting the section of the Code of Civil Procedure (645) heretofore referred to, the court said: "This section leaves the matter entirely in the hands of the court. He may at any time, upon proper notice, change any former order made in reference to these matters by adding to or taking from the burdens of either party relative to the same." Thus it will be seen that in Kansas, when an application is made to the court to modify a decree or judgment relative to the custody and care of minor children in a divorce case, there must be notice served.

As to the second contention, that no notice was given sufficient in the Kansas practice: The judgment says service was had on the attorney. The deposition of H. G. Larimer, who was the attorney of respondent in the divorce proceedings, was taken. He says: "The day before she left here she called upon me to bid me good-bye, and said in leaving, 'If any trouble comes up here in this case, I will want you to look after it for me.' To that extent I represent her still." He was asked as follows: "State whether any notice was ever given to you of said application to modify the judgment aforesaid, rendered on the 4th day of April, 1904, in said action?" To which he answered: "No notice of any such application was ever given to me, either verbally or in writing. The practice in our court is that the attorneys, who are making application or asking for orders, either, shall serve a notice upon the opposing attorney, when the same is published in the *Legal News*, a paper published in the city of Topeka. Through neither source did I ever have any notice of any such application." Mr. Larimer states further in his deposition that in a conversation with Judge Hazen, who made the modifying order, which conversation was held between the 1st and the 15th of October, 1904, Judge Hazen said: "If the Culps make any application ordering the child brought back here, I will grant it. I will turn the child over to them." Mr. Larimer never heard anything more of the application or the order, until the latter part of March, 1905, and declares again in his deposition that no notice of any kind was ever served on him, and that he was not in the courtroom when the order was made. The deposition of A. M. Harvey, who was the attorney for C. H. Culp, and who drew up the order of January 5, 1905, was taken, and he says he filed no application for the modification of the judgment of April 4, 1904, and that he has no personal knowledge of any

notice having been given to the attorney, Larimer. Had there been any notice served upon Mr. Larimer, who would know better than Mr. Harvey, who was acting for petitioner? It appears that all the service of any kind in these proceedings was that the judge had said to him that, if the Culps applied for an order, he would make it; and in the light of Mr. Larimer's testimony, uncontradicted as it is, and supported by the testimony of Mr. Harvey, this must be the service the judge had in mind when he directed the recital in the judgment. This was no service at all, and no notice that any application had been filed or would be heard on January 5, 1905, or on any other day. It therefore follows, it seems to me, that the courts of Kansas have established the rule that, when a domestic or foreign judgment is assailed on the ground of want of jurisdiction, as this is here, the party assailing it may prove by extrinsic evidence the want of jurisdiction. Such courts have also established the doctrine that the application to modify a decree awarding the custody of minor children in a divorce proceeding must be noticed to the party to be bound. The fact appears in the case at bar that there was no service of notice, and no notice at all, given to any one of the application to modify, and that the judgment made thereunder has no binding effect on the said *Fantasia F. Culp*, assailed as it is, either in Kansas or here.

Neither the rule of comity, supposed to exist between sister states, nor provisions of the federal Constitution requiring each state to give full faith and credit to the judicial proceedings of a sister state, warrants this court in saying, under the attack and showing made as to jurisdiction, that, because the said judgment recites that notice was given, the jurisdiction of the Shawnee county district court is conclusively established and cannot be inquired into. But this whole question of whether or not the jurisdiction of a foreign judgment can be inquired into was determined by the United States Supreme Court in the case of *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897, where that court said, in substance, that the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and, if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite they did exist. This has been followed in every case rendered by the United States Supreme Court since that time, when the question was involved, and is the leading authority on that point in the United States. Coming now to the decisions in our own state. There are a number holding that jurisdiction may be assailed, but the citation of the leading case I deem sufficient. This is *In re James*, 99 Cal. 375, 33 Pac. 1122, 37 Am. St. Rep. 60, and is cited by both parties. William E. James married the petitioner,

Sarah M., in the state of New York in 1859, and they lived together in New York until 1871, when they separated. Some time after, he went to the state of Missouri, and in 1874 procured a divorce from Sarah M., who had remained in New York. She had no notice of the pendency of the action, though the service was by publication. James removed to and became a resident of this state, and in February, 1883, married Leonora A. King, of Santa Cruz, this state. He lived with this last wife until about the time of his death, which occurred in April, 1887. Letters of administration on his estate were issued to the said Leonora A. James. Sarah M. James, the New York wife, appealed from an order of the court refusing to revoke the letters issued to Leonora A., and also from an order refusing to grant letters to her. The petitioner contended that the court in Missouri had no jurisdiction to render the judgment of divorce, upon three several grounds, the second of which was that "the deceased, James, was not a resident of the state of Missouri for one year next before the commencement of the action resulting in the decree; such residence being necessary under the laws of that state in order to give the court jurisdiction in actions for divorce." This was a collateral attack upon the Missouri judgment, and our Supreme Court says, at the top of page 377 of 99 Cal., page 1123 of 33 Pac. (37 Am. St. Rep. 60): "In regard to the second ground of objection to the decree in *James v. James*, we agree with appellant that it is competent to collaterally impeach the record of a judgment rendered in another state by extrinsic evidence showing that the facts necessary to give the court pronouncing it jurisdiction to proceed did not exist; and this is true, although the record sought to be impeached may recite the existence of such jurisdictional facts"—citing *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897; *Starbuck v. Murray*, 5 Wend. 148, 21 Am. Dec. 172, *Grover & Baker Machine Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670; and other cases. There was a substantial conflict in the evidence as to whether James was a citizen of Missouri or not, or a bona fide resident therein for one year, and upon that ground the court held the decree valid. This case has been followed in all the well-considered cases in this state involving the same question since the rendition of that opinion, and must be considered the leading case in this state. But, independent of this decision, the Code of Civil Procedure, as adopted in 1872, and now in force, provides as follows:

"Sec. 1915. The effect of the judgment of any other tribunal of a foreign country having jurisdiction to pronounce the judgment, is as follows: (1) In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing. (2) In case of a judgment against a person, the

judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title, and can only be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact."

It will thus be seen that, when a foreign judgment is assailed, its recitals are but presumptions which may be overcome by extrinsic evidence showing such recitals of jurisdiction to be untrue. But, as if this was not enough, the Code further provides:

"Sec. 1916. Any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings."

The further citation of authorities seems useless.

The writ is dismissed.

I concur: CHIPMAN, P. J.

McLAUGHLIN, J. I concur in the order dismissing the writ, and in the conclusions voiced in the main opinion touching jurisdiction and the right of this court to inquire into such jurisdiction. But I am unwilling, by silence, to lend implied consent to the proposition that the judgment relied upon as conclusive of petitioner's right to the custody of this child could, under any state of facts, be enforced in this state through the medium of a writ of habeas corpus. This is exactly what petitioner seeks to accomplish by this proceeding. He insists that this court has no alternative, but must execute said judgment by granting his petition, because the federal Constitution and laws require that full effect must be given to judgments rendered in a sister state. Granting his premise, the conclusion does not follow.

Judgments rendered in Kansas have no extraterritorial effect as judgments. *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; *Black on Judgments*, § 682. Judgments rendered there will not be enforced here, unless a judgment thereon is recovered in this state. *Am. & Eng. Ency. Law*, vol. 13, p. 986; *Cooley, Const. Lim.* p. 43, note; *Freeman on Judgments*, §§ 559, 564, 575; *Brown v. Campbell*, 100 Cal. 646, 35 Pac. 433, 38 Am. St. Rep. 314; *McElmoyle v. Cohen*, 13 Pet. (U. S.) 312, 10 L. Ed. 177; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239; *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; *Code Civ. Proc.* § 1913. Such judgments will, as a general rule, be accepted as conclusive proof of rights finally adjudicated by courts of a sister state having jurisdiction of the parties and subject-matter. *Huntington v. Attrill*, *supra*; *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535; *Freeman on Judgments*, § 559; *Cooley, Const. Lim.* p. 586; *Am. & Eng. Ency. Law*, vol. 13, p. 983. But, unfortunately for petitioner's contention,

judgments relating to the custody of children fall within an exception to this general rule. Such judgments have never been accorded conclusive force, even as evidence, in another state. No person has an absolute right to such custody, for the welfare of the third party—the minor—is always an open and paramount question, and courts of another state may, and will, award the custody of minors, regardless of such judgments. *Kentzler v. Kentzler* (Wash.) 28 Pac. 370, 28 Am. St. Rep. 21; *In re King*, 66 Kan. 698, 72 Pac. 263, 67 L. R. A. 783, 97 Am. St. Rep. 399; *Woodworth v. Spring*, 86 Mass. 321; *Kline v. Kline*, 57 Iowa, 386, 10 N. W. 825, 42 Am. Rep. 47; *Matter of Rice*, 42 Mich. 530, 4 N. W. 284; *Matter of Heather Children*, 50 Mich. 261, 15 N. W. 487; *In re Stockman*, 71 Mich. 192, 38 N. W. 876; *Kraft v. Wickey*, 23 Am. Dec. 569; *Williams v. Storrs*, 10 Am. Dec. 343; *Black on Judgments*, § 861; *Bishop on M. & D.* (6th Ed.) vol. 2, p. 604; *Am. & Eng. Ency. Law*, vol. 13, pp. 965, 968, 960; *Cooley, Const. Lim.* pp. 497, 584. If the jurisdiction of the court and absolute verity of the modified judgment before us be granted, it could hardly have greater legal effect or confer greater powers than an order constituting the petitioner guardian of the person of this minor. If this be true, then our courts are not bound to recognize either his authority or the judgment on which it rests. *Code Civ. Proc.* § 1913; *Hoyt v. Sprague*, 103 U. S. 631, 26 L. Ed. 585; *Morgan v. Potter*, 157 U. S. 197, 15 Sup. Ct. 590, 39 L. Ed. 670; *Curtis v. Smith*, 6 Blatchf. 537, Fed. Cas. No. 3,505; *Cooley, Const. Lim.* p. 44; *Am. & Eng. Ency. Law*, vol. 13, p. 966, and notes; cases cited *supra*.

But, waiving this rule, which seems conclusive of the question before us, and giving this judgment all the effect claimed for it, as evidence, in the courts of another state, we are forced to the conclusion that, even in a direct proceeding to obtain a judgment thereon, the courts of this state would be at liberty to disregard it. It cannot be claimed that it must be given greater effect here than in Kansas. It could be modified there whenever circumstances rendered such change proper. *Dassler's Gen. St. Kan.* 1901, § 5138. It is as inconclusive here as there. It would be open to inquiry and change in that state, and it is no more sacred in this. *In re King*, 66 Kan. 698-700, 72 Pac. 263, 67 L. R. A. 783, 97 Am. St. Rep. 399. In short, such judgments are universally held subordinate to the welfare of the child, and any court in this state might act as *parens patriæ* to this child and award its custody to the mother, or other proper person, notwithstanding this judgment. *Black on Judgments*, § 861; *Code Civ. Proc.* § 1913; *Cooley, Const. Lim.* pp. 496, 497, 584; *Avery v. Avery*, 33 Kan. 1, 5 Pac. 418, 52 Am. Rep. 523; *In re Bort*, 25 Kan. 308, 37 Am. Rep. 255; *In re King*, 66

Kan. 698, 72 Pac. 263, 67 L. R. A. 783, 97 Am. St. Rep. 399; *People v. Allen*, 40 Hun (N. Y.) 611; *Dubois v. Johnson*, 96 Ind. 6; *De La Montanya v. De La Montanya*, 112 Cal. 116, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; *Id.*, 112 Cal. 133, 44 Pac. 354. This being true of a direct proceeding, it seems to me that habeas corpus is not adapted to the hearing of equitable and interstate questions involved, and that it cannot be extended to such cases without inconsistency and incongruity. All authorities agree that habeas corpus will extend only to the point of freeing the minor from unauthorized restraint. But it is said by those supporting its use in cases involving the custody of children that, the office of the writ having been accomplished, the court will go beyond this, and exercise its equitable powers to protect and conserve the welfare of the minor whose custody is sought. This, confessedly, involves a supplemental inquiry and adjudication equitable in its nature, based on considerations entirely foreign to, and beyond the scope and purpose of, this writ. It is an admission that the writ is inadequate in such cases; and even the authorities sanctioning its use admit such inadequacy, and confess that habeas corpus "gives no jurisdiction to appoint guardians of infants." *Church on Habeas Corpus*, §§ 445, 446, 451, 452; *Spelling on Extraordinary Relief*, §§ 1236-1242; *Hurd on Habeas Corpus*, pp. 476-534. It seems more logical to adopt the course pursued by Southard, J., in *State v. Cheesman*, cited by the last-named author at pages 554 to 556 of his valuable treatise. See, also, *Church on Habeas Corpus*, § 452.

Habeas corpus has its legitimate and time-honored scope, and so peculiar is the purpose, nature, and dignity of this writ that it cannot be coupled with other remedies without creating confusion. Even an enlightened and commendable desire to abolish useless forms cannot be carried to the extent of making every writ an agency to right every wrong and vindicate every right without obliterating distinctions designed to prevent confusion and chaos. This is illustrated in the record and briefs before us. The petition and return both show that a similar application was heard and denied by the superior court of Sacramento county. It is argued by the attorneys for Mrs. Culp that the decision of Judge Shields is final, while the attorneys for the petitioner contend that it has no binding force whatever in this or any other court. The authorities generally seem to hold that such decisions are *res adjudicata*. *Freeman on Judgments*, § 324; *Church on Habeas Corpus*, § 387; *Spelling on Extraordinary Relief*, § 1152. But under our practice repeated applications for a writ of habeas corpus may be made, and it is at least doubtful whether an appeal from the decision of the learned judge of the superior

court would lie. This is hardly reconcilable with the theory of finality, and points a reason why this proceeding is peculiarly inappropriate and inadequate to the determination of such questions under the practice in this state. If this remedy may be invoked, then the supplemental inquiry and adjudication is a necessary corollary under all the authorities sanctioning such practice. If the decision rendered on this supplemental hearing be not final, then the equitable powers of a court can be invoked, and its decision will count for nothing, even in the eyes of the person who sought and was denied its aid. Under our system the petitioner cannot be prevented from making repeated applications. He may, perchance, be dissatisfied with the decision of this court, and, if so, he may apply to another department of the superior court of Sacramento county, or to the Supreme Court, for relief denied him here. But, if this be the rule, how fares the other party to this proceeding? Compelled to submit to repeated inquiries involving her character and fitness to retain the custody of her child, the first adverse decision will send her out of the court without child, without appeal, and justly without confidence in the theory that all stand equal before the law. This is not fair or just. It cannot be the law. It might be said that she, in turn, could resort to repeated applications of the same nature; but, if this be admitted, it furnishes an unanswerable argument against such a practice. In my opinion the petitioner should be compelled to seek relief through ordinary legal channels, because the writ of habeas corpus is inappropriate and inadequate to the proper consideration and final adjustment of important questions and rights here involved.

I am also unwilling that the decision in which I concur shall, under any circumstances, be considered as implied authority sustaining the doctrine that the district court of Shawnee county, Kan., retains jurisdiction of this child during her minority, regardless of her presence within or absence from that state. There can be no question that during the time occupied by the proceedings leading to the modified judgment this minor and her mother were in California. The modified judgment shows on its face that the minor was not within the jurisdiction of the court. A decree of this kind can only be made, or continue operative, while the child "remains within the jurisdiction." *Cooley*, Const. Lim. p. 584; *De La Montanya v. De La Montanya*, 112 Cal. 133, 44 Pac. 354; Code Civ. Proc. § 1913. The mother, after her divorce, certainly had a right to fix her domicile wherever she pleased, and I can see no

good reason, in law or logic, why she could not change the domicile of the child by taking her with her. I can find nothing in the judgment, the laws of Kansas, or the general current of authority to forbid such removal or change. Some courts have held that, where the other parent is permitted to see the child, the court may forbid removal from the jurisdiction, and one decision is to the effect that forbiddance is implied in such a case. *Campbell v. Campbell*, 37 Wis. 206; *Hewitt v. Long*, 76 Ill. 399; *Miner v. Miner*, 11 Ill. 43. This rule is founded on a substantial reason, and I entertain no doubt that, under such circumstances, comity alone would prompt the courts of this state to aid the courts of another state in conserving rights reserved to the other party to the litigation. But here the original decree absolutely debarred the husband and all his agents and kin from seeing, or in any way interfering with the custody of, this child, and I have found no case, and believe none can be found, which holds that, under these conditions, the minor may not be taken from the jurisdiction. *Griffin v. Griffin* (Utah) 55 Pac. 88; *Adams v. Adams*, 62 Ky. 169; *Woodworth v. Spring*, 86 Mass. 323-326; *In re D'Anna*, 117 N. C. 462, 23 S. E. 431. In the case of *Stetson v. Stetson*, 80 Me. 483, 15 Atl. 60, this right is expressly recognized, but the court also laid down the inconsistent and untenable proposition that, notwithstanding such right, the jurisdiction continues. There is nothing in *Estate of Henning*, 128 Cal. 214, 60 Pac. 762, 79 Am. St. Rep. 43, to support the opposite view. That decision rests upon the express prohibition found in section 248 of the Civil Code, and on the presumption that no change of domicile was effected by the permissive removal. Had Mrs. Culp fled from Kansas for the apparent purpose of evading a law or judgment of that state, a very different question would be presented. But I know of no rule of law or reason which prevents a person from doing that which no law or court has forbidden.

It may be said that this prohibition is implied from the power to modify the judgment. But, if implications are to be indulged, it is equally as reasonable to construe section 5138, *Dassler's* Gen. St. 1901, as permitting such modification at any time while the minor remained within the jurisdiction. We have seen that most of our courts, including those of Kansas, recognize the rule that other courts may consult the welfare of the child, regardless of judgments rendered in another jurisdiction. This rule is irreconcilably in conflict with the idea that the child may not be removed from the state, and that the jurisdiction is continuing and extraterritorial.

IRBY v. TILSLEY et al.

(Supreme Court of Washington. Dec. 28, 1905.)

FRAUD — RELIANCE ON REPRESENTATIONS — MEANS OF KNOWLEDGE OF THE PARTIES.

By means of fraudulent representations the officers of a mining company induced one to buy its stock. After the purchase, the buyer examined the mine for the purpose of informing himself and exercising his own judgment, and subsequently bought additional stock and sold stock on commission, exhibiting samples of ore he had taken from the mine. *Held*, that the buyer could not rely on the false representations and maintain an action therefor.

Appeal from Superior Court, Spokane County; Geo. W. Belt, Judge.

Action by J. A. Irby against J. H. Tilsley and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Peacock, Wells & Ludden, for appellant. Richard M. Barnhart and Barnhart, Langbon & Pugh, for respondents.

CROW, J. This action was instituted by appellant J. A. Irby; plaintiff below, against respondents J. H. Tilsley, William Lambert, and the New Jersey Gold Mining & Milling Company, a corporation, defendants below, to recover damages for false and fraudulent representations made by respondents on certain sales of stock of said corporation. On a jury trial, the court at the close of appellant's evidence sustained a challenge thereto, and directed a verdict in favor of respondents. From a judgment entered on said directed verdict this appeal has been taken.

Appellant produced evidence tending to show that said mining company, of which Lambert was president, and Tilsley, secretary, owned certain claims, near Wardner, Idaho, which it was operating, the principal office of the company, and the residence of all the parties being at Spokane, Wash.; that a 2-stamp mill had been erected, certain water power secured, and much work done; that on or about January 6, 1903, respondents Tilsley and Lambert approached appellant for the purpose of inducing him to invest in some of the stock of said company held by them; that they presented appellant with a printed pamphlet or prospectus which represented the property of said company to be a mine, and not a prospect; that the company had certain water rights capable of producing 250 horse power, and being used to run a 40-stamp mill which was to be installed in the near future; that the property was a free milling proposition with \$2,000,000 worth of ore in sight of an average value of from \$8 to \$14 per ton, and that all these facts could be easily verified by an inspection of the property; that said respondents themselves made the same representations orally, further asserting the outlook to be even better than shown by the prospectus. Appellant testified that relying on the truth of these statements, he, on January 9, 1903, traded certain real estate in Spokane to re-

spondents Lambert and Tilsley for 9,000 shares of their stock at 10 cents per share, and also purchased 1,000 shares of treasury stock at the same price. He now claims that all the statements contained in the prospectus and made by respondents were false, and were at the time known by them to be false.

After carefully examining all the evidence we conclude the trial court committed no error in directing a verdict for respondents. Without stating our conclusions as to whether the evidence was sufficient to show the representations to have been false, we will proceed upon the assumption that it was sufficient for that purpose. Appellant testified that within a week or two after he traded for said 10,000 shares of stock, he made a trip to the mine, remained there several days, examined the property, saw the mill, the water power, the tunnels and shafts, met and talked with the foreman and workmen, and procured samples of ore which he brought with him to Spokane. Shortly after his return, he met respondents, and instead of expressing any dissatisfaction with his investment or the property, he traded with respondents for 15,000 additional shares of their stock at the same price of 10 cents per share, and thereafter at sundry times acquired still more stock. He also agreed to and did sell treasury stock for the company upon commission, and, in doing so, told prospective purchasers he had visited the mine showing them samples of quartz, with free gold visible, which he had taken out. On cross-examination he testified in part as follows: "Q. Didn't you show Mr. Castle Thompson at the time that you sold him a hundred dollars' worth of stock at 12½ cents a share, a piece of quartz with free gold visible to the naked eye, and tell him that you got that out of the mine yourself? A. I did. Q. Did you get that out of the mine yourself? A. I did." He further testified that he had sold 10,000 shares of treasury stock to one Williams for 12½ cents per share, earning for himself a commission of \$200, and that he had made other sales of treasury stock, and his own stock at a profit. He told one Doust that when he examined the mine he found the work done as represented. On April 5, 1904, after the commencement of this action and before trial he sold 30,000 shares of his stock to one Sargensen for \$1,500. There is some intimation in the record that Sargensen made this purchase for respondent Tilsley, but this does not clearly appear, although at the trial Tilsley, who was called as a witness for appellant, claimed he then owned the stock. The dealings above enumerated are only a part of those made by appellant after his return from the mine, but are sufficient to show his course of procedure. During all this time the mine was operated by the company. In the summer of 1903 a larger stampmill was installed and operated until the following December, when, having proved unprofitable, it was shut down.

Shortly thereafter, appellant brought this action to recover losses actually sustained, and also damages to his business standing and reputation caused by his selling treasury stock to his friends. Even though it be conceded that all the representations made by respondents prior to appellant's original purchase on January 9, 1903, were false, yet appellant is not entitled to recover. On his visit to the mine, he could see the situation for himself. By his subsequent acts he expressed entire satisfaction with his investment. He did not need to say he was satisfied. His actions spoke louder than words, and could not be misunderstood. If within a reasonable time after his return from the mine, he had commenced an action either to rescind or to recover damages, he might have had some standing in a court of justice. Instead of this he purchased more stock, and his rights should now be ascertained with reference to the knowledge he possessed and the situation as it existed at the time of his second purchase. He was not thereafter entitled to rely on representations made by respondents.

In *Zilke v. Woodley*, 38 Wash. 84, 78 Pac. 299, it appeared that appellant Zilke and his assignors employed respondent Woodley to locate them on certain timber claims, and made certain advance payments before seeing the land; after they were located by Woodley and had seen the land, they deposited certain drafts in a Spokane bank for collection, the proceeds to be passed to the credit of Woodley. When the bank collected the drafts both appellant and respondent claimed the money which the bank then paid into court under the provisions of section 4843 et seq., Ballinger's Ann. Codes & St. By his pleadings and on the trial Zilke not only claimed the proceeds of the drafts, but also sought to recover the advances made. This court speaking through Hadley, J., said: "It is further claimed that it was error to confine the testimony of appellant concerning false representations of respondent as to the timber claims to the period after the parties returned from viewing the land. We think the court was right. Any representations made before the parties viewed the land were not pertinent, for the reason that, after viewing the land for themselves, they no longer had a right to rely upon such representations, and they thereafter proceeded in the light of their own knowledge from actual view of the premises and surroundings. This court has frequently held that one who has the means of knowledge before him, and who refuses or neglects to avail himself thereof, is prevented from asserting that he is defrauded." We think this doctrine should be applied to appellant, Irby. At all times after his return from the mine, he dealt at arm's length, no fiduciary or confidential relation existing between him and respondents, and he cannot now claim any fraud based on false representations made either before or after

he visited the mine. *Washington Central Imp. Co. v. Newlands*, 11 Wash. 212, 39 Pac. 366; *West Seattle Land & Imp. Co. v. Herren*, 16 Wash. 605, 48 Pac. 341; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180; *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117; *Hulet v. Achey* (Wash.) 80 Pac. 1105.

Appellant, however, testified that when he visited the mine he could not see the ore on the dump, nor judge its value as it was covered with a deep snow. He did see the walls in the tunnels and shafts, and took samples of ore therefrom. He also claims he knew nothing about a mine, but was compelled to rely on respondents' statements. But he did undertake an examination for the purpose of informing himself and exercising his own judgment, respondents did not direct him, nor were they even present. He afterwards exhibited to prospective stock buyers samples of ore which he personally took from the mine. He was then making a commission on sales of treasury stock, and also a profit on his own stock. It is apparent from the record that appellant was satisfied until the mill closed. When his stock depreciated in its market value, then it was he first claimed he had been defrauded.

We find no error in the record. The judgment is affirmed.

MOUNT, C. J., and RUDKIN, FULLERTON, HADLEY, ROOT, and DUNBAR, JJ., concur.

WHELAN v. WASHINGTON LUMBER CO.

(Supreme Court of Washington. Dec. 26, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—MACHINERY—STATUTORY PROVISIONS.

The failure of an employer to comply with Laws 1903, p. 40, c. 37, § 1, providing that any corporation operating a factory or mill shall provide proper belt shifters or other mechanical contrivances for throwing on or off belts on pulleys, is negligence per se, and the employé cannot waive the statute and assume the risk of the danger consequent on such negligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 545, 553.]

2. DAMAGES—EXCESSIVE DAMAGES—PERSONAL INJURIES.

In an action for personal injuries, where it was shown that plaintiff's injury was in the ankle joint, that he was long in the hospital under treatment, that pieces of bone were extracted at the joint and a discharging sore continued up to the time of the trial, that a depression exists at the ankle joint, that he cannot move the foot, that the joint is stiff, and that permanent ankylosis has resulted, an award of \$6,000 damages was not excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 358, 377.]

Appeal from Superior Court, Pierce County; Thad Huston, Judge.

Action by Lawrence Whelan against the Washington Lumber Company. From a

judgment in favor of plaintiff, defendant appeals. Affirmed.

James M. Ashton and W. H. Hayden, for appellant. Govnor Teats, for respondent.

HADLEY, J. This is an action to recover damages for personal injuries. Plaintiff was, at the time he received his injuries, in the employ of the defendant, and his duties were those of attending to a cutoff saw. The saw was operated by means of a belt extending upward from a pulley attached to the saw; the belt being also connected with a pulley above. The latter pulley was run by means of another to which was attached a power belt connecting with the main shaft which was propelled by steam power in the mill. The belt at the saw had become unlaced and was liable to be caught so as to cause injury to the plaintiff. No belt shifters were provided, and this belt could not be repaired without stopping the entire mill or removing the power belt above. Plaintiff notified the head sawyer of the situation, and the latter caused the mill to be stopped. About this time the foreman appeared, and the plaintiff testified that the foreman then ordered him to go up and remove the power belt. The foreman says he told him to remove the saw belt. The plaintiff is corroborated by another witness who says he heard the order, and that he and the foreman stood together and watched plaintiff while the latter was attempting to remove the power belt. Plaintiff ascended a ladder and stood upon a plank above for the purpose of reaching the power belt. He descended to get a stick to assist in the removal and then returned to the position above. Meantime the mill was started by direction of the foreman, and plaintiff says it was running at about half its ordinary speed. He says he understood that it was thus started and run at the reduced rate of speed for the purpose of assisting him in the removal of the belt, as some motion was necessary in order to effect the removal. While attempting to remove it by the aid of the stick, he was caught and injured. He alleges in his complaint that the defendant was negligent in not providing a proper belt shifter or other mechanical contrivance for the removal of the belt. The answer alleges that the plaintiff assumed the risk of the danger, and that his injuries were due to his contributory negligence. A trial was had before a jury, and a verdict was returned for plaintiff. From a judgment entered upon that verdict, the defendant is prosecuting this appeal.

A large part of appellant's brief is devoted to a discussion of its contention that the court erred in not holding as a matter of law that respondent assumed the risk of the danger. Section 1, of chapter 37, p. 40, of the Laws of 1903, provides as follows: "That any person, corporation or association,

operating a factory, mill or workshop where machinery is used, shall provide and maintain in use proper belt shifters or other mechanical contrivances for the purpose of throwing on or off belts on pulleys. * * * Respondent alleges negligence of appellant in not complying with the requirements of the statute. Appellant argues that, inasmuch as respondent had full knowledge of the situation, he waived the requirements of the statute and assumed the risk of the danger. Since appellant's brief was written, the case of *Hall v. West & Slade Mill Co.* (Wash.) 81 Pac. 915, was decided. In that case it was held that the provisions of the statute above cited cannot be waived by an employé. A similar holding with reference to another statute of like effect was made in *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310. It is unnecessary at this time to review the arguments of those cases, for the reason that we regard the question now raised by appellant as settled against its contention. Under the above decisions, it was negligence per se for defendant to fail to maintain proper belt shifters, and respondent could not waive the statute and assume the risk of the danger consequent upon such neglect.

It is further contended that, notwithstanding the statute, if a belt shifter was not necessary or practicable, then respondent assumed the risk, and that it should have been left to the jury to say whether it was necessary or practicable to provide such a device at the place in question. The Legislature has left little room in the premises for the exercise of discretion of mill operators, or of judgment on the part of juries. The statute was manifestly intended for the protection of life and to prevent the mangling of human bodies. To that end the Legislature sought to make the protection as complete as such devices can make it. It did not say that belt shifters shall be maintained where necessary, and leave mill operators and juries to say when the necessity exists. The term "proper belt shifters," as used in the statutory connection, does not merely mean belt shifters in proper or necessary places, but rather sufficient "belt shifters or other mechanical contrivances" to effect the "throwing on or off belts on pulleys." There is no classification of pulleys or places as to the matter of necessity or practicability; and it was the manifest theory of the lawmakers that, when belts have been placed upon any pulleys for the purpose of operating machinery, the necessity for removing and replacing them will at some time arise; and that, in order to guard against danger from an attempt to shift them while in operation, some effective contrivance must be maintained for that purpose. It certainly must be conceded that the contrivances must be maintained at all places where belts are shifted while in operation, in order to exempt the mill owner from the charge of

negligence. The shifting of some belts while the machinery moves may seldom occur, but it is upon those rare occasions that the protection is needed. We are not now prepared to say that occasion may never arise when a question of this character may be proper for a jury, although it seems to us that, under this statute, such occasions must be very rare. To open the way for controversies as to whether the protection designated by the statute is or is not necessary or practicable in given places would lead to much litigation which might result in the nullification of the very purpose of the statute. Such statutes are mandatory, and it is not for the mill owners or juries to say whether the requirements are wise or necessary. Passing upon a similar principle, the Supreme Court of Montana, in *State v. Anaconda Copper Mining Co.*, 59 Pac. 854, said: "The contention that the court erred in excluding evidence offered to show that the devices or cages required by the amended law would be dangerous, and apt to result in accidents, must fall also. The text of the law discloses a measure designed to guard against the dangers incident to lowering and elevating men in deep mining shafts. Whether the cased-in cage and its appliances is the best or wisest method was a question for the Legislature to decide." But what may have been appellant's absolute right in this regard, in the case before us, we need not determine, since we think the question was actually submitted to and passed upon by the jury to such an extent that, even under appellant's contention, its rights in the premises were not prejudiced. There was before the jury evidence of millwrights that belt shifting devices could have been effectively maintained and operated at the place in question, and there was also the evidence of others that they could not. The issue was therefore squarely made in the evidence, although it was not raised by appellant's answer to the complaint, and was not within the pleadings. The court instructed the jury as follows: "While the law commands the performance of the duty I have named, it does not require or compel the performance of an impossible or impracticable and useless thing. If you find from a fair preponderance of the evidence that proper belt shifters or other mechanical contrivances could have been provided and maintained without a substantial interference with the use and operation of the machinery, and that no such proper belt shifters were provided and maintained, and that the failure to so provide and maintain them was the proximate cause of the injury complained of, then you should find for the plaintiff, unless you should further find from a fair preponderance of the evidence that plaintiff in any wise con-

tributed to his own injury by carelessness, negligence, or recklessness." Under the evidence admitted, and under the above instruction, the appellant undoubtedly had the benefit of a finding by the jury upon the subject. The jury must have found under the evidence, and under that instruction, that proper belt shifters could have been practicably provided and maintained. We think the question of contributory negligence was, under the circumstances, properly submitted to the jury, and that it was submitted under proper instructions.

It is insisted that the verdict was excessive. It was in the sum of \$6,000. Respondent's injury was in the bones of the ankle joint. He was long in the hospital under treatment. Pieces of bone were extracted at the joint, and a discharging sore continued up to the time of the trial. At the ankle joint where the bone was removed, a hole or depression exists, about 1½ by 2 inches in dimension. He cannot move the foot. The joint is stiff, and the evidence shows that permanent ankylosis has resulted. Appellant cites *Bailey v. Cascade Timber Co.*, 35 Wash. 295, 77 Pac. 377, as authority for reducing this verdict. The verdict in that case was also for \$6,000, and was, by direction of this court, reduced to \$4,000. The injury there consisted of a fracture of the ulna of the forearm, and a dislocation of the head of the radius. The turning motion of the forearm was to some extent limited, and at the elbow the arm could not be bent to the full extent. The evidence showed that Bailey was still able to cut wood, and that his earning capacity was not greatly lessened. Moreover, the trial court in that case, in its order denying a motion for new trial, expressly stated that the amount of the verdict should not have been in excess of \$4,000, but declined to require a remittance from the amount, in the belief that it lacked the power to do so. This court held that it had such power, and directed that it should require Bailey to remit \$2,000 or submit to a new trial. The record discloses no such finding of the trial court in this case. The denial of the motion for new trial, which expressly raised the point, shows that, in the opinion of that court who saw and observed respondent's injury, the verdict was not excessive. We do not think the evidence is such that we would be justified in interfering with the trial court's ruling in that regard.

The judgment is affirmed.

MOUNT, C. J., and DUNBAR, J., concur. FULLERTON, J., concurs in the result. RUDKIN, ROOT, and CROW, JJ., concur, in view of the decision in *Hall v. West & Slade Mill Co.*, 81 Pac. 915.

DRUGALIS v. NORTHWESTERN IMP. CO. et al.

(Supreme Court of Washington. Jan. 9, 1906.)

1. APPEAL—REVIEW OF FACTS—CONCLUSIVE-NESS OF VERDICT.

Where the evidence is in direct conflict upon the vital points of the case, the finding of the jury, approved by the trial judge, is conclusive of the facts on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3948-3950.]

2. MASTER AND SERVANT—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action for injuries to a servant, a charge that, if the injury complained of was caused by the negligence of defendants and without any greater want of care and skill on the part of plaintiff than was reasonably to be expected from a person of ordinary care in the situation in which he was placed, plaintiff was entitled to recover, was not subject to the objection of authorizing a recovery by plaintiff, although he himself was guilty of some negligence.

Appeal from Superior Court, Pierce County; A. E. Rice, Judge.

Action by A. J. Drugalis against the Northwestern Improvement Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

B. S. Grosscup and A. G. Avery, for appellants. Govnor Teats, Frank B. Sayre, and Otis W. Brinker, for respondent.

MOUNT, C. J. Action for personal injuries. Plaintiff recovered a judgment for \$1,000 in the court below. Defendants appeal.

Plaintiff was employed as an experienced miner to mine coal in defendants' coal mine near Roslyn, Wash. The vein of coal where plaintiff was employed was about 4 feet, 10 inches, in thickness. Next above this vein of coal was a sandstone formation, about 12 inches thick, lying flat upon the vein of coal. A seam separated this sandstone from the coal on the lower side, and a seam likewise separated the sandstone from the hard country rock on the upper side. Above this sandstone formation was a continuous hard, solid rock. The method pursued in mining was to break down the coal in the face of the working by means of blasts. When the coal was broken down, the sandstone cap rock remained in its place. The miner then examined the sandstone cap rock above by means of a bar or pick, to see that it was safe. An experienced miner could tell by tapping the cap rock whether it was safe or not. If it was not safe, he put props under it, and then shoveled back the coal which was broken down by the blast. If it was safe, he did not use the props. Generally, however, the props were used, and after the coal was shoveled back toward or into a car which was furnished for the purpose of being loaded with coal, the props were removed, and the miner proceeded to break down the cap rock, which was thereupon piled up at one side of the "room" where he

worked. This cap rock was usually broken down by driving an iron wedge into the seam between it and the solid rock above. Sometimes it could be pried down with a bar without the use of the wedge. When it could not be broken down in either of these ways, it was broken down by a blast of black powder. It was always necessary, and was a part of the miner's duty, to take down and carefully pile away this cap rock, which was done immediately after the coal was shoveled from under it. The props which were used to hold up the projecting cap rock, while the loose coal broken down from the face of the vein was being removed, were furnished to the miners by car drivers upon request of the miners. On the 17th day of June, 1903, while the plaintiff was at work in the mine, a piece of cap rock fell upon, or rolled against, his right leg, and broke it. Thereafter he brought this action, alleging negligence of the defendants in two particulars: First, in providing for the excavation of a room of unsafe size; and, second, in failing to provide timbers to enable plaintiff to safely prop his working place, as required by statute. The answer denied the allegations of negligence, and pleaded affirmatively contributory negligence and assumed risk. The first charge of negligence was abandoned at the trial. The evidence as to how the accident happened and as to whether or not there were props furnished to the plaintiff, and whether or not plaintiff requested props from the drivers, or defendant Forsythe, is in irreconcilable conflict. The plaintiff's evidence was to the effect that he was injured while shoveling coal, that no props were furnished him, and that he had demanded props from both the driver and defendant Forsythe whose duty it was to furnish the props to the drivers to be delivered to the miners. The defendants' evidence was to the effect that, at the time of the injury, plaintiff told a number of witnesses that he was injured while wedging down the cap rock. These witnesses also testified that the coal was all cleaned out from under the cap rock, and that the wedge mark was plainly visible where the cap rock had been broken down. Defendants' evidence also tended to show that there were an abundance of props at hand for plaintiff's use, and that he had made no demand for props. The jury returned a verdict in favor of the plaintiff.

Appellants contend that the court erred in refusing to direct a verdict in favor of each of the appellants. As stated above, the evidence was in direct conflict upon each of the vital points in the case. It was therefore, under repeated rulings of this court, for the jury to determine the facts. The jury did so, and found in favor of plaintiff. The judge who saw and heard the witnesses refused to grant a new trial. The facts must therefore stand as found by the jury in favor of the plaintiff. A large part of appellants' brief is devoted to the question of assumption

of risk, and we are urged to overrule the case of *Green v. Western American Company*, 30 Wash. 87, 70 Pac. 310. The appellants' brief in this case was filed before the decision in *Hall v. West & Slade Mill Co.* (Wash.) 81 Pac. 915, and was considered by us in that case, because of the able argument it contained upon the question then at issue. But we then concluded not to change the rule laid down in *Green v. Western American Company*, and since that time we have recently decided two other cases following the rule of *Green v. Western American Company* and of *Hall v. West & Slade Mill Company*, *supra*. Those cases are *Whelan v. Washington Lumber Company* (decided December 26, 1905) 83 Pac. 98, and *Hoveland v. Shipbuilding Company* (decided December 26, 1905) 82 Pac. 1090. The rule has therefore become the settled rule of decision upon the question of assumption of risk in this class of cases.

Appellants assign several errors upon the instructions, besides those relating to the assumption of risk. These assignments are technical in their nature and we think are without sufficient substance to constitute reversible error. Some of the criticisms upon the language used by the court are probably justified; but, taken as a whole, the jury could not have been misled by the instructions. For example, the following instruction was given: "You are instructed that, in determining the question of negligence in this case, you should take into consideration the conduct and situation of both parties at the time of the alleged injury as disclosed by the evidence, and, if you believe from the evidence that the injury complained of was caused by the negligence of defendants as charged in the complaint, and without any greater want of care, prudence, and skill on the part of the plaintiff than was reasonably to be expected from a person of ordinary care, prudence, and skill in the situation in which he found himself placed, then the plaintiff will be entitled to recover." It is claimed that this instruction means that the plaintiff may have been guilty of some negligence and yet recover. We think the instruction is not susceptible of that construction. The court evidently meant to tell the jury that, if they believed the plaintiff was using ordinary care, prudence, etc., or, in other words, that the plaintiff himself was not negligent, then he could recover. The words used to express that idea did not do so as clearly as they might have done, but the meaning is manifest, and we think did not constitute reversible error. Without considering each one of the instructions separately, we think it is sufficient to say that, taken together as a whole, they fairly gave the law of the case to the jury, and that there is no reversible error therein.

After a careful reading of the evidence, we are not impressed with the merits of plaintiff's case, but, since the jury found the

material facts in favor of the plaintiff, after seeing and hearing the witnesses, whose testimony was conflicting, and since the trial judge refused to grant a new trial, and also since we find no reversible error of law in the record, the judgment must be affirmed.

DUNBAR, HADLEY, and FULLERTON, JJ., concur. RUDKIN, ROOT, and CROW, JJ., concur. on the authority of *Hall v. West & Slade Mill Co.*, 81 Pac. 915.

HANSEN v. SEATTLE LUMBER CO. (Supreme Court of Washington. Jan. 5, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to an employé, evidence considered, and *held*, that the question of plaintiff's contributory negligence was for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089-1132.]

2. SAME—INSTRUCTIONS.

In an action for injuries to an employé, refusal of an instruction that every person of mature years and ordinary intelligence is charged with knowledge of the danger that cogwheels in operation will crush parts of the human body coming in contact with them is not error, where the court charges that it was the duty of one working around dangerous machinery to use his senses and faculties to avoid injury to himself, and a failure to do so would amount to such negligence as to relieve the defendant from liability, and that the employé is chargeable with knowledge that cogwheels in operation would crush his hand if it came in contact with the cogs, provided that, if ordinarily careful, he ought to have been aware of their existence.

3. EVIDENCE — OTHER INJURIES FROM SAME CAUSE.

In an action for injuries to an employé from the crushing of his hand between unguarded cogwheels, evidence that other accidents had happened in the same mill on the same cogwheels, which accidents had been complained of, was admissible to show their dangerous condition and that the employer knew of it, especially in view of the allegation of these facts in the complaint and their denial by the answer.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 406, 411; vol. 34, Cent. Dig. Master and Servant, §§ 919, 923.]

4. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

An instruction that it was the duty of an employer to provide such appliances as would avoid injuries to its employés, so far as this could possibly be done, was not prejudicial to the employer, where it was conceded that no guards had been placed on the cogwheels on which the employé was injured, while Laws 1903, p. 40, c. 37, § 1, required employers to maintain proper safeguards for all cogs and prohibits the use of such machines not properly guarded.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Hans Hansen against the Seattle Lumber Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

G. M. Emory, for appellant. Martin J. Lund and Walter S. Fulton, for respondent.

MOUNT, C. J. On July 8, 1904, while respondent was working as a common laborer in appellant's sawmill, he caught his left hand in some unprotected cogwheels, and lost the second and third fingers thereof. His hand was otherwise crushed and injured. He brought this action for damages, alleging negligence of appellant in failing to guard and protect the cogwheels. Appellant in its answer denied the allegations of negligence, and pleaded affirmatively contributory negligence and assumption of risk on the part of the respondent. The cause was tried to the court and a jury, which returned a verdict in favor of respondent for \$2,500. From a judgment rendered on the verdict, defendant appeals.

Appellant argues, first, that the evidence shows that the respondent was guilty of contributory negligence as a matter of law. Upon this point the evidence shows that respondent was employed in the mill as second man behind a gang edger to bear away lumber; that he had worked at this employment for about three days. Under the rules and customs of the mill, when the first man behind the edger was away, it became the duty of the second man to move up to the place of the first man; and, when the man whose duty it was to operate the live rolls by means of levers was away, it was the duty of the first man behind the edger to take his place. At the time of the injury respondent had been working for about two hours as first man behind the edger. The man controlling the live rolls left his station for a short time and requested respondent to take his place. Respondent expressed some doubt as to his ability to operate the rolls, but assumed the place. Soon after he had done this, he saw some timbers coming along the rolls. One of the sticks, four by six inches in size and ten feet in length, was about to fall from the rolls. Respondent thereupon stepped over to the stick and attempted to replace it on the rolls. The stick happened to lie over a pair of revolving cogwheels, which respondent did not see. When he took hold of the stick, his hand was caught in the cogwheels and crushed. There was some evidence to the effect that, when respondent expressed doubt as to his ability to operate the levers which controlled the rolls, they were stopped, and that respondent thereupon started them again. This, however, was disputed by respondent. The evidence shows that it was the duty of the respondent to perform the act he was performing when he was injured. Usually the question of contributory negligence is a question for the jury, and it is only in rare cases, and where there is no question of fact, or the evidence is undisputed, that the question becomes one of law for the court. *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. Rep. 799; *Christianson v. Bridge Company*, 27 Wash. 582, 68 Pac. 191; *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114. Under the facts as testified to by the re-

spondent, and as above stated, we are clearly of the opinion that this question was one for the jury.

Appellant next complains that the court refused to instruct the jury, in substance, that every person of mature years and ordinary intelligence is charged by law with knowledge of the danger that cogwheels in operation will crush parts of the human body coming in contact with them, and instead thereof instructed the jury as follows: "You are instructed that mere knowledge on the part of the plaintiff that the cogwheels were uncovered is not, as a matter of law, sufficient to have charged the plaintiff with an assumption of the risk, but such knowledge must have conveyed to the plaintiff the danger that was likely to result to him from the uncovered condition of the cogwheels. Upon an examination of the instructions, we find that the court fully instructed the jury as to the duty of the plaintiff in working around dangerous machinery. For example, the court charged the jury as follows: "I charge you that it is the duty of one working around dangerous machinery to use his senses and faculties to a reasonable degree, with a view to avoiding injury to himself, and that failure to use his senses and faculties to any degree at all while working in the vicinity of an open, visible, and exposed cogwheel would, as a matter of law, amount to such negligence on his part as to relieve the defendant from liability, provided such carelessness on the plaintiff's part directly caused or helped to cause his injury. If you believe that the cogwheel was open, unguarded, and plainly visible, at or before the time of plaintiff's injury, and that the plaintiff in the ordinary careful use of his powers of observation saw or ought to have seen it, and yet approached it and placed his hand on a board so close to the cogwheel that his hand was drawn into it, without looking or watching or thinking of the danger of coming in contact with it, and his failure to look, watch for, or think about the danger was the partial or total cause of his injury, then I charge you that he would be guilty of contributory negligence and could not recover a verdict in this action." And several other instructions were given to the same effect. The court then gave the following: "The plaintiff in this case is chargeable with the knowledge that a cogwheel in operation would crush his hand if it came in contact with the cog, provided you find that he was aware, if ordinarily careful, or, if ordinarily careful, ought to have been aware, of their existence." These instructions are as favorable to the appellant as could have been given under the rule in *Hall v. West & Slade Mill Co.* (Wash.) 81 Pac. 915.

Appellant next contends that the court erred in receiving evidence of two witnesses, who testified that other accidents had happened in the same mill upon these same cogwheels, and others similarly situated, prior

to the time of the injury complained of in this case. This evidence was introduced and admitted for the avowed purpose of showing the defective and dangerous condition of the cogwheels, and that appellant knew thereof. We think it was admissible for that purpose; especially, in view of the fact that the complaint alleged that, prior to the time of the accident, the cogwheels were left open, exposed, and unprotected, and that appellant knew of the dangerous condition of said cogs, which allegations were denied by the answer. *Smith v. Seattle*, 33 Wash. 481, 484, 74 Pac. 674; *Stock v. Le Boutilier* (City Ct. N. Y.) 41 N. Y. Supp. 649; *Morse v. Railway Company* (Minn.) 16 N. W. 358. Appellant relies upon the cases of *Christensen v. Trunk Line*, 6 Wash. 75, 32 Pac. 1018, and *Atherton v. Tacoma Railway Co.*, 30 Wash. 393, 71 Pac. 39, where evidence to the effect that motor-men had run cars at a high rate of speed on other occasions was held inadmissible, because this issue was a collateral and immaterial issue. In the case before us the condition of the cogwheels did not depend upon the will of the respondent, or the men who had charge of the operation of the machine. The condition was of a fixed and permanent character, made so by the will of the appellant. The fact that these same cogwheels, and others near by in the same condition, had injured other employes was notice of the dangerous condition of the wheels. This appears to distinguish this case from the ones cited by appellant, where the condition was not a fixed condition, but depended entirely upon some act of the operator which may not have been known to the railway company.

Appellant next contends that the court erred in giving the following instruction: "You are instructed that it is the duty of the defendant to use all reasonable care and forethought to provide appliances necessary to the safety of the plaintiff, and such appliances as would avoid injury to its employes, so far as this could possibly be done, and while it is true that the plaintiff was required to use his faculties for his own preservation, yet he was not required to make a minute examination to discover whether the defendant had discharged his duty towards him as hereinbefore stated." It is insisted by appellant that the words "so far as this could possibly be done," as used in this instruction, make the appellant an insurer of the life and limbs of its employes. The statute in force at the time of the injury to respondent required the appellant to maintain in use proper safeguards for all cogs, and prohibited the use of such machines not properly guarded. *Laws 1903*, p. 40, c. 37, § 1. We have recently passed upon the effect of this statute in *Whelan v. Washington Lumber Co.*, 83 Pac. 98, and *Hoveland v. Shipping Company*, 82 Pac. 1090, where we held that it was the positive duty of mill companies, or operators of such ma-

chines, to properly guard them as required by the statute, and that the term "proper guard" means a sufficient guard. In view of the fact that it was conceded in this case that there was no guard over the cogwheels on which respondent was injured, it became the duty of the court, under the rule as announced in the two cases last above cited, to instruct the jury that appellant was negligent as a matter of law in using the machine without guards, and permitting respondent to work around the machine with the cogs exposed. It follows therefore that the instruction above quoted was not prejudicial to the appellant, even if it is erroneous.

Finding no prejudicial error in the record, the judgment is affirmed.

ROOT, CROW, DUNBAR, HADLEY, and FULLERTON, JJ., concur.

In re O'NEILL.

(Supreme Court of Washington. Dec. 27, 1905.)

1. STATUTES — TITLE — EXPRESSION OF SUBJECT.

Sess. Laws 1905, p. 376, c. 180, prohibits any one but a duly authorized agent of a railroad to sell railway transportation; requires such agent to be provided with a certificate from the railroad showing his authority, and to have a fixed place of business in which his certificate shall be conspicuously shown; makes it unlawful for any one not possessed of such certificate to sell railroad transportation or to set up, establish, and conduct any office or place of business for the sale or transfer of railroad transportation. *Held*, that the subject of the act is sufficiently embraced within its title, which is: "An act to prevent fraud upon travelers and prescribing where, how, and by whom railroad tickets shall be sold, * * * and prescribing penalties for the violation of this act."

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 145.]

2. CONSTITUTIONAL LAW — DUE PROCESS OF LAW — PROHIBITION OF TICKET BROKERAGE.

The act does not, as to a ticket broker established in business previous to its passage, violate Const. U. S. Amends. 5, 14, nor Const. Wash. art. 1, § 3, guarantying due process of law, but is a valid exercise of the police power in the prevention of the perpetration of possible frauds on the public by the unauthorized sale of railway tickets.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 823.]

3. SAME — EQUAL PROTECTION OF LAWS.

Nor does the act deny to unauthorized ticket brokers equal protection of the laws by granting special privileges to railroads which are not enjoyed by others.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 616.]

4. SAME — DELEGATION OF LEGISLATIVE AUTHORITY.

Nor is the act subject to the objection of delegating to railroads the power to create crimes or to say who are criminals, by issuing or withholding certificates of authority at their own will.

5. STATUTES — PARTIAL INVALIDITY — EFFECT.

Section 5 of the act (*Sess. Laws 1905*, p. 377, c. 180), declaring that proof of certain

facts shall be sufficient evidence to establish a prima facie case against an alleged offender, does not, conceding that it changes the ordinary rule as to the burden of proof and presumption of innocence in criminal cases, invalidate the whole act.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 58-64.]

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Petition by H. J. O'Neill for a writ of habeas corpus. From an order denying a release, petitioner appeals. Affirmed.

Richard Saxe Jones, Wm. H. Brinker, and Graves & Graves, for appellant. Kenneth Mackintosh, Jas. F. McElroy, Arthur C. Spencer, and Dan J. Malarkey, for the State.

HADLEY, J. This appeal is from an order denying release upon a writ of habeas corpus. The writ was issued by this court upon application therefor, and was made returnable before the Honorable Mitchell Gilliam, one of the judges of the superior court of King county. From the denial of release by that court this appeal is prosecuted. The appellant was arrested by the sheriff of King county, by authority of a warrant issued by John B. Gordon, a justice of the peace in said county. The warrant was issued in pursuance of a complaint filed with said justice, charging appellant with selling, issuing, and dealing in railroad passenger transportation, and with setting up, establishing, maintaining, and conducting within this state an office and place of business for the sale, exchange, and transfer of the whole or any part of railroad tickets and other evidences of a right to travel upon railroads within or without the limits of this state, without keeping a certificate setting forth his authority to sell, issue, or deliver railroad transportation. The acts charged constitute a misdemeanor in this state under the terms of chapter 180, p. 376, Sess. Laws 1905. The sole contention of appellant is that said act is unconstitutional and void.

The first contention is that the title of the act is insufficient. It is suggested that the real object of the act is to prohibit the business of ticket brokerage, and that the title does not comprehend that subject. The title is as follows: "An act to prevent fraud upon travelers and prescribing where, how, and by whom railroad tickets shall be sold, and providing the terms upon which the redemption of the whole or any part of such tickets as may not have been used shall be made, and prescribing penalties for the violation of this act." It will be seen that the title specifically states that the act prescribes "where, how, and by whom railroad tickets shall be sold." It must be apparent to any one reading the title that the act discloses what persons shall not sell such tickets. The act is, therefore, not void on account of its title.

Appellant next contends that the act is void in that it deprives him of his business

and property without due process of law, and interferes with his liberty as a citizen in the pursuit of his business. The substance of the act is that no one but a duly authorized agent of a railroad company shall be permitted to sell railway transportation, and he shall be provided with a certificate from the company showing his authority. Such agent must have a fixed place of business, and must keep the certificate of his authority posted in a conspicuous place in such place of business. It is made unlawful for any one who is not possessed of such certificate and who has not posted it as aforesaid to sell or offer for sale railroad tickets or other evidence of a right to travel upon any railroad, whether the same be situated or owned or operated within or without the limits of this state. It is also made unlawful for one to set up, establish, maintain, conduct, or operate within this state, any office or place of business for the sale, exchange, or transfer of evidences of a right to travel upon any railroad, unless he possesses such certificate of authority and has posted it as aforesaid. It is also provided that any railroad company doing business in this state shall redeem, upon presentation to any of its ticket agents, the whole or any part of an unused ticket which has been issued by such company. Appellant argues that the act violates section 3, art. 1, of the state Constitution, and article 5, and section 1, art. 14, amendments to the Constitution of the United States. He states that for many years he has been a resident of Seattle, and that during that time he has pursued the occupation of a broker and dealer in railway and other tickets for transportation of passengers over various transportation lines in the state of Washington; that he bought from all persons desiring to sell, and sold to all persons desiring to buy, such tickets; and that in such way he had established a permanent and lucrative business. He insists that such business was property of which he may not be deprived within the constitutional provisions cited, which prohibit the taking of property without due process of law. If the business of buying and selling tickets evidencing the right to railway transportation is not a subject within the regulative powers of the state, then perhaps appellant's business in dealing in such tickets has become property in his hands which cannot be taken away.

Railway corporations exist by authority of the state, and are required to serve the public. One of the purposes of this act, as specified in its title, is "to prevent fraud upon travelers." It is true there is no charge of actual fraud made against appellant; but the declared purpose of the statute is to prevent, the possibility of fraud, and the method of regulation to prevent it has been violated by appellant. If it is within the power of the state to establish general rules designed to prevent fraud in the premises, appellant cannot be heard to say that the violation of those

rules does not result in fraud. We are unable to see why the state which creates the corporation and requires that it shall serve the public has not the power to adopt reasonable regulative means applicable to that service, whereby no fraudulent imposition may be visited upon the public. If, within the opinion of the Legislature as it is supposedly advised from experience of citizens of the state, the sale of railway tickets by others than the railway companies and their duly authorized agents results in fraudulent imposition upon travelers, then it would seem to be within the regulative police power of the state to adopt means to prevent it. The thing to be sold, viz., the right of transportation over the railway line, originally belongs to the company and is its property. The company is under obligation to sell that property to all who apply for it and who tender the necessary price. The state, by the act in question, has said that the original holder of that property and its duly authorized agents shall alone be permitted to sell it. Appellant's position is that he has the right to traffic in the property after the railway company has sold it, and that to deprive him of that privilege is to violate a constitutional right. The mere right to continue in the future to buy and sell property of the class of railway transportation, which is primarily owned by the railroad company to be sold to the individual traveler for transportation, and not for the purpose of subsequent traffic therein for speculation and gain, we think cannot be such an individual property right as comes within the constitutional provisions, when considered as against the regulative power of the state concerning such transportation, and in the interest of protecting the property rights therein of the great number of people who become the owners of such property. Such traffic bears an important relation to the welfare of the general traveling public who are patrons of the railway companies, quasi public corporations created to serve the public.

However, we do not approach this subject as a new question in the courts, and we need not discuss it as such. That the subject-matter of this statute is a proper subject for police regulation has been repeatedly held. We are aware that it is difficult to define the scope of the term "police regulation." It has been the subject of much discussion by the courts, and its application has sometimes been sarcastically criticized as the use of an indefinite something to sustain legislation unsupported upon any other ground. However, it is the term which is used to define a power which resides in the state, and it has been expressly held that legislation of the character of that now before us, and upon the same subject, comes within its scope. *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *Burdick v. People*, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329; *State v. Corbett*, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; *State v. Bernheim*, 19 Mont. 512, 49 Pac. 441;

Jannin v. State, 42 Tex. Cr. R. 631, 51 S. W. 1126, 62 S. W. 419, 96 Am. St. Rep. 821. While not expressly discussed, yet the police power in the premises was necessarily recognized in *State v. Ray*, 100 N. C. 736, 14 S. E. 83, 14 L. R. A. 529, and *Commonwealth v. Keary*, 198 Pa. 500, 48 Atl. 472. It was also expressly stated in some of the decisions that such legislation does not deprive one of his property without due process of law. While that subject was not particularly discussed in the opinions of all the cases cited, yet such was the necessary effect of the decisions. In *Ex parte Lorenzen*, 128 Cal. 431, 61 Pac. 68, 50 L. R. A. 55, 76 Am. St. Rep. 47, the same was, in effect, held with relation to an ordinance of San Francisco, requiring that street car transfer tickets should be issued and delivered within the car from which the transfer is made, and received only within the car to which it is made, and forbidding any person, except the conductor or agent of the street car line, to give, sell, or issue any transfer check.

Appellant argues that *Burdick v. People*, supra, should be distinguished from the case at bar, for the reason, as he alleges, that the Illinois act provided that a purchaser of a bona fide ticket with the intention of traveling upon the same might sell any part of it to another person, and it is therefore contended that the act was limited to the prevention of forgery and the fraudulent sale of tickets. The provision was that one who had so purchased a ticket "from any agent authorized by this act" might so transfer it, and clearly had reference to a mere individual traveler. The effect of the statute, so far as it related to such as appellant, who did not buy from an "agent authorized," but who bought miscellaneous in the open market and transferred again, was the same as our own. Moreover, our statute provides that the individual ticket holder is entitled to have the whole or any part of an unused ticket redeemed by the company that issues it, and the same end, in effect, is therefore accomplished for him as was provided by the Illinois statute. Our attention has been called to the fact that an effort was made before the Supreme Court of Illinois to have the opinion and judgment in the *Burdick* Case annulled, on the alleged ground that the opinion was obtained by collusion and fraud practiced on the court; and it is contended that the decision, for that reason, should not be regarded as a precedent. The court, however, declined to interfere with the opinion and judgment. In *re Burdick*, 162 Ill. 48, 44 N. E. 413. The majority opinion states: "No contention is made that the statute which was considered in the *Burdick* Cases is unconstitutional, or that this court in the opinions filed by it did not correctly hold the law." So far as we are advised, the original opinion therefore stands to this day as the decision of the court of last resort upon this subject in that state.

Appellant's chief reliance is upon the authority of *People ex rel. Tyroler v. Warden*

of Prison, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763. The majority opinion in that case was written by Chief Justice Parker, and held a statute of similar import to our own to be unconstitutional as taking property without due process of law and as interfering with the liberty of the citizen. There were three dissenting judges, and two somewhat extended dissenting opinions were written. Some of the opinions in cases we have cited above have referred to that case, and have followed the reasoning and conclusions of the dissenting judges, rather than the argument of Judge Parker. It was also argued in some instances that the decision of the majority of the New York court was based upon a statute having a distinguishing feature. In Judge Parker's opinion he emphasized the fact that the statute did not limit the right to sell tickets to the particular transportation company over whose line the traveler desired to be conveyed, and he construed the statute to mean that, when one became the agent of the transportation company, he was thereby authorized to buy tickets of any other transportation company in the world, and to sell them to any person who might apply for them. The statute had been previously construed otherwise by the Supreme Court of New York in the same case. Some of the cases criticizing the New York case distinguished it on the above ground, inasmuch as the statutes with which they dealt limited the authority of the agent in the premises to the sale of tickets of the one transportation company. Such is also true of our statute, as will be seen by reference to section 1. The authority of the agent of the railroad company mentioned is "to sell its tickets," and is not extended to those of other companies. Since this case was argued, however, our attention has been called to the fact that the Supreme Court of New York has, since the Tyroler Case, had under consideration a modified statute which eliminated the feature above mentioned, but that the court nevertheless felt impelled, on the authority of the Tyroler Case, to hold the statute unconstitutional. *People ex rel. Fleischman v. Caldwell*, 64 App. Div. 46, 71 N. Y. Supp. 654. The last-named decision was by the Court of Appeals affirmed by a mere memorandum decision based on the Tyroler Case. *People ex rel. Fleischman v. Caldwell*, 168 N. Y. 671, 61 N. E. 1132. All the judges seem to have concurred, except one, who did not vote. It appears, therefore, that as the matter now stands there is practical accord of decision in the state of New York in favor of appellant's view.

Appellant argues that this court has recognized the authority of the Tyroler Case in *State v. Brown*, 37 Wash. 97, 79 Pac. 635, 68 L. R. A. 889. That case involved a statute requiring one to submit to an examination and secure a license from the state dental board in order to "own, run, or manage" a dental

office. It was held that, in so far as the statutory condition of ownership of a dental office was concerned, it was unconstitutional. In the opinion the court, in discussing general principles, cited and quoted from the opinion of Judge Parker in the Tyroler Case. The language was cited as an illustration of a principle, but it cannot be said that this court then considered the force of the decision itself as applying to its own subject-matter, when regarded in connection with the argument and weight of authority from other courts of last resort on the same subject-matter. Undoubtedly the weight of decision in reference to this particular class of statutes is against the holding of the New York court, and apparently that court stands practically alone. Appellant also cites *In re Aubrey*, 36 Wash. 308, 78 Pac. 900, 104 Am. St. Rep. 952, as well as *State v. Brown*, supra, as sustaining the general principle for which he contends. The first case related to a statute which required a horseshoer to submit to an examination and pay a license fee as a condition precedent to the prosecution of his business. It was held to be an unconstitutional interference with his liberty to pursue such a business as horseshoeing. *State v. Brown*, as we have seen, dealt with a statute containing similar provisions with reference to the mere ownership of a dental office. Those are mere private occupations, and are unlike that of the common carrier, whose business and duty it is to serve the public generally, and who is therefore a proper subject for governmental control. Every one has the natural and constitutional right to pursue a lawful business; but we do not think he has such right to traffic in the transportation of a railway company, without its permission or authority, as against the power of the state to regulate the sale of such transportation in the interest of the general public. A legislative act should be upheld, unless there are clear constitutional reasons for holding otherwise. We are not convinced that such reasons exist in this case, and we are disposed to adopt the views of what we are constrained to believe is the weight of authority having reference to decisions upon statutes treating of the same subject-matter in sister states. The arguments of the other courts may not be as elaborate as that of Judge Parker. His distinguished personality as a jurist and otherwise should cause his opinion and argument to receive much consideration, but his conclusions are not supported by the decisions of the other courts.

It is further argued that the act is objectionable in that it denies to the appellant the equal protection of the laws. It is claimed that it grants special privileges to railroad companies which are not enjoyed by other citizens. Cases we have cited hold that such a law does not grant special privileges, but that it rather imposes a burden upon railway companies, in that it limits the authority to sell tickets to the agent of the carrier ap-

pointing him, requires that the railroad company shall provide him with a certificate of authority, that no others shall sell transportation, and compels the company to redeem unused tickets. In view of all the requirements placed upon the railroad companies, we do not think it should be said that the act confers special privileges within constitutional prohibition. It, in effect, says to railroad companies: "You must duly commission all persons who sell your transportation. No others shall sell it, and you shall redeem all unused transportation."

It is also urged that the act delegates to railroad companies the power to create crimes and to say who are criminals. It is argued that the companies may issue or withhold the certificates of authority at their own will, and that by withholding the certificate they are thereby empowered to make one a criminal who sells transportation without it. We do not think there is force in this argument. The statute simply says to the companies: "You must appoint your own agents and certify as to their authority." This, as we have seen, is a reasonable regulation, and intended for the interest of the traveling public. It is true that the power to appoint the agents is in the railway company; but, for reasons already stated, the Legislature has the undoubted power to say it shall be a misdemeanor for all others to engage in the sale of transportation. The railway companies must have agents to sell their transportation, and they cannot in reason be expected to appoint all who may apply. The mere fact that they may not appoint all applicants does not make any of the latter guilty of crime. If they become guilty, it is because of their own volition they persist in engaging in an act which the Legislature says shall constitute a crime.

It is simply suggested by appellant that section 5 (page 377) of the act provides that proof of certain facts shall be sufficient to establish a prima facie case. That involves a question that will arise upon the introduction of evidence at the trial upon the charge under which appellant is held. The matter now before us was determined upon demurrer to the return made by the officer to the writ of habeas corpus. What effect that portion of the statute may have upon the burden of proof is not now before us. Even if it should be held that that portion of the act changes the ordinary rule as to burden of proof and presumption of innocence, still it would not make the whole invalid. It purports to deal only with matters of evidence, and those are determinable at the trial.

The judgment is affirmed.

MOUNT, C. J., and FULLERTON, RUDKIN, CROW, DUNBAR, and ROOT, JJ., concur.

(41 Wash. 186)

HALL v. HALL et al.

(Supreme Court of Washington. Dec. 27, 1905.)

1. COURTS — RULES OF DECISION — FEDERAL QUESTIONS.

The rights of a surviving husband or wife with reference to a homestead entry made under the laws of the United States present a federal question, on which the decisions of the federal courts are controlling.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 332.]

2. HUSBAND AND WIFE—COMMUNITY PROPERTY—HOMESTEAD—PUBLIC LAND.

Plaintiff was divorced from her husband prior to August 30, 1898, when he made a homestead entry on the lands on which they had been residing. He made final proof on August 8, 1899, and a patent was issued to him on February 9, 1900. On August 30, 1899, the entryman was married to defendant, and lived with her until he died on February 5, 1903, after having conveyed all his interest in the property to her. Held, that plaintiff acquired no interest in the land by virtue of her residence thereon with her husband as husband and wife prior to her divorce.

Appeal from Superior Court, Stevens County; William E. Richardson, Judge.

Action by Anna M. Hall against Estella B. Hall and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Binkley, Taylor & McLaren, Voorhees & Voorhees, and Chas. Francis Voorhees, for appellants. J. C. Marshall and S. & J. W. Douglas, for respondent.

RUDKIN, J. Prior to the year 1898 the lands in controversy in this case were unsurveyed public lands of the United States. In the month of June of that year the surveyor's plat was filed in the district land office, and on the 30th day of August, 1898, the lands were thrown open for settlement. On the latter date John F. Hall, now deceased, entered said lands under the homestead laws of the United States, and made final proof on the 8th day of August, 1899, after completing his five years' residence thereon, as required by said homestead laws. Patent issued on the 9th day of February, 1900. At all times between the 24th day of March, 1899, and the 4th day of March, 1898, said John F. Hall and the plaintiff, Anna M. Hall, were husband and wife. On the latter date the plaintiff was granted a divorce from said John F. Hall in the superior court of Spokane county, but no disposition was made of the property rights of the parties in the divorce proceeding. On the 30th day of August, 1899, the said John F. Hall and the defendant Estella B. Hall intermarried, and continued to live together as husband and wife until the death of the former on the 5th day of February 1903. On the 10th day of January, 1903, said John F. Hall conveyed all his interest in said property by deed to the defendant Estella B. Hall. In view of the conclusion we have reached on the merits,

it becomes unnecessary to refer to the claims of the other defendants. The plaintiff brought this action and asked that she be declared the owner of an undivided one-half interest in the property so acquired. The theory of the plaintiff's case was that said property was the community property of herself and her former husband John F. Hall, and that by the decree of divorce they became tenants in common thereof. The plaintiff had judgment below, according to the prayer of her complaint, and the defendants appeal.

The only interest the decedent had in the property in controversy at the time of the divorce was the right of occupancy, coupled with a preference right to enter the land and acquire title thereto after the same was surveyed and thrown open for settlement. Before he could acquire such title the land must be surveyed and thrown open to settlement, he must continue his residence until that time, and thereafter comply with the requirements of the homestead laws. How far state laws regulating the property rights of husband and wife attach to land acquired from the United States before patent, or at least before final proof, gives rise to an important federal question, which can only be authoritatively settled by the Supreme Court of the United States. In the recent case of *McCune v. Essig* (not yet officially reported) 28 Sup. Ct. 78, 50 L. Ed. —, that court held that the patent which issues to the widow upon the death of the homestead entryman carries with it the full legal and equitable title, to the exclusion of the entryman's children; in other words, that the federal law controls. True the homestead law provides that the patent shall issue to the widow in such cases; but it seems inconsistent to hold that the widow acquires the entire title on the death of the entryman, and that the entryman only acquires an undivided one-half interest on the death of the wife, under identical circumstances. The manifest object of our community property system is to place the husband and wife on an equal footing as to their property rights, and perhaps the law should be so administered as to accord to each the same property rights on the death of the other. Furthermore, it is a well-known fact that our community system is utterly ignored in the administration of the federal land laws. The wife is not made a party to a contest against an entry, and the husband is permitted to relinquish without the wife joining him. In *Ahern v. Ahern*, 31 Wash. 334, 71 Pac. 1023, 98 Am. St. Rep. 912, this court held that, where the wife of the entryman died after the homestead law had been fully complied with, but before final proof, her children were entitled to a one-half interest in the homestead claim, as community property. In *James v. James*, 35 Wash. 655, 77 Pac. 1082, it was intimated that the community rights of the wife at-

tached at even an earlier date. We are not called upon to retrace our steps at this time, but we are satisfied that we can advance no further without coming in conflict with the paramount laws of the United States and the decisions of the federal Supreme Court. Under no proper construction of the laws of the United States and of this state can the respondent be held to have any interest in the property in controversy under the facts disclosed in the record before us.

The judgment is therefore reversed, with directions to dismiss the action.

MOUNT, C. J., and HADLEY, FULLERTON, CROW, ROOT, and DUNBAR, JJ., concur.

(41 Wash. 190)

CUNNINGHAM et al. v. KRUTZ et al.
(Supreme Court of Washington. Dec. 27, 1905.)

1. COURTS — FEDERAL QUESTIONS — AUTHORITY DECISIONS.

The rights of a surviving husband or wife with reference to a homestead entry under the laws of the United States present a federal question, on which the decisions of the federal courts are controlling.

2. HUSBAND AND WIFE — PUBLIC LANDS — HOMESTEAD ENTRY — COMMUNITY PROPERTY.

A husband entered certain land under the homestead laws of the United States, and continued to reside thereon until April, 1890, when he commuted, made final proof, received his final receipt, and afterwards a patent, which was issued to him in July, 1890. From the date of the entry the entryman and his wife were in possession and resided on the land, when the wife died in 1890, leaving a will by which she devised an undivided half of the land to her children in fee. Held that, on the issuance of a patent under the homestead law, the entire estate in the land vested in the husband, and that the wife was not entitled to devise any part of the same as community property.

Appeal from Superior Court, King County; W. R. Bell, Judge.

Action by R. Cunningham and others against Harry Krutz and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

George Fowler, for appellants. H. E. Foster, for respondents.

HADLEY, J. This is an action for the partition of real estate. The plaintiffs allege that they are seld in fee simple of the undivided half interest in the land, and that the defendants Harry Krutz and Mary E. Foster are tenants in common with plaintiffs in the ownership of the land. The defendants Harry Krutz and wife, by their answer, deny that the plaintiffs have any interest whatever in the land, either as tenants in common with the defendants or otherwise. They also deny that the defendant Mary E. Foster has any interest in the land, except that she holds a mortgage thereon for \$500. It is affirmatively alleged in the answer that in December, 1887, one Carlson made entry up-

on a certain quarter section of land, which includes the land in question, the entry being made under the homestead laws of the United States; that he continued to reside thereon until April, 1890, when he commuted the homestead entry, made final proof, paid cash for the land at the government price, received his final receipt therefor, and that, in due course thereafter, a patent was issued to him by the United States; that in July, 1890, said Carlson borrowed of one Thomas S. Krutz the sum of \$750, gave his note therefor, and to secure the same executed a mortgage upon said land, which was duly recorded. Allegations are made showing the due foreclosure of the mortgage by the assignee thereof against that part of the land here involved, a conveyance of the land under the foreclosure by the sheriff, and subsequent conveyances in direct line to the defendant Harry Krutz; that the defendant Hattie Krutz was, at the date of the conveyance to Harry Krutz, and still is, the wife of Harry Krutz; and that said land became, by said conveyance, the community property of the said two defendants. They ask that plaintiffs' complaint shall be dismissed. The answer of Mary E. Foster denies that the plaintiffs have any interest in the lands, and asks that their complaint be dismissed. The reply avers that the entry was made about December 21, 1887, and that from that time Carlson and wife were in possession and resided upon the land; that in 1890 the wife of Carlson died testate, leaving a last will, which was duly admitted to probate; that said wife left three children as devisees under her will; that one of the children, an infant, has since died intestate, and without issue; that on the death of the wife and the probating of her will the said children, her devisees, became the sole owners in fee simple of an undivided half interest in said land, and continued to hold the same until March, 1904, when, by deed, the two surviving children, together with their father, the surviving husband, conveyed said undivided half interest to one Shea; that thereafter said Shea and his wife conveyed to the plaintiffs. The cause was tried by the court, and resulted in a judgment for the plaintiffs, declaring that they are the owners in fee simple of an undivided half interest in the land, and awarding partition thereof. The defendants have appealed.

From the foregoing it will be seen upon what the respective claims of title are based. The respondents contend that the deceased, Mrs. Carlson, had a devisable community interest in the land, and that they are the owners, by successive conveyances, of the interest so devised. Upon the other hand, appellants urge that, when the patent issued to the surviving husband, it conveyed to him the entire title as his separate property, and that through the foreclosure of a mortgage given by the patentee and successive conveyances thereunder the appellants Krutz and

wife are the holders of the entire title. The trial court refused to receive and consider the offered evidence of appellants as to the giving and foreclosure of the mortgage, and as to the subsequent conveyances by which Krutz and wife claim title. It was the theory of the court that the land was the community property of Carlson and his deceased wife, and that by the will of the latter the undivided half passed to her children, through whom and their grantees it has come to respondents. Upon this theory the court treated appellants' offered evidence as immaterial and incompetent. Respondents, however, conceded in their brief that, if the patent conveyed separate, and not community, property, they have no interest in the land. The entry was made as a homestead entry, and within less than three years thereafter the wife died. The husband did not continue to reside upon the land the required time to perfect the homestead, but commuted his homestead rights after the death of his wife, and made final proof and cash payment, in pursuance of which, in due course, a patent was issued to him. It therefore becomes necessary to determine whether the land was the separate property of Carlson or whether it became the property of the community, and it is proper that we shall first refer to our own decisions bearing upon the question as to who obtains title from the United States through a homestead patent.

In *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671, Kromer made a homestead entry, and an Indian woman lived with him as his wife. The required time of residence expired, and final proof was made. After the making of final proof, a marriage ceremony was performed between Kromer and the woman, and soon afterwards a patent was issued to Kromer. It was held that the land became the community property of the two. The holding was, however, apparently based upon the theory that the fact that the two had been living together as man and wife, and that a marriage ceremony was subsequently performed, was not conclusive evidence that there was no previous marriage between them, and that the land therefore became community property, notwithstanding that final proof was made before the ceremony was performed. In *Bolton v. La Camas Water Power Co.*, 10 Wash. 246, 38 Pac. 1043, it was held that where the required time of residence upon a homestead had expired, and the wife afterwards died, but before final proof and issuance of patent to the husband, the community acquired only an equitable estate; the husband taking the full legal title, and, upon his conveyance to a grantee ignorant of the equities of the wife's heirs, both the legal and equitable titles passed. In *Forker v. Henry*, 21 Wash. 235, 57 Pac. 811, it was held that where a woman had settled upon and improved a homestead before her marriage, and final proof was made and patent issued to her after marriage,

the land became her separate property under our statute which defines as separate property of the wife all her property and pecuniary rights held by her at the time of her marriage. At the time of her marriage she had resided upon the land about four years, and, although she was not then entitled to the legal title, the court seems to have considered that, on account of her previous settlement and improvements, such equities attached as entitled her to the ultimate title as her separate property; the further fact appearing in that case that, as between the husband and wife, the land was deemed to be the wife's separate property. In *Ahern v. Ahern*, 31 Wash. 334, 71 Pac. 1023, 96 Am. St. Rep. 912, the husband and wife had resided upon the homestead more than six years, when the wife died. Final proof was made after her death, and the patent was issued to the husband. It was held that the land became community property. In *Towner v. Rodegeb*, 33 Wash. 153, 74 Pac. 50, 99 Am. St. Rep. 936, it was held that where a settler upon unsurveyed public lands died, leaving no widow, and without heirs who were citizens of the United States, the land was again open to settlement, since the heirs could not succeed by right of inheritance, but by virtue only of a preference right given them by the laws of the United States if they had been duly qualified citizens. In *James v. James*, 35 Wash. 655, 77 Pac. 1082, the homesteader and his wife settled upon land, and three years afterwards the wife died. The husband completed the required residence and obtained a patent. It was said in that case that one who had been legally adopted by the husband and wife as a son was the lawful heir of the deceased wife, and had an interest in the land.

It is possible that some of the expressions in the above cases may be said to support respondents' contention here, and perhaps the conclusions upon the facts in some of them justify the contention that the decisions are decisive of this case in favor of respondents. Be that as it may, we shall now refer to recent federal decisions. In *McCune v. Essig* (C. C.) 118 Fed. 273, the following facts existed: *McCune* settled upon land in this state as a homestead, and made entry thereon. Within a year he died intestate; his only surviving heirs being his widow and a daughter, who continued to reside upon the land the required time for the widow to complete the homestead rights. *Mrs. McCune*, having become *Mrs. Donahue* by remarriage, then made final proof, and a patent was issued to her. About a year after the issuance of the patent she conveyed the land to the defendants in the case cited. Thereafter the daughter instituted the suit to procure a decree establishing that she was the owner of an undivided half of the land. Her contention was that, when the land was conveyed by the patent to her mother, it became the property of the community, com-

posed of her father and mother; that she, as the surviving heir of the father, succeeded to his interest; and that the interest was not conveyed by the mother's deed to the defendants in the action. The suit was begun in the superior court of this state for Lincoln county, and was removed to the United States Circuit Court. That court retained the cause on the ground that the question in the case was one which must be resolved by the laws of the United States, and decided that the widow, upon the issuance of the patent to her, took the entire title as her separate property, and that there was no community interest to descend to the daughter. This ruling was affirmed by the United States Circuit Court of Appeals, Ninth Circuit. *McCune v. Essig*, 122 Fed. 588, 59 C. C. A. 429. The same case, on appeal to the Supreme Court of the United States, was in all particulars affirmed by a recent decision, rendered November 27, 1905, and not yet officially published; the opinion being written by Mr. Justice McKenna. 26 Sup. Ct. 78, 50 L. Ed. —. From a copy of that opinion, which has been placed before us, we here quote: "The action of the lower courts on the motion to remand and on the merits is attacked by appellant to a certain extent on the same ground, to wit, that the laws of Washington determine the title of the parties, not the laws of the United States. The interest in *McCune*, acquired by his entry, it is contended, was community property, and passed to appellant under the laws of the state. Sections 4488 to 4491 of the statutes of Washington provide that property and pecuniary rights owned by either husband or wife before marriage, or that acquired afterwards by gifts, bequests, devise, or descent, shall be separate property. Property not so acquired or owned shall be community property, and, in the absence of testamentary disposition by a deceased husband or wife, shall descend equally to the legitimate issue of his or their bodies. 1 Ballinger's Ann. Codes & St. Relying on these provisions, the argument of appellant is, and we give it in the words of her counsel: 'When William *McCune* entered this land, he had not the legal title, but he had an immediate equitable interest and the exclusive right of possession until forfeited by failure to carry out the terms of his entry. *United States v. Turner* (C. C.) 54 Fed. 228. The terms of his entry were carried out. The patent issued by reason of his entry. The state Legislature had the right to direct to whom that equitable right and interest should pass. If the rights and interests under that entry had been forfeited, the state law would have no effect upon the title to the land. That equitable interest ripened, and was confirmed by the patent.' But this is begging the question. What interest arose in *McCune* by his entry, who could upon his death fulfill the conditions of settlement and proof, and to whom and for whom title would

pass, depended upon the laws of the United States. *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152. The motion to remand was rightly overruled." After quoting the federal statutes relating to the conditions of homestead entries and settlement (sections 2291, 2292, Rev. St. [U. S. Comp. St. 1901, pp. 1390, 1394]), the opinion further says: "It requires an exercise of ingenuity to establish uncertainty in these provisions. They say who shall enter and what he shall do to complete title to the right thus acquired. He may reside upon and cultivate the land, and by doing so is entitled to a patent. If he die, his widow is given the right of residence and cultivation, and 'shall be entitled to a patent as in other cases.' He can make no devolution of the land against her. The statute which gives him a right gives her a right. She is as much a beneficiary of the statute as he. The words of the statute are clear, and express who, in turn, shall be its beneficiaries. The contention of appellant reverses the order of the statute and gives the children an interest paramount to that of the widow through the laws of the state. The law of the state is not competent to do this. As was observed by Circuit Judge Gilbert: 'The law of the state of Washington governs the descent of land lying within the state, but the question here is whether there had been any descent of lands.' And against application of the state law the learned judge cited *Wilcox v. McConnell*, 13 Pet. 517, 10 L. Ed. 264, and *Bernier v. Bernier*, supra. In the former it was said that, whenever the question is whether title to land which had been the property of the United States has passed, that question must be resolved by the laws of the United States, but that whenever, according to those laws, the title shall have passed, then, like all other property in the state, it is subject to state legislation. In *Bernier v. Bernier* it was said that the object of sections 2291 and 2292 was 'to provide the method of completing the homestead claim and obtaining a patent therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate.' See *Hall v. Russell*, 101 U. S. 503, 25 L. Ed. 829. And hence it was decided that Mrs. Donahue took the title, free from any interest or right in the appellant under the laws of the state. Against the effect of the patent conveying title to Mrs. Donahue, appellant invokes the doctrine of relation. It is admitted 'that the title to the real estate in the case at bar passed and vested according to the laws of the United States by patent.' But it is contended that a beneficial interest having been created by the state law in *McCune* when the title passed out of the United States by the patent, it 'instantly' dropped back in time to the inception or initiation of the equitable right of William *McCune*, and that the laws of the state intercepted and prevented the widow from having a complete title without first complying

with the probate laws of the state.' This, however, is but another way of asserting the law of the state against the law of the United States, and imposing a limitation upon the title of the widow which section 2291 of the Revised Statutes does not impose. It may be that appellant's contention has support in some expressions of the state decisions. If, however, they may be construed as going to the extent contended for, we are unable to accept them as controlling."

There is no necessity for further reviewing the arguments of our own or of the federal decisions. The above decision is final and conclusive that the question as to what title passed to Carlson must be resolved by the laws of the United States. Without regard to the community laws of this state, it follows from the decision that when one makes a homestead entry and dies before completing the full residence period necessary under the homestead law, and leaving a widow who completes the period of residence, makes proof, and procures a patent, the land becomes the absolute separate property of such widow. In so far as our own previous decisions may be in conflict with the above, when applied to a similar state of facts, they must now be treated as overruled. The facts in the case at bar are very similar to those in *McCune v. Essig*. In the other case the husband died and the widow completed the homestead title; while in this one, the wife died within the third year of residence, and the husband commuted the homestead rights and made final proof, paying cash, and procuring patent to himself. If Carlson's title had been perfected as a homestead title, we should see no difference in principle by which to distinguish it from the *McCune* Case. Our views upon this point were expressed in the case of *Hall v. Hall* (recently decided) 83 Pac. 108, as follows: "True the homestead law provides that the patent shall issue to the widow in such cases; but it seems inconsistent to hold that the widow acquires the entire title on the death of the entryman, and that the entryman only acquires an undivided one-half interest on the death of his wife, under identical circumstances. The manifest object of our community property system is to place the husband and wife on an equal footing as to their property rights, and perhaps the law should be so administered as to accord to each the same property rights on the death of the other." The additional fact in this case, that Carlson commuted the homestead entry and paid cash for the land, strengthens respondent's position. By the consent and concurrence of the United States, he relinquished the homestead entry and availed himself of the benefits of the law granting preemption rights. The title conveyed to him was based upon a new consideration, passing from him to the United States, a consideration entirely different from the conditions which inhered in the homestead entry.

We see no escape from the conclusion that Carlson took the title as his sole and separate property. It follows that respondents have no title in the lands in question and no cause of action.

The judgment is reversed, and the cause remanded, with instructions to enter judgment dismissing the action.

MOUNT, C. J., and RUDKIN, FULLERTON, CROW, ROOT, and DUNBAR, JJ., concur.

STARR v. AETNA LIFE INS. CO.

(Supreme Court of Washington. Dec. 27, 1905.)

1. INSURANCE—ACCIDENT INSURANCE — CONDITION OF POLICY—BREACH—BURDEN OF PROOF.

Where, in an action on an accident policy, plaintiff proved that insured died of violent injuries which left visible marks on his body, the burden was on the defendant to show that the injuries resulting in insured's death were caused by the violation of some of the excepted causes in the contract, creating a forfeiture of the insurance.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1662-1664.]

2. SAME—POLICY—CONSTRUCTION.

Where an accident policy provided that it should not cover injuries sustained while insured was on any railroad bridge or "right of way," except at established crossings of such roads with public highways, the term "right of way" should be construed as meaning the way or track on which trains travel, and not the entire width of the railroad company's ground.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1164, 1172.]

3. EVIDENCE—RES GESTÆ.

Deceased, with certain associates, went to a depot in the early morning intending to take a certain train. Deceased left his associates, and after the train was gone he was found with both arms so mangled and crushed that amputation was necessary, and he died within 36 hours after the accident. Within an hour after the accident he made a statement that in attempting to go round the end of the train he fell, struck his head against a railroad tie, which rendered him unconscious, and when the train pulled out he discovered that he had sustained the injuries in question. *Held*, that such statement was not so remote from the time the injury occurred as to render it inadmissible as *res gestæ*.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 372-374.]

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Amelia Starr against the Aetna Life Insurance Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Jas. A. Williams and Denton M. Crow, for appellant. Post, Avery & Higgins, for respondent.

DUNBAR, J. The appellant is the beneficiary named in a certain accident insurance policy issued to her husband, Martin Luther Starr. This action was brought by appellant, as such beneficiary, to recover the principal

sum of \$5,000, by reason of the loss of the life of said Martin Luther Starr as the proximate result of external, violent, and accidental means. Some of the facts were stipulated between appellant and respondent, and appear as follows: On December 6, 1903, the insured, Martin Luther Starr, was at Hatton, Adams county, Wash. At about 4 o'clock in the morning of said day said Starr, with some companions, started from the hotel for the Northern Pacific Railway Depot. The train for Spokane was then due, and came in shortly after said Starr and his companions arrived at the depot. It was then still dark. Starr left his companions before the arrival of the train, and when the train arrived he could not be found by his companions, who made some search for him. Shortly after the train pulled out for Spokane some men at the depot heard Starr calling from a direction opposite to that in which the train had gone, and in a few moments said Starr came to the depot from the direction opposite to that the train had gone—that is, from down the track toward Tacoma—with both arms hanging limp and in a crushed condition. Within two days after said Starr was discovered as aforesaid he died from the effect of such injuries. Before his death his arms were amputated for the purpose of saving his life. Said Starr had not received said injuries before leaving his companions at the depot. The evidence shows that prompt notice was given the respondent of said injuries and the subsequent death of the insured, and that within the time limited by the policy proper proofs of death were furnished. Respondent denied any liability under the policy of insurance, and thereafter this action was brought.

The complaint set up the death by accident, the provisions of the policy, etc., and all the allegations usual in such a case. The answer admitted the issuance of the policy by the defendant, but alleged that there were other conditions and requirements in the policy, not mentioned in the complaint, wherein it was provided that the failure to comply with such provisions would work a forfeiture and loss of all rights under the policy; affirmatively alleged that the policy of insurance, described in the complaint and sued upon, contained the following provision: "This insurance does not cover disappearance nor suicide, sane or insane, nor the result, fatal or otherwise, of injuries of which there is no visible mark upon the body (except as hereinbefore provided); nor in event of accident or death, loss of limb or sight, or disability resulting, wholly or partly, directly, or indirectly, from bodily or mental infirmity, or disease in any form, nor from sleepwalking, medical or surgical treatment, war, or violating the law; nor for injuries intentionally inflicted upon the insured by himself; nor does it cover (except as incident to the occupation of railway employes) entering or trying to enter or leave a moving conveyance, using steam or electricity as a motive power

(except cable and electric street cars) being in any place in or on any such conveyance which has not been provided for the occupation of passengers during transit, or being on any railroad bridge or right of way, except at established crossings of such roads with public highways." The answer further averred that the insured was, at the time of said injury, trying to board a moving railroad train at a place other than a station, or trying to commit suicide, and at said time was on, and said injury occurred on, the right of way of the Northern Pacific Railway Company's railroad, and at a place that was not then an established, or any, crossing of such railroad with a public highway; that said railroad right of way at the place where said injury occurred was at the time 400 feet wide, and that the said railway company's railway tracks ran approximately in the center of said right of way. The reply admitted the exceptions specified in the answer in the affirmative defense, but denied the other allegations. At the conclusion of the plaintiff's testimony, upon motion of defendant, the case was taken from the jury on the ground that there was not sufficient testimony to sustain a verdict, and an order of dismissal was made. From the judgment following this order, this appeal is prosecuted.

It is alleged that the court erred in sustaining respondent's challenge to the sufficiency of the evidence, and in refusing to permit certain testimony which we will hereafter refer to. It appears from the record and the statements made by the court that the court was of the opinion that the burden of proof was upon the appellant to show that the death of the insured did not occur by reason of some of the exceptions incorporated in the policy. From an examination of all available authority on that subject we are forced to the conclusion that the court erred in this particular. It is the established and universal law that insurance policies are to be construed in favor of the insured, and most strongly against insurance companies. This is a reasonable rule, considering the fact that these policies are prepared by men who are learned in the law and trained in preparing contracts of this kind, and who have studied the legal effects of all the multifarious provisions in the ordinary insurance policies, whether accident or life; while the insured are frequently men and women of limited understanding, of simple methods of thought, and who, as a rule, would not be capable of technically construing doubtful provisions in a contract. Speaking of this proposition, it was said by the Supreme Court of Alabama, in *Equitable Acc. Ins. Co. v. Osborn*, 9 South. 869, 13 L. R. A. 267, 269: "Exceptions of this kind are construed most strongly against the insurer, and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary, especially in modern times, to circumvent the ingenuity of the insurance

companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy." In conformity with this rule, an examination of the subject shows that almost universal authority imposes upon the insurance company the burden of establishing the fact, in an action on an accident insurance policy, that the accident happened by reason of something that was excepted from the provisions of the policy, and that the burden is not imposed upon the insured to affirmatively show that the accident did not occur by reason of any or all of the exceptions incorporated in the policy. The rule is thus announced in 1 Cyc. 289: "As to Accidental Character of Injury. On an issue as to whether the injury to or death of the insured was caused by accidental means, or by some cause excepted by the policy, the legal presumption is against the insanity of insured, intentional injuries by third persons, lack of due care and diligence, self-inflicted injuries, and suicide. These presumptions may be overcome, however, by facts and circumstances establishing the contrary." Further, under the head of "Burden of Proof:" "The burden of proof is on plaintiff to show that the injury or death was due to accidental or other means specified in the policy. * * * (b) The burden rests on the defendant to show that the policy has been avoided by reason of a breach of some condition precedent, or that the injury or death was caused by some act which is made an exception to the risk in the policy, or that the action was not brought within the time required by the policy."

Meadows v. Pacific Mut. Life Ins. Co. (Mo. Sup.) 31 S. W. 578, is a case almost identical in circumstances and in principle with the one at bar. There it was shown that the deceased left the depot for the purpose of boarding a freight train standing at the station, and was soon after found mangled on the railroad track; and it was held that under such proof, in the absence of other evidence, the death was accidental. From a long and carefully considered opinion, in which many cases are reviewed, we quote the following excerpt: "The plaintiff showed, beyond controversy, that Meadows died by violent injuries, which were plainly visible upon his body, and that the nature of these injuries left no doubt that they were the sole cause of his death; and proper proofs were made. Here he rested. He had made a *prima facie* case, unless we are required to presume that, because he was killed by being run over by cars on a railroad track, he was voluntarily exposing himself to unnecessary dangers, and was violating his agreement in regard to being upon a roadbed of a railroad, within the meaning of the policy. Such a presumption would destroy the presumption indulged by the law that Meadows was at the time exercising proper care for his safety. In the absence of all evidence to the contrary, the law presumes that he was exercising due care for his protection"—quoting from *Allen v. Wil-*

lard, 57 Pa. 374, where the court said: "The natural instinct which leads men in their sober senses to avoid injury and preserve life is an element of evidence. In all questions touching the conduct of men, motives, feelings, and natural instincts are allowed to have their weight." The court then quoted from *Parsons v. Railway Co.*, 94 Mo. 286, 6 S. W. 464, where it was said: "There is no contributory negligence in the case, so far as the evidence goes. It can only be found by indulging in unwarranted presumptions. The only presumption the law indulges in respect thereto is that the deceased was in the exercise of ordinary care and diligence at all times, in the discharge of his duties, until the contrary appears"—citing *Buesching v. Gaslight Co.*, 73 Mo. 219, 30 Am. Rep. 503, *Huckshold v. Railway Co.*, 90 Mo. 548, 2 S. W. 794, and *Crumpley v. Railroad Co.*, 111 Mo. 152, 19 S. W. 820, to the effect that it was not incumbent upon plaintiff in the first place to prove that the deceased was in the exercise of ordinary care and prudence, and *Mallory v. Insurance Co.*, 47 N. Y. 52, and *Lancaster v. Insurance Co.*, 62 Mo. 121, to the effect that, in the absence of all evidence as to how the insured came to be thrown under the train which killed him, the presumption was that it was the result of accident.

Another carefully prepared opinion is that of Judge Day, of the United States Circuit Court, in the case of *Standard Life & Accident Ins. Co. v. Thornton*, 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116, where, after an analysis and review of the authorities, it was said: "This presumption must stand in the case and be decisive of it, until overcome by testimony which will outweigh the presumption. It casts upon the defendant, who claims that the death was intentional, the burden of establishing it by a preponderance of the evidence. Where, in an action on a contract of insurance, it is claimed that death resulted from one of the excepted causes enumerated on the back of the policy, it was held in *Railway Officials' & Employes' Acc. Ass'n v. Drummons* (Neb.) 76 N. W. 562, that the plaintiff was only required to bring her case within the terms of the policy appearing on its face; that she was not required to negative the conditions or exceptions indorsed thereon; that in declaring on a contract which contains exceptions, conditions, or provisos it is not necessary for the pleader to do more than to allege the general clause under which his cause of action has arisen; that he is not obliged to set out and negative a distinct clause which operates as an exception to the general clause, but which was not incorporated in it; that such condition afforded the basis for an affirmative defense, which would defeat a recovery if sustained by adequate proof; and that the burden of proving that death resulted from any of the causes enumerated on the back of the policy was on the defendant"—citing *Anthony v. Association*, 162 Mass. 354, 38 N. E. 973, 26 L. R. A. 406, 44 Am. St. Rep. 367; *Insurance Co. v. Brown*, 57 Miss. 308, 34 Am.

Rep. 446; *Association v. Sargent*, 142 U. S. 692, 12 Sup. Ct. 332, 35 L. Ed. 1160. But it is needless to quote authority, for the overwhelming weight of judicial opinion sustains this rule. In fact this is not denied by the learned counsel for respondent, but he asserts that good law is not made of numbers of authorities, and that logic alone is weight. Outside of the presumption which ordinarily attaches, that the numerical weight of authority correctly expresses the law, an examination of the authorities on this proposition, together with the reasoning advanced to sustain the decisions, convinces us that the appellant's contention must be sustained, not only by the numerical strength of decision, but by the weight of logic.

If it be true, then, that the burden was upon the respondent to show that the death of the insured was caused by an infraction of some of the provisions which were exceptions to the provisions of the policy, the cases relied upon by the lower court and decided by this court, viz., *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038, and *Reidhead v. Skagit County*, 33 Wash. 174, 73 Pac. 1118, would sustain the appellant's contention instead of the decision of the court. Those were personal damage cases, where a recovery could be based only upon the negligence of the defendant; and the announcement by this court that jurors should not be allowed to guess at how an accident occurred, but that there must be some proof on that subject before a recovery could be had, would apply here to the proof which must be demanded of the respondent. A prima facie case having been made out by the appellant, the negligence of the insured in violating any of the excepted causes in the contract must be proven by the respondent.

On the proposition, which might arise on a retrial of the cause in relation to the meaning, within the contemplation of the parties to the contract, of the phrase "right of way," there seem to be no direct adjudications. It is not contended by the respondent that the expression "right of way," as used in the policy, contemplates the full 400 feet right of way that this company has where the accident happened, but that it means something more than the mere roadbed. Contracts of this kind, like other contracts, must be construed with reference to what was the probable intention of the parties. What interest was to be protected; what danger guarded against? Construing this contract in the light of these queries, and not being bound by its pure literalism, we must conclude that the object of the precautionary provision was to prevent recovery for accidents by cars. Such accidents must of necessity happen on the roadbed. It is plain that the occupancy of the right of way outside of the roadbed would not increase the hazard, and we are inclined to construe the expression "right of way" as meaning the way that the train has a right to travel, and can travel, viz., on the track, which designates the only ground over

which the train can travel, and the only place at which it can do any injury to any one trespassing on its right of way.

After the court had indicated its view as to where the burden of proof rested in this case the appellant asked to have the case opened for the purpose of introducing testimony in relation to the circumstances under which the accident happened. Leave was granted, and witness Munger was called to testify in that particular. Mr. Munger testified that he was called immediately after Starr was discovered, that he was at his home about three blocks from the depot, that he at once dressed and went to the depot, and found Starr lying on the floor with his arms crushed, and within 10 or 15 minutes thereafter the statement was made to Mr. Munger and Dr. Marlon which the appellant offered in evidence. The witness stated that he thought it was about an hour after the accident when this statement was made by Starr. His only way of estimating the time, however, was by the fact that he had been sent for and had had time to dress, and that it was a few minutes after he arrived at the depot when Starr made the statement. This testimony was objected to by counsel for respondent, and the objection sustained on the ground that the testimony was not a part of the *res gestæ*; too long a time having elapsed after the accident before the statement was made by Starr to the witness. The offer was as follows: "Mr. Williams: I offer to show by this witness that the deceased and insured, Martin Luther Starr, just after the accident, at the time that the witness talked to him, as has already been stated, stated to the witness that he had reached the depot before the train arrived, and that he left the depot for the purpose of attending to a call of nature, and crossed the track, went over back of the warehouse, and will show by evidence, if I can, that the warehouse was in the direction of Tacoma from this road, this highway crossing, and that, while he was there, the train came in sooner than he expected, and stopped, and that he found the train a vestibuled train, and he could not board the train from the side on which he was then, and that the only way that he could get aboard the train was to go around the rear of the train, and that he started to run around the rear of the train, the he stumbled and fell, and struck his head against a railroad tie or some other obstruction, and was rendered unconscious, and in that condition he remained until after the train pulled out, and that, when the train pulled out, he discovered then that he had sustained these injuries which he had at the time he was found by these persons, and intend to show by other evidence than this witness to make the connection, after I have introduced this evidence, that at the time of the injury he was on this highway that was crossing the track." It may be that, under

the rule which we have announced in relation to the burden of proof, appellant, upon a retrial of this case, may not find it necessary to again offer this testimony; or it may be that testimony may be offered by the respondent in relation to the manner in which this accident occurred which will necessitate the offer of this proof. So that, in view of a contingency of that kind, we think it best to pass upon the admissibility of the testimony offered. The ordinary rule is that a statement of this kind must have been made so recently that it would leave no room for collusion or premeditated self-serving. But no time can be arbitrarily fixed; it depending so largely upon the circumstances of each individual case. In *Dixon v. Northern Pacific Railway Co.*, 37 Wash. 310, 79 Pac. 793, 68 L. R. A. 895, we held that 15 minutes was not so long a time as would exclude the testimony, and in *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111, that testimony given within three hours after a railroad accident had occurred could be admitted as *res gestæ*. In this case, considering the facts that the man's associates had left him, that he was so mangled and crushed that an amputation of his arms was necessary, and that he died within 36 hours of the accident, it would be a violent presumption to indulge that the statement was made for a self-serving purpose; and we think that the refusal of testimony under such circumstances would tend to work an injustice by excluding testimony which would have a tendency to throw light on a transaction which would otherwise be obscure for want of evidence.

Under all the circumstances of the case, we think the judgment must be reversed, and a new trial granted; and it is so ordered.

MOUNT, C. J., and HADLEY, FULLERTON, RUDKIN, and ROOT, JJ., concur.

CROW, J., having been of counsel, took no part.

STARR v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Supreme Court of Washington. Dec. 28, 1905.)

1. INSURANCE—APPLICATION—BINDING RECEIPT—CONTRACT.

An application for a life policy was made on a printed form with none of the blanks filled, and provided that it was the basis and part of a proposed contract for insurance which should not take effect until the first premium had been paid during the continuance of the insured in good health and until the policy should have been issued. As a part of the same transaction and at the same time a binding receipt was executed, wholly in writing, reciting that the applicant had paid to the soliciting agent a certain sum, and that such agent had furnished the applicant with a binding receipt therefor, making the insurance in force from that date, provided that the application should be approved and the policy be duly signed by the secretary at the head office

of the company and issued, and that such policy, if issued, should take effect as of the date of such receipt. *Held*, that the receipt controlled the application, which being accepted, a binding policy of insurance was created, though the policy was not actually issued at the home office of the company until after assured had died, and for that reason was never delivered.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 210.]

2. SAME—AGENT'S AUTHORITY.

Where a soliciting agent for an insurance company executed a binding receipt to an applicant for insurance, making the insurance in force from the date of the receipt, providing the application was accepted, and the policy issued, the insurer was not entitled to deny the authority of such soliciting agent to make such a contract, in the absence of notice of a limitation of the agent's authority to the applicant.

Appeal from Superior Court, Spokane County; William E. Richardson, Judge.

Action by Amella Starr against the Mutual Life Insurance Company of New York. From a judgment for defendant, plaintiff appeals. Reversed.

Hartson & Holloway, Bedford Brown, and J. D. Campbell, for appellant. Hughes, McMicken, Dovell & Ramsey, for respondent.

RUDKIN, J. On November 30, 1903, at Spokane, Wash., Martin Luther Starr made application to the defendant insurance company, through one of its soliciting agents, for insurance on his life in the sum of \$2,000. The application, which was on a printed form furnished by the company, contained the following provisions: "This application is the basis and part of a proposed contract for insurance which shall not take effect until the first premium shall have been paid during my continuance in good health, and the policy shall have been signed by the secretary of the company and issued." Also: "I have paid \$—— to the subscribing soliciting agent, who has furnished me with a binding receipt therefor, signed by the secretary of the company, making the insurance in force from this date, provided this application shall be approved and the policy duly signed by the secretary at the head office of the company and issued." On the same day Starr was examined by a physician designated by the insurance company, and thereupon the soliciting agent issued to him the following receipt: "Nov. 30, 1903. Received of Martin Luther Starr, five and no-100 dollars to apply on life policy for \$2,000.00 in Mutual Life Ins. Co. of New York. Also his note to be paid to said Company Jan. 30th, 1903, for \$76.22, bal. on first half of semiannual premium. Policy to take effect from date. J. W. Pantall, for Mutual Life Ins. Co. of N. Y." The application was forwarded to the head office of the company in New York, through its Seattle office, and on the afternoon of December 8, 1903, the application was approved and a policy issued.

The policy was returned to the Seattle office for delivery to the insured. Starr died on the morning of December 8th, before the approval of the application, and the issuance of the policy of insurance from injuries received two days before, and the agent of the defendant company refused to deliver the policy for that reason. This action was prosecuted by Starr's widow to recover the amount of the insurance. The court below held on the foregoing facts that there was no contract of insurance, and granted a nonsuit. From the judgment of nonsuit, this appeal is prosecuted.

The appellant contends that the above receipt constituted a preliminary contract of insurance, which remained in force until the application was either approved or rejected at the home office of the company. The respondent, on the other hand, contends that the receipt and the application must be construed together, that the approval of the company was a prerequisite to the consummation of the contract of insurance, and that the approval of the application and the issuance of the policy after the death of the insured, and without knowledge thereof, was of no effect. With this latter contention we fully agree. By the death of Starr the subject-matter of the contract of insurance ceased to exist, and at that moment there was a contract of insurance or there was none. The approval or rejection of the application after that time would be ineffectual for any purpose. The object of the second provision of the application, above quoted, is not entirely clear, especially from the standpoint of the insured. If there was to be no contract of insurance in any event until the application was approved at the home office and a policy issued thereon, it would seem entirely immaterial to the insured whether the contract related back to the date of the application or not. If he lived until the application was approved and a policy issued, it would seem a matter of indifference to him whether he had been insured during the interim between the date of the application and the date of the issuance of the policy. On the other hand, if he died before the application was approved and the policy issued, his beneficiaries would derive no benefit from the insurance. The chief object of the provision would, therefore, seem to be to enable the insurance company to collect premiums for a period during which there was in fact no insurance, and consequently no risk. However this may be, if the receipt issued to the insured contained the same provision as the application, viz., that the insurance would take effect from that date, provided the application was approved at the home office and a policy issued, we would feel constrained to give full effect to the contract of the parties, and hold that there was no contract of insurance, unless the applica-

tion was approved and a policy issued during the lifetime of the insured. Such was the case of *Steinle v. New York Life Ins. Co.*, 81 Fed. 489, 26 C. C. A. 491, cited by the respondent. *Pace v. Provident Sav. Life Ins. Society*, 113 Fed. 13, 51 C. C. A. 32, is so briefly reported that the facts do not appear. While the application and the receipt form a part of the same transaction and must be construed together, yet where there is a conflict between the two, the court must of necessity determine which will control. The application in this case is on a printed form, with blanks not even filled, while the receipt given is wholly in writing. If there is a conflict between the two, under such circumstances the latter will control. *Cole v. Union Cent. Life Ins. Co.*, 22 Wash. 26, 60 Pac. 68, 47 L. R. A. 201. Adopting and applying this rule of construction, which is approved by the authorities, we have no doubt that it was the intention of the parties to effect a present contract of insurance, binding from the date of the receipt, which would be superseded by the policy when issued, or terminated by a rejection of the application and notice to the insured. We think that no other construction will give effect to the manifest intention of the parties.

There was evidence tending to show that the soliciting agent had no authority to enter into a contract such as is contended for by the appellant, but this fact does not seem to be relied on by the respondent. "The powers of the agent are, *prima facie*, coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals." *Insurance Company v. Wilkinson*, 13 Wall. 233, 20 L. Ed. 617; and the general rules of agency do not apply in such cases. *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 273, 27 L. R. A. 86. See, also, *Bacon's Benefit Societies & Life Ins.* (3d Ed.) § 153. If insurance companies deem it necessary for their protection to limit the operation of their contracts of insurance from the date of issuance of the policy, or from any other date, it is very easy for them to say so and to bring knowledge of that fact home to those with whom they are dealing. In this case, we hold that the receipt given constituted a present contract of insurance, subject to be continued or terminated by the approval or rejection of the application, and that the insured was not affected by any want of authority in the soliciting agent to enter into such a contract, unless notice of such want of authority was brought home to him.

The judgment is reversed, with directions to vacate the judgment of nonsuit, and for further proceedings not inconsistent with this opinion.

MOUNT, C. J., and FULLERTON, HADLEY, ROOT, and DUNBAR, JJ., concur.

LYNCH v. CADE et al.

(Supreme Court of Washington. Dec. 28, 1905.)
MORTGAGES — VALIDITY — NECESSITY OF ACKNOWLEDGMENT.

A mortgage given to secure payment of the purchase price of land is good as between the parties without acknowledgment.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 155.]

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Thomas Lynch against Enos B. Cade and others. From the judgment rendered, plaintiff and defendants Cade appeal. Affirmed.

H. E. Foster, for appellant Lynch. S. H. Steele, for appellants Cade. Thomas B. MacMahon and George McKay, for respondent.

MOUNT, C. J. Plaintiff brought this action to remove a cloud from the title of certain real estate. He alleged in the complaint, in substance, that he was the owner of the property; that prior to the time he purchased the same, E. B. Cade and wife, his grantors, signed a blank mortgage, and delivered the same to defendant Sarah J. Millar, who, without the knowledge or consent of said Cade and wife, filled in the blanks in said mortgage, including a debt for \$1,575, and wrote a description of said property therein, and without the knowledge and consent of said Cade and wife had a notary public attach an acknowledgment thereto, regular in form and in all respects untrue and false, and filed the said mortgage for record; that the said mortgage was void, and of no force or effect, and cast a cloud upon the title of appellant's property. For answer the respondent Sarah J. Millar denied all the allegations of the complaint, and alleged affirmatively that, on August 24, 1904, she was the owner of real property described in the mortgage, and that on the said day she sold said property to Cade and wife for the sum of \$2,200; that \$1,575 of the purchase price of said real estate was paid in stock of a corporation at the agreed price of 10 cents per share; that at said time, Cade and wife entered into an agreement in writing guarantying the price of said stock at 10 cents per share for one year, and agreeing that, at the end of the year, they would purchase all of said stock, which respondent Millar had not then sold, at 10 cents per share; that, to secure the said contract, Cade and wife executed a mortgage upon the property for \$1,575; that said respondent at the end of the year had been unable to sell 1,000 shares of the said stock, and that the same was worthless; that she had tendered said stock to said Cade and wife, and that there was due at the time of the answer \$100 for which the mortgage was security; that the plaintiff took title to the property with

notice of respondent's lien. She then prayed for a foreclosure of the mortgage. Cade and wife denied the answer of respondent. Plaintiff replied to respondent's answer, and denied substantially the allegations of the answer. At the trial Cade and wife assumed the burden of plaintiff's case. Findings were made in favor of the defendant Sarah J. Millar, and a decree of foreclosure was entered. Plaintiff and defendants Cade and wife have appealed.

It is conceded in the case that the appellant Lynch had notice of the mortgage and is prosecuting this action for the benefit of Cade and wife, who have agreed to pay all expenses in connection with the case, and to pay whatever judgment is obtained against the land or said Lynch. Cade and wife are therefore the real parties in interest. At the trial Cade and wife admitted on the witness stand, that they purchased the lot from respondent Millar; that they paid \$1,575 of the purchase price in stock of the Tide Power Fog Signal Company, a corporation, and agreed to guaranty the price of said stock at 10 cents per share for one year, and to repurchase at 10 cents per share all that Mrs. Millar had not sold at the end of the year; that they intended to give a mortgage on the lot to secure the contract, and that they signed a blank mortgage for that purpose. They maintain, however, that the mortgage they signed was an entire blank printed form, without the description of the land, and that it was not acknowledged, and the notary's blank acknowledgment was not signed by the notary. Respondent Millar conceded that the acknowledgment of the mortgage was not taken, as a matter of fact, but claims that the acknowledgment was properly filled in, and that the notary had signed the same prior to the execution of the mortgage by the appellants Cade and wife. Respondent's evidence tended to show, and the trial court found, that the blank mortgage was properly filled out with the amount which it was given to secure, and with the description of the land given as security, and that the notary's acknowledgment was upon the mortgage at the date it was signed by Cade and wife. The only point seriously contended for on this appeal is that the mortgage was void, because it was not, in fact, acknowledged. Conceding that the mortgage would be void as to the purchasers without notice on creditors of the mortgagors, it was good as between the parties. *Mann v. Young*, 1 Wash. T. 454; *Edson v. Knox*, 8 Wash. 642, 36 Pac. 698; *Carson v. Thompson*, 10 Wash. 295, 38 Pac. 1116. We have seen that Cade and wife who executed the mortgage are the only parties in interest in this action. They admitted that they intended to give a mortgage upon this piece of land to secure a part of the purchase price, and the court found from the evidence that they signed the mortgage, perfect in form,

and which they intended to give. The court was amply justified from the evidence in finding this fact. Cade and wife cannot be permitted to come into a court of equity and say that the mortgage which they intended to give is void, and thus defeat the payment of the purchase price of the land, which they bought and upon which they gave the void mortgage back to secure the same. If they did not acknowledge the mortgage, they intended to do so, and should have done so. They cannot in this action be heard to say they did not. The mortgage should therefore be held valid as to them.

The judgment is affirmed.

DUNBAR, CROW, FULLERTON, HADLEY, RUDKIN, and ROOT, JJ., concur.

INTERSTATE NAT. BANK v. RINGO et al.
(Supreme Court of Kansas. Nov. 11, 1905.)

1. BILLS AND NOTES — PAYMENT — GIVING WORTHLESS CHECK.

A bank holding a note for collection delivered it to an indorser on the day of maturity, in exchange for the indorser's check upon another bank, and after inquiring by telephone of the drawee bank about the check, and being told through a mistake as to what check was meant that it would be paid, entered the amount to the credit of the owner of the note. On the next day, payment of the check, which at no time was good, was refused for want of funds, and the collecting bank delivered it to the drawer and in return received the note of its principal. *Held*, that these transactions did not effect the payment of the note.

2. BANKS AND BANKING—NOTES HELD FOR COLLECTION—ERRONEOUS CREDIT TO OWNER—LIABILITY OF BANK.

Where a bank holding a note for collection surrendered it to the maker in exchange for his worthless check upon another bank, but upon the dishonor of the check regained possession of the note as a subsisting obligation against all makers and indorsers, and no actual prejudice resulted to the owner from the transaction, which took place after the close of banking hours upon one day and before their opening on the next, no liability was thereby created against the collecting bank in favor of the owner of the note.

3. SAME.

Under the circumstances stated in the preceding paragraph, no liability against the collecting bank arose from the further facts that, upon being orally promised payment by the bank on which the check was drawn, it gave the owner of the note credit on its books for the amount and mailed to the owner a statement to that effect, adding that the credit was subject to collection; notice of the non-payment of the check having been given to the owner of the note by telephone early in the morning of the next day.

4. SAME.

Under the circumstances stated in the two preceding paragraphs no liability against the collecting bank arose from the further fact that, having on deposit funds of the bank on which the check was drawn, it charged the amount of the check against such deposit, and refused to pay it out until indemnified against loss in so doing.

(Syllabus by the Court.)

Error from District Court, Wyandotte County; E. L. Fischer, Judge.

Action by J. W. Ringo and others against the Interstate National Bank. There was judgment for plaintiffs, and defendant brings error. Reversed.

Ringo & Askew, residing in Oklahoma, gave their note for \$10,209.63, to Ladd, Penny & Swazey, commission merchants of Kansas City, due without grace June 14, 1900, secured by a mortgage on cattle which was duly filed for record. The payees sold the note to the Watkins National Bank, of Lawrence, which sent it for collection to the Interstate National Bank, at Kansas City, a few days before its maturity. To meet this note the makers, on June 5, 1900, executed a new note and a mortgage on the same cattle securing it, and sent it to Ladd, Penny & Swazey with directions to sell it and use the proceeds to pay the first note. Ladd, Penny & Swazey indorsed the note to the Union Brokerage Company, to find a buyer for it. The Union Brokerage Company sold the note to the Boatmen's Bank, of St. Louis, which paid for it by giving the brokerage company credit for the amount. The Union Brokerage Company paid Ladd, Penny & Swazey for the note by giving them its check on the Merchants' Bank, of Kansas City. Ladd, Penny & Swazey had at the time issued checks on the Merchants' Banks, which exceeded the amount of their deposit by \$11,393.92. To provide for the payment of these checks, upon receiving notice from the bank that they had been presented and would not be paid unless such provision was made, they on June 13th deposited the check given them by the Union Brokerage Company for the Ringo & Askew note, and the checks were paid by reason of this deposit. The deposit was made in the Interstate National Bank to the credit of the Merchants' Bank, in accordance with an existing arrangement between the banks and Ladd, Penny & Swazey. In the afternoon of June 14th the collector of the Interstate National Bank, as was his custom, took the note which had been sent to it for collection by the Watkins Bank, carried it the office of Ladd, Penny & Swazey, and left it there, going on with other business. Later in the afternoon he returned to the office and took from a basket, where it had been left for him, a check drawn by Ladd, Penny & Swazey on the Merchants' Bank, payable to the Interstate Bank, for the amount of the note. There was no conversation on the occasion of either visit. The collector took the check to the Interstate Bank, leaving the note and mortgage where they were, with Ladd, Penny & Swazey. Previous to this time (and the arrangement still subsisted) the Merchants' Bank had authorized the Interstate Bank to pay and charge to its account any checks drawn by Ladd, Penny & Swazey upon the Merchants' Bank that were stamped "Interstate

National Bank" under or across the words "Merchants' Bank." Where a check drawn by this firm upon the Merchants' Bank, but not bearing the stamp "Interstate National Bank," was presented at the latter bank, it was the custom to call up the Merchants' Bank by telephone, ask instructions, and be governed by the reply. The check under consideration bore no such stamp. When it was delivered by the collector to the teller of the Interstate Bank, a little after 3 o'clock he called up the Merchants' Bank and inquired if it were good. The officer of the Merchants' Bank who responded to the inquiry understood that another check was referred to—one for a smaller amount given by Ladd, Penny & Swazey to a different payee—and answered that it was good and that his bank would pay it. Relying upon this assurance, the Interstate Bank credited the Watkins Bank with the amount of the check and mailed to it a postal card reading as follows: "J. D. Robertson, Prest. Lee Clark, V. Prest. Wm. C. Henriel, Cash. The Interstate National Bank, Stock Yards Station, Kansas City, Kans., June 14, 1900. Yours of ——— received, with enclosures as stated. Due diligence will be observed in the selection of banks or agents for the collection of all papers out of the city, but this bank will not be responsible for the failure or negligence of such bankers or agents. All items credited subject to payment. Credited: No. 16,513, \$10,209.63. Entered for collection: W. N. Bank, June 15, 1900." It also mailed the check to the Merchants' Bank for collection and credit. The Merchants' Bank, about two hours after the conversation related, discovered its mistake and attempted to reach the Interstate Bank by telephone, but was unable to do so. At half past eight the next morning, however, it did so, explained the misunderstanding of the day before, said that Ladd, Penny & Swazey had no funds to meet the check, and asked in substance to be relieved of any liability resulting from its former statement. The Interstate Bank answered in effect that it had surrendered the note for which the check was given, and which it had held for collection, and that it could not release the Merchants' Bank, but that it would do what it could to assist it and for that purpose would talk with the Watkins Bank. It accordingly at once called up that bank by telephone, stated that the notice of credit of the day before had been sent by mistake, that a check which had been given for the note had not been paid, and asked instructions. Later in the day the Watkins Bank directed the protest of the note, without having been informed, however, of the details of the transactions of the previous day, or of the connection of the Merchants' Bank with the matter. The Merchants' Bank, on the morning of the 15th, refused payment of the check and returned it to the Interstate Bank, which on the same morning between 9 and 10 o'clock sent it to

Ladd, Penny & Swazey and exchanged it for the Ringo & Askew note and mortgage. The note was then formally protested. The Merchants' Bank during all of this time carried a deposit of some \$25,000 with the Interstate Bank. At some time—the exact date does not seem to be shown, and is not important—the Interstate Bank charged the amount of the check against this deposit. On June 16th the Watkins Bank, having learned all the circumstances of the case, notified the Interstate Bank that it refused to permit the credit given it to be set aside, and would insist upon the payment of the amount. On June 18th the Interstate Bank replied, stating that, while it had originally credited the Watkins Bank with the amount, and charged it to the Merchants' Bank, it had now charged it to the Watkins Bank and placed it in the form of a cashier's check, and was so holding it pending a settlement of the matter. About a month later the Interstate Bank paid the money to the Merchants' Bank, upon the execution of a bond indemnifying it against the claim of the Watkins Bank. After 3 o'clock on June 14th Ladd, Penny & Swazey took notes of the face value of \$28,000 to the Merchants' Bank and asked the bank to accept them as collateral security for all overdrafts, notes, and bills of exchange, and to agree to pay all their checks that had been written that day. This the bank refused to do; the officers conducting the negotiations saying that they would have to take the matter up with the other directors. The collateral offered was left with the bank and was never returned to Ladd, Penny & Swazey. On the morning of June 15th the Union Brokerage Company saw the note and mortgage in the office of Ladd, Penny & Swazey, in their custody and under their control. Ringo & Askew brought an action against all persons interested asking that their first note be canceled, upon the theory that it had been paid. Issues were framed between the various parties, findings were made embodying substantially the facts already stated, from which the court concluded that the note had been paid, and a judgment was rendered decreeing the cancellation of the note, ordering the Interstate Bank to pay its amount to the Watkins Bank, declaring that the note held by the Boatmen's Bank was a first lien upon the mortgaged cattle, and holding that the question of the liability of the Merchants' Bank to the Interstate Bank was not raised by the pleadings. The Interstate Bank prosecutes error.

C. F. & S. D. Hutchings, McFadden & Morris, and Wm. R. Smith, for plaintiff in error. S. D. Bishop, A. C. Mitchell, I. N. Watson, and Edwin C. Meservey, for defendants in error.

MASON, J. (after stating the facts). In support of the judgment rendered it is argued

that, inasmuch as the check given by the Union Brokerage Company to Ladd, Penny & Swazey really belonged to Ringo & Askew, it could not under the circumstances of this case be diverted from its true ownership, but after its deposit in the Merchants' Bank constituted a trust fund for the purpose for which it was intended, namely, the payment of the first Ringo & Askew note. *Cady v. South Omaha Nat. Bank*, 40 Neb. 756, 65 N. W. 906, *Id.*, 49 Neb. 125, 68 N. W. 358, and *Davis v. Panhandle Nat. Bank* (Tex. Civ. App.) 29 S. W. 926, are the strongest cases cited to sustain this contention. Whether the doctrine they announce would apply to the facts here present need not be determined, for this court has already refused to follow them. See *Klimmel v. Bean*, 68 Kan. 598, 75 Pac. 1118, 64 L. R. A. 785, 104 Am. St. Rep. 415. Upon the authority of that case and *Martin v. Bank*, 66 Kan. 655, 72 Pac. 218, it must be held that the proceeds of this check became the absolute property of the Merchants' Bank, and the situation presented is no different from what it would have been if Ladd, Penny & Swazey had spent the money which belonged to Ringo & Askew for any other purpose of their own, instead of using it, as they happened to do, to provide for the payment of checks issued by them upon the Merchants' Bank. As is said in the syllabus of *Martin v. Bank*, *supra*: "A bank cannot be held to account to the owner of a fund, where such fund has been deposited by an agent in his own name and paid out upon his check without knowledge by the bank of any want of power on the part of the agent."

The two principal questions involved are: (1) Do the circumstances narrated show a payment of the Ringo & Askew note so as to discharge the makers from liability upon it? And (2) was the conduct of the Interstate Bank such as to establish a liability against it in favor of the Watkins Bank? The inquiry whether the note was paid may perhaps be simplified by a consideration of the effect of the successive steps in the transaction. The mere delivery and acceptance of the check, of course, did not constitute a payment and was no evidence of a payment. 22 A. & E. Encycl. of L. 560, par. 13. The surrender of the note (if it is to be considered as having been surrendered) did not affect the matter one way or the other. 22 A. & E. Encycl. of L. p. 572, par. "d." If the Interstate Bank had been the owner of the note, and upon receiving the check had made entries upon its books as though a payment had been made, this likewise would have been immaterial, for such entries would be interpreted in the event of the nonpayment of the check as evidencing conditional payment only. *Cheltenham Stone & Gravel Co. v. Gates Iron Works*, 124 Ill. 623, 16 N. E. 923, *Turner v. Bank of Fox Lake*, *42 N. Y. 425. Credits made upon books of account can have no greater effect in this connection

than receipts given acknowledging payment, and these, where exchanged for checks, do not show that absolute payment was intended. 22 A. & E. Encycl. of L. (2d Ed.) 572, par. "e." The fact that the Interstate Bank held the note for collection, and credited the proceeds to the Watkins Bank, does not call for a different rule in interpreting the entry of such credit. Whatever effect it may have had upon the relations of the Interstate Bank and the Watkins Bank, it was, as to the makers of the note, merely evidence of a conditional payment.

If, then, the note was ever paid, so as to protect Ringo & Askew, this condition must have resulted from the transactions between the Interstate Bank and the Merchants' Bank. In this connection it is important to notice that in the telephone conversation between these banks on June 14th the Merchants' Bank did not authorize the Interstate Bank to pay the check out of the funds of the Merchants' Bank then on deposit in the Interstate Bank. If that authority had been given and acted upon, the situation would have been the same as though the check had been presented at the counter of the Merchants' Bank and there accepted for the credit of the holder. In such a case, according to the prevailing doctrine, the check would ordinarily have been deemed paid, whatever might have been the condition of the account of the drawer, upon the principle that in such circumstances the bank is bound to know of the state of its depositor's account, and cannot be relieved from the effect of any mistake it may make in that regard, and that the entry of the credit closes the transaction. 2 Morse on Banks and Banking, § 569; 2 Daniel on Negotiable Instruments, §§ 1621, 1622; 5 A. & E. Encycl. of L. (2d Ed.) 1058. And if the check had been paid, of course, this would have operated to change the conditional payment of the note into an absolute payment. But what the Merchants' Bank in fact did was merely to say that the check was good and to promise to pay it. This was no more than an oral acceptance or certification of the check and was not binding by reason of section 547 of the General Statutes of 1901, which reads: "No person within this state shall be charged as an acceptor of a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent."

A bank check is held to be a bill of exchange within the meaning of the section. Eakin v. Bank, 67 Kan. 338, 72 Pac. 874. It does not appear that the Interstate Bank charged the check to the account of the Merchants' Bank on the 14th—the day it was given—for on that day it was mailed to the latter bank for collection and credit. Such an entry upon the books of the Interstate Bank, however, would have been unimportant, for it would have been made without authority. The matter is not affected by the consideration that the Interstate Bank

afterwards attempted to hold the Merchants' Bank liable for the payment of the check, and accordingly made an entry upon its books showing a deduction of the amount from the deposit account of the Merchants' Bank. The assertion by the Interstate Bank of a claim against the Merchants' Bank which could not be maintained did not operate by estoppel or otherwise to prevent its standing upon any legal right it might have against Ringo & Askew. It follows that the trial court erred in concluding that the facts found showed that the Ringo & Askew note had actually been paid. As the note until paid was secured by a lien upon the cattle, it was likewise error to hold that the mortgage accompanying the note held by the Boatmen's Bank was a first lien. To sustain the trial court in holding the Interstate Bank liable to the Watkins Bank the defendants in error invoke the doctrine that a collecting agent who surrenders the note of his principal in exchange for the check of the maker thereby assumes the risk of its payment. The plaintiff in error denies the doctrine and contends that the collecting agent is protected from liability in pursuing such course by the fact that it is in accordance with a custom of bankers and business men of which the courts must take notice. Of this contention it is said in 2 Daniel on Negotiable Instruments, § 1625: "While it may be, and as a general rule undoubtedly is, the practice of creditors, in mercantile communities, to take checks in the collection of debts, and frequently to surrender other instruments on receiving them, such a practice, on the part of the principal, falls far short of a usage which would permit the agent to do likewise." See, also, 5 Cyc. 505, 506; 3 A. & E. Encycl. of L. (2d Ed.) 804.

Assuming, but not deciding, that ordinarily where a bank holding a note for collection in surrendering it to the maker in exchange for his check upon another bank thereby makes itself liable to the owner of the note for the amount, would not this case be taken out of the rule by the fact that the Interstate Bank regained possession of the note under the circumstances already stated? In 2 Daniel on Negotiable Instruments, § 1625, it is said: "In the United States it is quite certain that a banker or other agent, holding a bill or note for collection, would act at his peril in delivering it up on receipt of a check for the amount; and that, if the debtor did not pay the amount in money, and the drawer or indorsers were not duly notified, they would be discharged, and the loss would fall upon the collecting agent. If, indeed, on the same day that the bill or note was due the agent received a check for the amount and delivered up the bill or note, but on presentment of the check at the bank, and refusal of payment that very day, it had been returned, the bill or note reclaimed and protested, and the drawer or indorsers duly notified, then no right would be forfeited, but

the liability of all preserved. But if the agent neglected to present the check until the next day, it would then be too late to preserve recourse against the drawer, if a foreign bill, by making protest; and, if in the meantime the bank had failed, the loss would fall upon the agent." This language makes plain the theory upon which the rule referred to is based, which is that the collecting agent who assumes without authority to pursue a course which results in releasing a part of the security of the note, thus rendering it less valuable than it was before, is justly held to become at once liable to the owner for the full amount, perhaps irrespective of any question of actual or probable final loss. There is at least plausible ground for the argument that until the note is paid its owner is entitled to its possession and to all the incidental rights attached to it, and therefore an agent who fails to return either the very thing intrusted to him, or its equivalent in money, the only thing he is authorized to accept for it, should not be permitted to haggle about the extent of the resulting injury, but should be compelled to respond at once to his principal for the full amount of the note and to look for his own reimbursement to whatever rights he has succeeded in retaining against the maker. But when the note is recovered without its vitality or security having been in any way impaired, no reason is apparent why the agent should be liable at all, unless to the extent of any actual loss that might have been occasioned by his act. Therefore, as suggested by Mr. Daniel, a recovery of the note by the collecting agent upon the very day of its surrender to the maker retrieves any wrong thereby done to the owner. But manifestly the only importance of the two acts being done on the same calendar day arises from the necessity under ordinary circumstances of the note being protested on the day of presentation in order to hold the indorsers. In the present case there was no indorsement upon the note except that of Ladd, Penny & Swazey, who were hardly in a position to assert a right to notice of its dishonor. Moreover, the note bore upon its face a waiver by the makers and indorsers of both protest and notice of nonpayment. Therefore the fact that the Interstate Bank did not recall the note from Ladd, Penny & Swazey on the very day upon which it was delivered to them is not controlling here. The leaving of the note at the office of Ladd, Penny & Swazey by the collector was clearly only provisional, as well after he had obtained the check as before. The Interstate Bank could not upon any theory be considered as having surrendered the note until it had made inquiry of the Merchants' Bank about the check. This was after banking hours on June 14th. The knowledge that the check was worthless was imparted to it

before the opening of banking hours on the next day, and it at once acted upon the information. So far as the mere lapse of time was concerned, the interval was no more significant than if these acts had all been done upon the same day, and no just cause appears for giving them any different effect than would have resulted had the Merchants' Bank succeeded in reaching the Interstate Bank by telephone at the time it attempted to do so on June 14th for the purpose of correcting the mistake which it then suspected had occurred.

We do not understand that it is claimed, and it certainly cannot successfully be maintained, that the mere physical exchange of a note held for collection for a check can at once fix a liability upon the collecting agent, irrespective of all considerations of the subsequent conduct of the parties. If after such an exchange the agent, before the maker of the note left his presence, should become so far doubtful of the sufficiency of the check as to insist upon and obtain a retransfer of the note, this would clearly reinstate the precise situation that existed before any surrender of the note was made. In the present case, if, when the Interstate Bank first called up the Merchants' Bank, it had been told that the check was worthless and had then reclaimed the note, probably no contention would have been made that it had incurred any liability. This is for all practical purposes just what was done so far as the mere matter of time was concerned—for the delay was really insignificant. We are therefore of the opinion that the recaption of the note was accomplished under such circumstances as to relieve the Interstate Bank of liability unless the matter is affected by its entry upon its books of a credit to the Watkins Bank and by its subsequent dealings with that bank and the Merchants' Bank.

We cannot regard this entry of credit upon the books of the Interstate Bank as any more determinative of its relations with the Watkins Bank than of the question of the payment of the note. In *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 49 S. W. 904, 71 Am. St. Rep. 608, it is said: "When a note or draft is sent by one individual or bank to another bank for collection and to remit the proceeds to the sender, the relation of principal and agent is created and not that of creditor and debtor. * * * Having received the note or draft for collection, it does not owe the amount thereof to the sender until collected, and though it may credit in its books therefor, such a credit may be treated as provisional if the paper is afterward dishonored, and it may cancel the credit." "The fact that the depositor's account is credited with the amount of the items taken for collection does not of itself operate to transfer the title to the paper, for, by the custom of bankers, the

collection is charged back at once if not paid." 3 A. & E. Encycl. of L. (2d Ed.) 817. The fact that the credit was given only after the check had been received and an inquiry made about it does not affect the principle by which the matter is controlled. The bank might well elect to give credit only for such collection items as upon investigation it believed reasonably certain would be paid, and to hold others without credit until actual payment, without, by pursuing such course, binding itself to be answerable whenever its judgment that payment would be made should prove mistaken.

The rule, already referred to, that when a bank accepts a check and credits a depositor with it the transaction is deemed closed and cannot be reopened for the correction of a mistake, is confined to checks drawn upon the bank which gives the credit and proceeds upon the principle before stated that the bank is conclusively presumed to know the state of its depositor's accounts. Even with this limitation the rule has not always been approved. See *Morse on Banks and Banking*, § 419; 3 A. & E. Encycl. of L. (2d Ed.) 817, note 1, par. 2.

In *Steinhart v. Mills*, 94 Cal. 362, 29 Pac. 717, 28 Am. St. Rep. 132, it was held, although without full discussion, that a bank to which a note had been sent for collection and which at the request of the maker, its customer, charged the amount to him, marked the note canceled, and deposited in the mail addressed to the owner of the note a draft for the amount, might still, upon discovering that the maker was insolvent, reclaim the draft, rescind the entry upon its books, return the note to its principal, and by these means escape liability on its own part; such transactions not having effected a payment of the note. See, also, *Bank v. Cummings*, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618, and *Second Nat. Bank v. Western Nat. Bank*, 51 Md. 128, 34 Am. Rep. 300.

The postal card sent to the Watkins Bank is not more effective than the credit upon the books of the Interstate Bank. Indeed it is somewhat significant of the character of the entire transaction that, while this card acknowledged the receipt of the note and the entry of credit for the amount, it also gave express notice that all items were credited subject to payment. The attitude of the Interstate Bank toward the Merchants' Bank—the attempt to insist upon the payment of the check—cannot avail the Watkins Bank, which was not entitled to rely upon it and was not misled by it. The positions the Interstate Bank assumed in its communications with the other two banks may not have been entirely consistent with each other, but it was not required to determine at its peril what its obligation might be under the law and at once act accordingly. It was probably in doubt whether it might not be able to hold the Merchants' Bank accountable upon its oral acceptance of the check, and, as it had

funds of that bank in its custody, it prudently decided to retain enough to cover the amount until its rights should be settled or until it was otherwise indemnified. The Watkins Bank suffered no prejudice through the failure of the Interstate Bank to learn on the 14th that the note would not be paid. The notice that it had been given credit was mailed to it after half past 3 o'clock in the afternoon of that day. Even if this had justified an inference of the payment of the note, it would have been counteracted by the telephone message given before 9 o'clock the next morning. In any view of the case this was a timely notice of nonpayment and gave the Watkins Bank every opportunity to which it was entitled to protect its interests.

We are unable to attach any significance to the circumstance that the Union Brokerage Company saw the Ringo & Askew note uncanceled in the possession of Ladd, Penny & Swazey on the morning of June 15th. Nor can we believe that the case is affected in any aspect by the fact that Ladd, Penny & Swazey deposited certain collateral with the Merchants' Bank to secure any claims against them, for it is expressly shown that the bank did not agree with them to pay the check in question. The case is a hard one for Ringo & Askew, but their misfortune results from the misappropriation of their funds by agents of their own selection. If the transactions between Ladd, Penny & Swazey and the several banks had resulted in destroying the vitality of the first note, the purely fortuitous circumstance of a mistake occurring in a telephone conversation to which they were not a party would have enabled Ringo & Askew to shift their loss to one of the banks. If any principle of law enabled them to do this, they would, of course, be entitled to the full benefit of their good fortune. In the absence of any such legal doctrine, there is no peculiar hardship in permitting the loss to remain where it originally lodged, nor is any rule of equity or good conscience thereby violated.

The judgment is reversed, and the cause remanded, with directions to render judgment upon the findings in accordance with the views herein expressed. All the Justices concurring, except PORTER, J., not sitting.

KNIGHT et al. v. DALTON.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. PLEADING—MISJOINDER OF CAUSES OF ACTION—CURE BY PLEADING AND PROOF.

The objection that the petition of plaintiff contained two causes of action which were not separately stated and numbered, one being to reform a deed, became immaterial when the defendant in his pleading and proof showed that the mistake in that deed had been cured by the making and delivery of a subsequent deed.

2. FRAUDULENT CONVEYANCES—PERSON ENTITLED TO ATTACK.

A party to whom land was conveyed without negotiation or consideration, and who afterwards conveyed it back to the original grantor,

is not in a position to question the motive of such grantor in making the original conveyance.

3. DEEDS—QUITCLAIM—ESTATE CONVEYED.

Ordinarily a quitclaim deed passes only a present, existing interest, and the grantee in such deed gets nothing, except what his grantor in fact owned at the time of the execution of the deed.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 394, 395.]

4. SAME—RIGHT OF INHERITANCE.

While the possibility of inheritance, under certain circumstances, may be assigned, it is held that the instrument in question was not intended as a transfer of such contingent interest, and is not effective for that purpose.

(Syllabus by the Court.)

Error from District Court, Ellis County; J. H. Reeder, Judge.

Action by William Dalton against Elizabeth Knight and another. There was judgment for plaintiff, and defendants bring error. Affirmed.

David Rathbone, for plaintiffs in error.
W. E. Saum, for defendant in error.

JOHNSTON, C. J. William Dalton instituted this action against Elizabeth Knight and Richard L. Knight to reform a deed purporting to convey real estate which they had executed to Susan Dalton, and to quiet the title of William Dalton to the real estate as against the claims made by Elizabeth Knight. On September 18, 1891, Susan Dalton, the wife of William Dalton, owned a quarter section of land and two city lots, and on that day she and her husband joined in a conveyance of the property to her sister, Elizabeth Knight. Although there was an expressed consideration in the deed of \$2,000, no consideration was in fact paid. It appears that about that time Susan Dalton had been sued on a large surety debt, and it is said that the transfer was an effort to place the property beyond danger of an adverse judgment in that litigation. There was no change of possession of the land, nor did Elizabeth Knight assert ownership under the deed during the lifetime of Susan Dalton. On January 28, 1897, Elizabeth Knight and her husband undertook to reconvey the land to Susan Dalton, but in the deed the quarter section of land was inadvertently described as a part of section 32, instead of section 24. The mistake in the description was not discovered until 1899, and in the meantime Susan Dalton had become insane. On June 24, 1899, at the instance of the guardian of Susan Dalton, Elizabeth Knight and her husband executed another deed, purporting to convey the same land to Susan Dalton, which correctly described the land, and was intended to cure the error of description in the first conveyance. On July 6, 1899, William Dalton contracted with Elizabeth Knight to care for his insane wife at the stipulated charge of \$30 per month. At the same time he made an instrument, which

was in form a quitclaim deed of the property in question, to Elizabeth Knight, and it recited, among other things, that the property was owned by Susan Dalton, the contract which had been made for her care, and it released and quitclaimed his interest and title to the land, subject to a life estate in him. On September 7, 1899, Susan Dalton died without issue and intestate, leaving her husband as her sole heir at law. Elizabeth Knight was fully paid for the care of Mrs. Dalton out of the personal estate, but through the instruments mentioned she claimed that the title to the land was in her, subject only to a life estate in William Dalton. He contended that there had never been an actual transfer of title to Elizabeth Knight, that his wife was the absolute owner of the property at the time of her death, and that the so-called quitclaim deed was intended as a mere security for the payment of care which Elizabeth Knight was to take of his insane wife, and that she had been fully paid for her services in that respect. He asked that the deed of Elizabeth Knight and her husband of January 28, 1897, in which there was a misdescription of the number of the section in which the land was situate, should be reformed and his title quieted. The trial court, in effect, held that reformation of the deed was unnecessary, as the subsequent deed, voluntarily made by the same parties, cured the error in description, and also that the quitclaim deed of July 6, 1899, was not effectual to convey any title or interest in the property, and was no more than a mortgage intended to secure Elizabeth Knight for the care of Susan Dalton.

There is a complaint that the petition included two causes of action in a single count, and that the motion of the Knights to separately state and number should have been sustained. It is claimed that there was a cause of action to reform one deed and to quiet the plaintiff's title as against another. If we assume that more than one cause of action was stated, the objection appears to be wholly immaterial. It was conceded in the answer, and otherwise, that a subsequent deed of Elizabeth Knight had been made and delivered which correctly described the property and cured the error. If a correction of the first deed from Elizabeth Knight was necessary, it was accomplished by the later deed, and the matter of reformation was not, therefore, a contested matter.

There is a contention that the original deed of Susan Dalton was made to defraud creditors, and that neither she nor her heir should be allowed to question the validity of that conveyance. There might be force in the claim if Dalton was seeking to set aside the conveyance; but, the Knights having voluntarily reconveyed the land and placed the legal title in Susan Dalton, nothing remained in them, and they are not in a

position to question the motive of Susan Dalton in making the transfer.

It appears that Mrs. Knight in her claim of title chiefly relies upon the quitclaim deed executed by William Dalton. At that time the absolute title was in Susan Dalton. He had no share in the ownership of the land, and, as the trial court rightly held, had nothing to convey. He had no interest whatever, except the possibility that he might outlive his wife and inherit from her in case the property had not been transferred. As he had no estate or vested interest in the land, his mere quitclaim, if it had been so intended, would not have affected the title nor have carried to the grantee any estate or title which the grantor might subsequently acquire. *Simpson v. Greeley*, 8 Kan. 586; *Bruce v. Luke*, 9 Kan. 201, 12 Am. Rep. 491; *Ott v. Sprague*, 27 Kan. 623; *Johnson v. Williams*, 37 Kan. 179, 14 Pac. 537, 1 Am. St. Rep. 243; *Price v. King*, 44 Kan. 639, 25 Pac. 43. In certain cases an heir may make an assignment of a possibility of inheritance, which a court of equity will enforce after the death of the ancestor, but this is not one of them. *Clendenen v. Wyatt*, 54 Kan. 523, 38 Pac. 792, 33 L. R. A. 278. It is manifest that Dalton was not contracting to convey a future interest which he did not possess and which he expected to acquire at the death of his wife. The proof tends to show that the quitclaim deed was given merely to secure compliance with the contract by which Dalton agreed to pay Mrs. Knight \$30 per month for taking care of his insane wife, and upon that testimony the court held it to be a mortgage.

As the indebtedness to Mrs. Knight under the contract had been fully paid, her pretensions to a lien or to title to the land were without foundation, and the judgment of the court quieting Dalton's title was rightly rendered, and will be affirmed. All the Justices concurring.

POOLE et al. v. POINDEXTER et al.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. APPEAL—QUESTIONS REVIEWABLE—FINDINGS—NECESSITY OF EVIDENCE.

A finding of the referee cannot be reviewed, in the absence of a part of the evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2911.]

2. PRINCIPAL AND AGENT—ADVERSE INTEREST OF AGENT.

A transaction by which a member of an association furnished funds to a corporation which was conducting experiments under a contract with the association, and accepted stock for the funds so furnished, did not, in the absence of anything inconsistent with actual good faith and fair dealing, preclude the member from recovering from the association for expenses incurred in looking after operations under the contract with the corporation.

3. REFERENCE—REPORT OF REFEREE—FILING.

A referee's report which is presented to the clerk and marked "Filed" within the time

allowed for its filing, and then withdrawn and retained until after the expiration of such time in order to have it bound, is filed in time.

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Action by George A. Poole and others against E. W. Poindexter and others. There was a judgment rendered on a report of a referee, and plaintiffs bring error. Affirmed.

Hazen & Welch, for plaintiffs in error. Quinton & Quinton and Loomis, Blair & Scandrett, for defendants in error.

PER CURIAM. In 1899, 11 persons associated themselves together for the purpose of acquiring lands in Trego and Ellis counties, believed to contain gold-bearing shale, and obtaining a process by which the gold could be extracted; their plan including the subsequent forming of a corporation. Lands were purchased and attempts were made to discover such a process. These efforts were not attended with success and disagreements arose with regard to the management of the business, as a result of which several members of the association brought an action to wind up its affairs and distribute its assets. A referee was appointed to take an accounting between the parties to the action. He did so, and made a report which was approved by the court and upon which a judgment was rendered. The plaintiffs were dissatisfied with the findings of the referee on several matters, and have brought this proceeding to reverse the judgment.

The principal objections urged against the findings of the referee relate to allowances made to E. W. Poindexter and E. S. Quinton, who were members of the association, for expenses incurred while looking after its business. The first objection in this regard is based upon the fact that a part of these expenses arose after the death of one of the members of the association. It is argued that the association was a partnership, that the death of one of the partners effected its dissolution, and that its members could not be charged thereafter with the expenses of carrying on its business. In answer to this the defendants in error say that the company was a mining partnership, and that therefore its existence was not affected by the death of one partner; or, if it was an ordinary partnership, that the expenses involved were made in the preservation of its property by authority of all the members, and were therefore chargeable against them. It is at least doubtful whether the organization was, strictly speaking, a mining partnership, although it may have so far partaken of the nature of one as to be subject to the same rule in this regard. This need not be determined, however, for the evidence taken before the referee is not all preserved in the record, and without it we cannot say that his findings might not be upheld upon one of the theories suggested.

The second objection made is that a part of the expenses in dispute were incurred in

transactions conducted in violation of a restraining order granted by the court at the commencement of the action, forbidding the making of any contract whereby the association or its members might be made liable. It does not appear, however, that this order was violated, and a subsequent application for an injunction of broader scope, directed against the transaction of any business for the company, was not allowed.

The third and final objections are based upon a claim that Poindexter and Quinton were financially interested in the business in which the expenses were incurred otherwise than as members of the association, and therefore were not entitled to reimbursement from it. Experiments designed to discover a process for the extraction of gold from the shale were conducted by a corporation under a contract with the association. A part of the expenses referred to were made in looking after operations under this contract. It is contended that Poindexter and Quinton were stockholders in this company, and were by this fact disqualified to represent the interests of the association in the matter. It is shown that a small amount of stock was offered them with the avowed purpose of enabling them to become directors; but it is not clear that this stock was accepted. Poindexter, however, stated that, finding the corporation to be without funds to prosecute the work, he furnished a sufficient amount to enable the experiments to be continued, in order that the efforts might not be abandoned, and accepted stock for it. There is nothing in the evidence that is preserved that is inconsistent with actual good faith and fair dealing, and, in the absence of a part of the testimony, it certainly cannot be said as a matter of law that the character of the transaction was such as necessarily to preclude a recovery of expenses from the association.

A second complaint relates to a controversy between S. S. Ott and E. S. Quinton. F. O. Poponoe, one of members of the association, withdrew, under an agreement that, in order to be relieved of further liability, he should pay \$500 in addition to \$450 that he had already contributed, and that whoever took his interest should have the benefit of the additional payment. Ott took half of it, which he afterwards transferred to Quinton, and the disputed question is whether the transfer carried with it the share of the payment mentioned. In the absence of a part of the evidence, this court cannot review the finding of the referee upon this matter.

An objection is also made to the time the referee's report was filed. On the last day allowed for its filing the referee presented it to the clerk, had it marked filed, and then withdrew it, and retained it for several days in order to have it bound. It is claimed that the document was not actually filed until its subsequent return to the clerk. It is clear that there may be circumstances, such as were present in *Wilkinson v. Elliott*, 43 Kan. 590,

23 Pac. 614, 19 Am. St. Rep. 158, under which a paper may be so indorsed by the clerk without in fact being filed. But it is equally clear that a document may be on file in legal contemplation, although it is not physically in the clerk's possession or in his office. In this case the notation by the clerk upon his records of the filing of the report was a notice to all concerned that it had been completed and received by him and was from that time in his official custody. An inspection of it could readily have been had at any time thereafter by anyone interested. It is not conceivable that any rights were prejudiced by its temporary removal. The suggestion that changes were made in it before its return is not borne out by the evidence. We think the report was effectually filed within time.

The judgment is affirmed.

HAIN et al. v. MATTES.

(Supreme Court of Colorado. Nov. 6, 1905.)

1. MINES AND MINING—ACTION ON ADVERSE CLAIM—COMPLAINT.

The complaint in an action on an adverse claim to a mining location need not allege that the adverse claim was filed in the land office within 60 days of publication.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 93.]

2. SAME — TIME OF FILING COMPLAINT — WAIVER OF OBJECTION.

Any objection based on the complaint in action on an adverse claim to a mining claim not being filed within 30 days after the filing of the adverse claim is waived, where not specially raised by demurrer or answer.

3. SAME—ASSESSMENT WORK.

Under Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], providing that on each located mining claim, till issuance of patent, \$100 worth of labor or improvements shall be made each year, but, when such claims are held in common, such expenditure may be made on any one claim, and Act Cong. Feb. 11, 1875, c. 41, 18 Stat. §15 [U. S. Comp. St. 1901, p. 1427], amending such section, so that, when a person has or may run a tunnel for developing the lode or lodes owned by him, the money so expended shall be taken and considered as expended on such lode or lodes, work done in a tunnel may be applied as assessment work on a mining location, though the person doing the work does not own a continuous strip of territory from the portal of the tunnel to the boundary of such location.

4. TRIAL — INSTRUCTIONS—NECESSITY OF REQUEST.

Complaint that instructions were indefinite and uncertain may not be made by one who fails to request instructions on the points involved.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 628.]

Appeal from District Court, Ouray County; Theron Stevens, Judge.

Action between Frank A. Hain and others and William F. Mattes. Judgment for Mattes, and the other parties appeal. Affirmed.

Henry & Sigfrid and T. W. Emerson, for appellants. Story & Story and Thomas Y. Bradshaw, for appellee.

MAXWELL, J. This is a suit in support of an adverse claim filed by the Senator Beck lode mining claim against the Dutch Girl lode mining claim. The Senator Beck had judgment.

In the discussion of this case we shall call the appellants the Dutch Girl and the appellee the Senator Beck. The Senator Beck is many years the senior location. No question is raised involving the validity of the location of either claim, provided, that at the time of the discovery and location of the Dutch Girl, the land was subject to location by reason of the failure to perform the annual assessment work for the Senator Beck, for the year 1898. Preliminary to a discussion of the main question we will dispose of the contention that the complaint does not state facts sufficient to constitute a cause of action, in that it does not allege that the adverse claim was filed in the United States Land Office, and suit in support thereof commenced within the time provided by section 2326, Rev. St. U. S. [U. S. Comp. St. 1901, p. 430]. These precise points were ruled in *Pennsylvania Mining Co. v. Bales*, 18 Colo. App. 108, 70 Pac. 444, and *Rawlings v. Casey*, 19 Colo. App. 152, 73 Pac. 1090, to the effect that it was unnecessary to allege in the complaint that the adverse claim was filed in the Land Office within the 60 days of publication, and that defendant waived his objection—if one—that the complaint was not filed within 30 days after date when the adverse was filed, by going to trial without having raised such question, by specially pleading it in a demurrer or answer. The questions presented here were raised for the first time at the trial by a motion of the Dutch Girl to exclude all evidence. With the rulings made by the Court of Appeals in the cases cited, we are in accord.

The pivotal question in this case is, was the annual assessment for the year 1898 performed within the surface boundaries of the Senator Beck, or if the work was performed elsewhere, was it intended as an annual assessment upon the claim and of such character as would inure to the benefit thereof? There was evidence that in 1898 a shaft had been sunk within the surface boundaries of the Senator Beck for the benefit of the owners of the property; that this work was not worth \$100 (as testified by the person who performed the same), and that it was worth \$120 to \$140 (as testified by two disinterested witnesses); that previous to and during the year 1898 the owner of the Senator Beck was driving what is known as the "Swamp Angel tunnel," which had its portal on the Swamp Angel lode, the property of such owner; that such tunnel was driven with the intention of developing the Senator Beck and other claims; that work upon such tunnel tended to the development of the Senator Beck, and inured to its benefit; that \$2,400 worth of work was done in the tunnel during the year 1898; that this work was

done in the tunnel for the benefit of the Senator Beck and 31 other claims; that the Swamp Angel tunnel continued would eventually reach the Senator Beck. The jury was instructed that it was not necessary that the annual assessment should be done within the boundaries of the claim; that such work might be done in a tunnel off the claim when such tunnel was driven by the owner for the purpose of developing the claim, and if it was found that the plaintiff (Senator Beck) was running a tunnel for the purpose of developing the Senator Beck and that the work performed therein tended to develop such claim, such work is in law considered the equivalent of assessment work within the boundaries of the claim.

The last paragraph of this instruction is: "And the court further instructs you that contiguity of territory is not necessary in order to have such work apply as an assessment." Exception was taken to and error is assigned upon the paragraph quoted. As we understand the contention of counsel, it is that the owner of a claim cannot develop his claim by a tunnel, or apply work in such tunnel as an assessment on the claim, unless he owns a continuous strip of territory from the portal of the tunnel to the exterior boundaries of the claim upon which it is sought to apply the tunnel work as assessment work. Pertinent statutory provisions are: " * * * On each claim located after the 10th day of May, 1872, and until patent has been issued therefor, not less than \$100.00 worth of labor or improvements shall be made during each year, * * * but when such claims are held in common such expenditure may be made upon any one claim." Section 2324, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1426]: "That section 2324 of the Revised Statutes be and the same is hereby amended so that when a person or company has or may run a tunnel for the purpose of developing the lode or lodes owned by such person or company, the money so expended shall be taken and considered as expended on such lode or lodes." Act Cong. Feb. 11, 1875, c. 41, 18 Stat. 315 [U. S. Comp. St. 1901, p. 1427].

One end sought by the acts of Congress above quoted was the development of the mineral resources of the country, and to the accomplishment of this end the appropriator of public mineral domain was required to expend not less than \$100 in labor or improvements upon or for the development of each claim in each year. Section 2324 required this expenditure to be on each claim, subject to the exception that when claims were held in common such expenditure might be made upon one claim, clearly indicating that it was the intention of Congress to provide a method for the economical development of a group of contiguous claims. The amendment of 1875 provided for the development of one or more claims by means of a tunnel, which method of development was not pro-

vided for by section 2324, unless such tunnel was on one of the claims held in common, and which comprised a group of contiguous claims. A construction which would limit the right granted by the amendment of 1875, to a tunnel constructed or driven on a claim or claims contiguous to each other, would destroy the right granted by the amendment, as such right was granted by section 2324. In other words, if work done in a tunnel cannot be applied to assessment work on a mining location, unless the party doing the work in the tunnel is the owner of a continuous strip of territory through which a tunnel may be driven from the portal thereof to the claim sought to be improved by tunnel work, the amendment of 1875 is meaningless, and of no force and effect. Section 2324 granted the right to perform the assessment upon one claim for the benefit of claims held in common, or a group of contiguous claims, and there is no manner of securing a continuous strip of territory through or over mineral lands except by locating a group of contiguous mining claims, or by means of a tunnel site location. It is conceded that there is not a syllable in either section 2324 or the amendment of 1875 in regard to the contiguity contended for; but the same is sought to be established by a construction placed upon the cases cited, which would, in our judgment, establish the principle by judicial legislation.

A careful analysis of the cases cited in support of the contention of the Dutch Girl, keeping in mind the statutory provisions above quoted, will demonstrate that they are not in point. We cannot review all of the cases, but will select those which seem to be strongest in support of the proposition contended for, and point out the distinction between the cases cited and the case under consideration, at the same time calling attention to statements and expressions in the opinions which are opposed to the proposition in support of which the cases are cited.

The first case cited is *Mt. Diablo Mining Co. v. Callison*, 5 Sawyer, 489, Fed. Cas. No. 9,886. As stated by Judge Hillyer, who wrote the opinion, the question before the court was: "Whether the plaintiff in the year 1877 failed to comply with the condition as to labor on the Dinero claim stated in section 2324, Rev. St." The facts were: The plaintiffs owned three mining claims, the Dinero, Mt. Diablo, and Peru, all of which adjoined each other. No question of the contiguity of territory was involved. No mention of the amendment of 1875 was made, and consequently no construction thereof could have been announced. In the course of the opinion it is said: "Work done outside of the claim or outside of any claim, if done for the purpose and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim as if done within the boundaries of the claim itself. One gen-

eral system may be formed, well adapted and intended to work several contiguous claims or lodes, and, when such is the case, work in furtherance of this system is work on the claims intended to be developed by it."

St. Louis Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875, is cited. In this case the question involved was the validity of a placer patent which included a number of contiguous claims amounting in all to 164.61 acres. Incidentally the court discussed the law applicable to assessment on mining claims, and, in this connection, uses the following language: "Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development; that is, to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water or where the improvement consists in the construction of a flume to carry off the debris or waste material." There is nothing in the statement of facts or the discussion of the court to indicate that the amendment of 1875 was under consideration in this case.

Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990, decided that the extension of a flume upon a placer claim and the use of such claim for dumping purposes was not such improvement of the claim as contemplated by section 2324, although the claim so used and other claims were held in common. The amendment of 1875 was not in any manner before the court, and the statement of facts clearly indicates that this case was decided upon a construction placed upon section 2324 alone.

In *Chambers v. Harrington*, 111 U. S. 350, 4 Sup. Ct. 428, 28 L. Ed. 452, the defendant owned three adjoining claims which were being developed by a shaft on one of the claims. The plaintiff claimed a portion of the territory of one of the claims, other than the one upon which the shaft was located, on the ground that the claim had been forfeited by failure to work the annual assessment on the claim. It was held that work done in the shaft had a tendency to develop the claim relocated, and was sufficient to hold it. The language of the opinion clearly indicates that the case came within section 2324. After stating the substance of the amendment of 1875, the opinion proceeds: "We are unable to see that it, the amendment, affects the character of other work to be done or improvements to be made according to the law as it stood before, except as it gives a special value to making a tunnel." This quotation is the only reference in the opinion to the amendment of 1875, and

the only construction placed by the court upon such amendment.

De Noon v. Morrison, 83 Cal. 163, 23 Pac. 374, involved placer mining claims adjoining each other and the question of the contiguity of territory was not before the court.

Hall v. Kearney, 18 Colo. 505, 33 Pac. 373, decided that work done upon a patented claim, one of a group of contiguous claims, if in fact done for the development of the claim, may be considered assessment work for such claim, notwithstanding the fact that it was done outside of the exterior lines of the claim. The court says: "Did the work, where done, tend to the development of the Randolph and Roscoe claims? and was it in fact performed for the benefit of these locations? are the controlling questions to be determined; and it is immaterial whether the improvement is upon patented or unpatented property, except as this may throw light upon the intention of the parties in doing the work."

Gird v. California Oil Co. (C. C.) 60 Fed. 531, involved the application of section 2324 to placer locations of oil lands, and in no wise involved a construction of the amendment of 1875.

Royston v. Miller (C. C.) 76 Fed. 50, was a suit in equity for an accounting and for partition of a group of mining claims known as the "Kingston Mines" and the "Irvine Tunnel" run for the purpose of prospecting and developing the mining claims. The group consisted of four claims known as the "Provider," the "Morris," the "California" and the "Chicago." The first three were contiguous. The Chicago was separated from them by the Victorine, a patented mining claim owned by other parties. The question of forfeiture of the rights of some of the parties in a portion of the property arose upon the trial, one side contending that work in the Irvine tunnel for the year 1892 was sufficient to hold the four claims of the group, including the Chicago, which as stated, was separated from the other claims by a patented claim. Judge Hawley, in an oral opinion, held that work done upon the Irvine tunnel in 1892 was wholly insufficient to constitute a compliance with the provisions of section 2324 as to the amount of annual assessment to be performed on the Chicago claim, and that such work was only sufficient to hold the three mining claims that were contiguous; citing *Chambers v. Harrington*, supra, and *Mining Co. v. Callison*, supra, in support of this conclusion.

It does not appear from the statement of facts contained in the opinion that the tunnel was either on or off the group of contiguous claims. The amendment of 1875 was not discussed in the opinion, which, as to the point here under discussion is based entirely upon the cases cited, which cases, as we have shown, did not involve the question of contiguity or noncontiguity of territory under the amendment of 1875. It further appears

from the opinion, that the discussion of this particular point was not necessary to a decision of the case, and therefore the statement of the court in this behalf might be treated as obiter dictum. Further discussion of the cases cited would unnecessarily prolong this opinion. Suffice it to say that we have examined all of them and that the statement of facts in each case shows that the mining claims involved were contiguous, and that the question here presented was not under discussion or decided in any of them.

Our investigation of the cases cited also discloses the fact that expressions may be found in some of them which seem to support the proposition to which they are here cited. "The language of the court is always to be understood by applying it to the facts of the case decided. That which seems to be general and of universal application has, in reality, often a limited application; and so the words of truth and utterances of law, undeniable in the case wherein they are spoken, become the parents of error and false doctrine." *Branch v. Mitchell*, 24 Ark. 439. Applying this rule to all the cases cited, we unhesitatingly say that no one of them is an authority in support of the proposition to which it is cited. This court has decided that labor performed by the owner of a claim in constructing a wagon road, a small part of which was within the boundary of the claim, for the purpose of better developing the claim, may be treated as a compliance with the law relating to annual assessments thereon. *Doherty v. Morris*, 17 Colo. 105, 28 Pac. 85. If labor performed upon a wagon road outside the boundaries of the claim, or "outside of any claim" (*Mt. Diablo Case*, supra), or "at a distance from the claim itself" (*St. Louis Co. v. Kemp*, supra), or "upon a patented claim" (*Hall-Kearney Case*, supra), may be held to be a compliance with the law relating to annual assessment work, work done in a tunnel for the purpose of developing the claim, and which has a tendency to develop it, may be so considered regardless of the contiguity or noncontiguity of territory, from the portal of the tunnel to the claim sought to be developed. The true test to be applied is, does the work benefit or tend to benefit the claim, and was it done for the purpose of developing the claim? The fact that the territory between the tunnel and the claim to be developed is vacant and unoccupied, or owned by another person, becomes important only in so far as that fact, if it exists, may have a bearing upon the ultimate question of fact, as to whether the tunnel does or does not tend to develop the claim, which question of fact, must be determined by the jury under proper instructions. Our conclusion is that there was no error in the instruction.

Complaint is made that other instructions were indefinite, and tended to mislead the jury. It is possible that standing alone some of the instructions are subject to this criticism; but, considered as a whole, the instruc-

tions fairly and fully presented to the jury the legal principles applicable to the evidence. If more specific instructions had been desired upon any of the points involved, request therefor should have been made. This was not done. Therefore complaint that the instructions were indefinite and uncertain cannot be made by the party failing to request instructions covering the points. *M. & M. Co. v. Prentice*, 25 Colo. 4, 52 Pac. 210, and cases cited. It is sufficient to say, that the court did not err in sustaining objections to questions on cross-examination relating to the work done on the Senator Beck in 1896 and 1897, as such evidence was immaterial. The evidence admitted of the value of work done in the Swamp Angel tunnel, and the intention with which such work was done, was competent and admissible. Other exceptions taken and urged here were either not well taken or concern immaterial matters.

The judgment will be affirmed.
Affirmed.

GABBERT, C. J., and GUNTER, J., concur.

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DENVER PUBLIC WAREHOUSE CO. et al. v. HOLLOWAY.

(Supreme Court of Colorado. Nov. 6, 1905.)

1. LIBEL—PRIVILEGED COMMUNICATION.

A communication between officers of a corporation on the subject of the conduct of one of its servants is privileged.

2. SAME—QUESTION FOR COURT.

Whether the occasion of a communication is such as to make it privileged is a question for the court.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 362.]

3. SAME—LOSS OF PRIVILEGE.

The privilege connected with a communication from one officer of a corporation to another on the subject of the conduct of one of its servants is not lost by the officer receiving it disclosing its contents to another servant as a reason why the servant about whom it was written was discharged.

4. SAME—ACTUAL MALICE.

Plaintiff, in an action for libel based on a privileged communication, has the burden of proving actual malice.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 150.]

Appeal from District Court, City and County of Denver; F. T. Johnson, Judge.

Action by Judson H. Holloway against the Denver Public Warehouse Company and others. Judgment for plaintiff. Defendants appeal. Reversed.

Thomas H. Hood, for appellants. Horace G. Benson, for appellee.

STEELE, J. Judson H. Holloway brought his action in the district court of the Second judicial district against the Denver Public Warehouse Company, John L. Jerome, and D. R. Benedict, based upon the following letter: "Denver, Colo., Dec. 4,

1901. Mr. D. R. Benedict, Manager Denver Public Warehouse Co., City—Dear Sir: I have given a good deal of thought to the report you made yesterday of the disappearance of forty-one bags of sugar on consignment to the warehouse. I am not satisfied with the statement that no explanation can be given for this loss. Your foreman is on duty through business hours. It would be impossible for the 41 bags of sugar to disappear without his knowledge. When merchandize of this sort is put in his charge, we have got to depend upon finding the goods there or receipts for same. I don't consider that it was possible for this sugar to have been taken out of the warehouse during the night. Please discharge Mr. Holloway immediately from his position as foreman, and tell him that it is my intention to prosecute him for the theft of the sugar, unless he can give some reasonable explanation. Yours truly, John L. Jerome."

The amended complaint alleges that the Denver Public Warehouse Company is a corporation, and that at the time of the sending of the letter John L. Jerome was the treasurer and D. R. Benedict was the manager of the business of the said company. It is further alleged that the defendants, for the purpose of impeaching plaintiff's good name and subjecting him to disgrace, and to bring him into disrepute among his neighbors and acquaintances, did falsely, wickedly, and maliciously write and publish the aforesaid letter, and that the said defendants did maliciously and willfully publish said letter and the contents thereof by reading the same to various people, and permitting other persons to read the same, for the purpose of injuring this plaintiff in his reputation. Plaintiff therefore prays for damages in the sum of \$10,000. A demurrer to this amended complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, was filed, and the demurrer was overruled. In the answer the defendants admit writing and sending the letter as alleged in the complaint, and alleged that it was written by said Jerome to said Benedict in the course of their said employment by and for the warehouse company; that said defendant John L. Jerome, in good faith and without ill will or evil intention of any sort toward the plaintiff, and in no other manner whatsoever, on December 4, 1901, wrote and sent to said defendant D. R. Benedict the said letter, believing the statements therein to be true; and that said D. R. Benedict, in good faith and without ill will or evil intention of any sort toward the plaintiff, and in no other manner whatsoever, received and submitted to plaintiff said letter in regard to the discharge of said plaintiff from his position as foreman. The replication denies the matters set forth in the answer. The trial resulted in a verdict in favor of the plaintiff and against the defendants jointly

for the sum of \$5,000, from which judgment the defendants have appealed.

We shall not undertake to consider all of the assignments of error, for the reason that we are of opinion that the court in his instructions to the jury has committed error which requires the reversal of the judgment.

Instruction No. 3, given by the court, is as follows: "The court instructs the jury that the suspicion or belief in the mind of the publisher that the article published is true constitutes no justification of the charge. The publisher, in order to justify, must not only prove that there was such belief and suspicion, but he must prove that the identical charge made was true. It is the policy of the law to protect the innocent from reports that may be spread over the world by means of writing contaminating, vile, and malignant falsehoods, which may make an impression which would take much time and trouble to erase, and which it might be difficult, if not impossible, ever completely to remove."

Instruction No. 4: "The court instructs the jury that, where a false article is libelous upon its face, the law implies malice, and evidence of malice is not required outside of the publication; and in this case, if the publication is false, the plaintiff is not bound to offer other evidence than that of the publication in proof of malice, for in such case the law implies malice in the author and publisher and each subsequent publisher, whether in fact malice existed or not."

Instruction No. 12: "The court instructs the jury that a publication, the obvious tendency of which, taken as a whole, is to fasten suspicion of guilt of a felony upon the plaintiff, is actionable, although the publication contains no direct charge; and in this case, if the jury believe from the evidence that the tendency of this letter in question, taken as a whole, is to falsely and maliciously fasten the suspicion of guilt of a felony upon the plaintiff, even though you may believe that it contains no such direct charge, your verdict will be for the plaintiff, unless defendants shall have proved by a preponderance of the evidence that the charge made is true, or that the publications of the letter were each privileged publications and without malice in fact."

Instruction No. 20: "The jury are instructed that the stockholders, officers, and directors of a corporation have the right or privilege to communicate to each other, or to the corporation of which they are members, whatever they know, or have reason to believe, and do in fact believe, in respect to the management of the corporation or the conduct of any one of its employes or servants. These are what in law are called 'privileged communications.' And, when words are thus spoken or written in such privileged communications, the party concerning whom they

are spoken or written cannot recover for such words so spoken or written, unless he shows that said communications were made with malice or without probable cause toward him, or unless the same are published to some third person other than such officers and directors."

It appears to us that the court has proceeded upon a wrong theory, and has excluded from the consideration of the jury the question of the right of the officers of this corporation to communicate with each other upon the subject of the conduct of one of the employes. In *Wagner v. Scott*, 164 Mo. 289, 63 S. W. 1107, the court, quoting from *Newell on Slander and Libel*, says: "A privileged communication is an exception to the rule that every defamatory publication implies malice. A qualified privilege is extended to a communication made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, either legal, moral, or social, if made to a person having a corresponding interest or duty, and the burden of proving the existence of malice is cast upon the person claiming to have been defamed. * * * 'The theory of privilege in connection with the law of defamation involves a variety of conditions of some nicety, and also a doctrine not always of easy application to a set of facts, and, such being the case in any trial, whether civil or criminal, while the questions of libel or no libel, malice or no malice, are matters of fact for the jury, the question of privilege or no privilege is entirely one of law for the judge. That is to say, it is exclusively for the judge to determine whether the occasion on which the alleged defamatory statement was made was such as to render the communication a privileged one. The jury, however, will be the proper tribunal to determine the question of express malice, where evidence of ill will is forthcoming; but, if, taken in connection with admitted facts, the words complained of are such as must have been used honestly and in good faith by the defendant, the judge may withdraw the cause from a jury and direct a verdict for the defendant.'" And, in quoting from *Gassett v. Gilbert*, 6 Gray, 97, further says: "The question whether in a particular case a publication is to be deemed privileged—that is, whether the situation of the party making it and the circumstances attending it were such as to rebut the legal inference of malice—is a question of law, to be determined by the court in the first instance. But," the court proceeds, "'In deciding this question, the conditions on which it is held to be privileged must necessarily be assumed—that is, it must be taken for granted that the publication was believed, by the party who made it, to be true, and that it was made bona fide—because, if these elements are found to be wanting, then the jury would be authorized to infer malice. The sole duty of the court, there-

ore, in such cases, is to determine whether the occasion, in the absence of actual malice, would justify the publication. If so, then it is incumbent on the plaintiff to prove the existence of malice in order to sustain his action; and this must be shown to the satisfaction of the jury, whose exclusive province it is to pass upon the question. But it is not necessary to prove it by extrinsic evidence. It may be inferred from the relation of the parties, the circumstances attending the publication, and even from the terms of the publication itself. The defendants cannot be justified if they have included in their notice any statements or language of a defamatory nature not warranted by the occasion which called forth the publication. The privilege must be limited to the exigency; and, if the defendants, by the terms of the notice published by them, exceeded the just limits which were necessary and proper to accomplish the legitimate purpose of protecting the corporation and the public from the unauthorized acts of the plaintiff, it will be evidence of malice, proper to be weighed by the jury. So, too, the question of good faith on the part of the defendants and their honest belief in the truth of the statements put forth by them are matters of fact which are to be determined exclusively by the jury. Although it is not necessary for the defendants to prove the truth of the statements contained in the notice, in order to justify the publication, yet proof of their falsity is admissible on the part of the plaintiff to show that the defendants did not act on an honest belief in their truth."

In the case of *Klinck v. Colby et al.*, 46 N. Y. 427, 7 Am. Rep. 360, Mr. Justice Folger, in delivering the opinion of the court, said: "But, when the paper published is a privileged communication, an additional burden of proof is put upon the plaintiff, and he must show the existence of express malice in the publication of it. Hence, as a general proposition, it may be said that the question of whether a publication is a privileged communication is one for the jury. That is to say, the court may determine whether the subject-matter to which the alleged libel relates, the interest in it of the defendant, or his relations to it, are such as to furnish the excuse. But the question of good faith, belief in the truth of the statement, and the existence of actual malice, remains, although the court should hold, that *prima facie*, the communication was privileged." And, at page 433, 46 N. Y. (7 Am. Rep. 360), the court defines "privileged communication" in these words: "The proper meaning of a privileged communication is said to be this: that the occasion on which it was made rebuts the inference arising, *prima facie*, from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact, and that the defendant was actuated by motives of personal spite or ill will, independent of the circumstances

in which the communication was made." It seems to us that this communication was privileged; that is, that the occasion which called forth the letter and the subject-matter of the letter made it a privileged communication. In *Conroy v. Pittsburgh Times*, 139 Pa. 334, 21 Atl. 154, 11 L. R. A. 725, 23 Am. St. Rep. 188, it is held that "the general rule is that nothing but proof of its truth is a defense of a libel. That it was privileged, because published on a proper occasion, from a proper motive, and upon probable cause, is the excepted case, and he who relies on an exception must prove all the facts necessary to bring himself within it. * * * So, where the alleged libel charges an indictable offense, the presumption of innocence ought and must stand as *prima facie* evidence of falsity and want of probable cause, and therefore of malice, even in cases of a claim of privilege."

But this case does not have the support of the weight of authority. It seems to us that, when the occasion is shown to have been privileged, the burden of showing that the defendant has lost his privilege is cast upon the plaintiff. The presumption which attaches to a writing written on a privileged occasion is that it was written in good faith and upon probable cause. As said by Justice O'Brien, in *Hemmens v. Nelson*, 138 N. Y. 524, 34 N. E. 342, 20 L. R. A. 440: "The question is not whether the charge is true or false, nor whether the defendant had sufficient cause to believe that the plaintiff sent the letter, or acted hastily, or in a mistake, but the question is, the occasion being privileged, whether there is evidence for the jury that he knew or believed it to be false. The plaintiff [defendant] may have arrived at conclusions without sufficient evidence, but the privilege protects him from liability on that ground until the plaintiff has overcome the presumption of good faith by proof of a malicious purpose to defame her character under cover of the privilege." "This kind of malice," says Justice O'Brien, in the case cited, "which overcomes and destroys the privilege, is, of course, quite distinct from that which the law, in the first instance, imputes with respect to every defamatory charge, irrespective of motive. It has been defined to be an 'indirect and wicked motive which induces the defendant to defame the plaintiff.' *Odgers on L. & S.* 267." The authorities other than those cited herein, holding that when the occasion is privileged the burden is cast upon the plaintiff to show malice, are *Noonan v. Orton*, 32 Wis. 106; *McDavitt v. Boyer*, 169 Ill. 475, 48 N. E. 817, citing 2 *Greenleaf on Evidence* (15th Ed.) § 418; *Bradley v. Heath*, 12 Pick. 163, 22 Am. Dec. 418; *Beeler v. Jackson*, 64 Md. 589, 2 Atl. 916; *Livingston v. Bradford*, 115 Mich. 140, 73 N. W. 135; *Strode v. Clement*, 90 Va. 553, 19 S. E. 177; *Bacon v. Mich. Cent. R. R.*, 66 Mich. 166, 33 N. W. 181, and cases cited.

The case of *Republican Publishing Co. v.*

Conroy, 5 Colo. App. 262, 38 Pac. 423, is cited as supporting appellee's contention that the burden is upon the defendant to prove, not only that the occasion was privileged, but that the matter was privileged. The defendant in that case defended upon the grounds that the article was true, that it was published in good faith, believing it to be true, and that it was privileged. The court held that, as the article was not published in the discharge of any duty owed by the defendant to itself or others, it was not privileged. The court, in the course of the opinion, said that, if the writer had contented himself with giving the fact of the arrest and the charge upon which it was made, the claim of privilege would be entitled to consideration. The plaintiff had been arrested upon a serious charge. The writer had not only published the fact of the arrest and the nature of the charge, "but he proceeded upon his own responsibility to brand the plaintiff with an opprobrious epithet, and to assert him guilty of the most disgraceful and infamous of offenses." This decision is undoubtedly correct. The privilege accorded the publisher of legal or judicial proceedings is that of publishing an accurate and impartial report, and, unless it appears that the report is impartial and accurate, the publisher cannot claim immunity upon the ground of privilege; the very essence of the privilege being that the report is impartial and accurate. Not so with respect to communications between persons having a common interest in the subject-matter of the communication, as when the officers of a corporation communicate with each other upon the subject of the conduct of one of the officers or servants of the corporation. Then it is that the occasion determines the question of privilege. Then language which would otherwise be *prima facie* actionable is not *prima facie* actionable, because the occasion repels the inference of malice, and the plaintiff is called upon to show that malice in fact existed, which malice may be shown by extrinsic facts, an antecedent grudge or previous dispute, and the jury should determine from all the facts and circumstances, as well as from the communication itself, whether in writing the communication the defendants were inspired by a malicious intent to defame the plaintiff. But, if the defendants wrote the communication in good faith, in the belief that the statements therein contained were true, then they cannot be held liable.

It is quite clear that instruction No. 3, in which the court charged the jury that suspicion or belief in the mind of the publisher that the article published is true constitutes no justification of the charge, and that the publisher must not only prove that there was such a belief and suspicion, but must prove that the identical charge is true, is positively wrong. Under this instruction one would be liable if he truthfully charged

another with the commission of an offense, unless he proved that he believed the charge to be true. The instruction is also erroneous in that it is in direct conflict with No. 12, which directs an acquittal if the charges made are proven to be true, and, also, in that it instructs the jury that belief in the mind of the publisher that the charge is true is no justification. Authorities we have cited hold to the contrary.

In the fourth instruction the court charged the jury that, where a false article is libelous upon its face, the law implies malice, and evidence of malice is not required outside of the publication, and that the plaintiff is not bound to offer other evidence than that of the publication in proof of malice; "for, in such case, the law implies malice in the author and publisher, whether in fact malice existed or not." This is not a correct statement of the law as applicable to this case. The occasion was privileged, the subject-matter was privileged, and the law presumes that Jerome in writing the letter was not guilty of malice.

Instruction No. 12 casts upon the defendant the burden of showing that the communication was privileged and that no malice in fact existed. The law is that it is for the court to determine whether the occasion is or is not privileged, and, if the communication was written upon a privileged occasion, that the burden of showing malice is then cast upon the plaintiff. In cases where there is a dispute as to the occasion upon which the communication was written, it is for the jury to find the fact; but in this case it is conceded that the occasion was privileged. The court, therefore, should not have required the defendant to prove that the communication was privileged and that it was written without malice in fact.

There was testimony that this letter was shown by Benedict to the night watchman, and instruction No. 20 is equivalent to a direction to return a verdict for the plaintiff if the jury believed that the letter was shown, or its contents disclosed, by the defendant Benedict to one of the employees of the company. The privilege was not lost by reason of Benedict showing the letter to an employé. The employé was interested, and Benedict had a right to tell why Holloway was discharged. If the officers of the corporation publishing the letter exceed the just limits which are necessary to accomplish the legitimate purpose of protecting the corporation and the employés, such fact may go to the jury as evidence of malice, but the privilege is not lost unless malice in fact existed. *Wagner v. Scott*, 164 Mo. 289, 63 S. W. 1107; *Bacon v. Mich. Cent. R. R. Co.*, 66 Mich. 166, 33 N. W. 181. In the latter case an employé was discharged upon the alleged ground of larceny. The corporation posted in a conspicuous place a list of names including plaintiffs, and opposite his name, in a column wherein the causes for discharge

were to be placed, the word "stealing" was written. In the opinion it is said: "But it is said that it was not necessary to state the cause of the discharge, that the communication was from a superior to a subordinate, and would have been sufficient to state the fact of the discharge, without stigmatizing the plaintiff as a thief. This objection goes to the character of the language used, and not to the occasion. The occasion determines the question of privilege. The language is only proper to be considered in connection with the question of malice."

We are of opinion that the jury was not properly directed by the court, and for the reasons given the judgment is reversed.

GABBERT, C. J., and CAMPBELL, J., concur.

34 Colo. 461

McCONATHY et al. v. DECK.

(Supreme Court of Colorado. Nov. 6, 1905.)

1. ASSAULT AND BATTERY—EXEMPLARY DAMAGES—EVIDENCE—SUFFICIENCY.

Where the evidence in an action for an assault shows rough treatment of plaintiff by defendants, his confinement in a cold jail, and consequent illness and loss of time, there is such a showing of actual damage as to entitle plaintiff to exemplary damages, although the money extent of the actual damage is not shown or found.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, § 54.]

2. WEAPONS—CARRYING CONCEALED WEAPONS—FORFEITURE OF WEAPON.

Under Mills' Ann. St. Rev. Supp. § 1304, making it an offense for any person to carry concealed weapons, and providing that all concealed weapons taken from parties violating the statute shall be forfeited to the county, a concealed weapon taken from a person is forfeited by the taking, and without a conviction of the offense of carrying a concealed weapon.

Appeal from District Court, Hinsdale County; Theron Stevens, Judge.

Action by James W. Deck against R. P. McConathy and another. From a judgment for plaintiff, defendants appeal. Affirmed in part.

Charles F. Repath, for appellants. H. C. Clay, for appellee.

GUNTER, J. This was an action by appellee, Deck, to recover of appellants, McConathy and Smeltzer, damages for an alleged assault upon appellee; also to recover certain personal property, taken from the person of appellee, or its value. The complaint contained two causes of action. The first stated the facts constituting the alleged assault, the second the facts showing the plaintiff (appellee) entitled to recover a certain pistol and a certain knife, or their respective value. After issue joined the case was tried to the court sitting without a jury.

1. As to the first cause of action, that to recover damages for an assault, the court

found that appellants, as sheriff and deputy, acting under a warrant, arrested appellee; that in so doing they maliciously and unnecessarily subjected him to indignities, to violence, and to mental and physical suffering; that in disobedience of the mandate of the warrant they threw him into the common jail; and that for such trespass appellee (Deck) was entitled to recover exemplary damages in the sum of \$500. Judgment went accordingly. The amount of the actual damages sustained by appellee was not found. The court did find, however, facts showing that appellee sustained actual damage, and the undisputed facts show that he received such damage; for example, the evidence shows that, in consequence of the rough treatment to which the court found appellee was unnecessarily subjected by appellants, he was rendered so ill as to be confined to his bed for several days, suffering in consequence mental and physical pain and loss of time. It is said the failure to find the amount of such actual damage is fatal to the judgment. This contention is an attempt to apply the rule announced by some of the authorities that exemplary damages can be awarded only when actual damages have been sustained; that is, "exemplary damages can never constitute the basis of a cause of action." It is unnecessary for us, in this case, to express an opinion as to whether such rule is the law in this jurisdiction, because the facts of the case do not bring it within such view of the law. As stated, the finding and the undisputed facts show that the arrest here was attended by unnecessarily rough treatment of a frail, sick man, his confinement in a cold jail, and consequent illness, and loss of time. The finding was to the effect that appellants were trespassers ab initio in making the arrest and casting appellee into prison, and that appellee had sustained real injury therefrom.

The authorities are that if actual damage is shown, even though its amount is not shown or found, and the other elements entitling the plaintiff to exemplary damages are present, exemplary damages may be awarded. In other words, after actual damage is shown it is unnecessary to show its money extent to sustain a judgment for exemplary damages. We think the reasoning in *Williams v. Williams*, 20 Colo. 51, 67, 37 Pac. 614, is authority for this conclusion. That action was by the wife to recover damages for alienation of the husband's affections. The action arose after the enactment of our exemplary damage act. 1 Mills' Ann. St. § 1512. The court was of the opinion that the injury complained of was within the statute, because it was an actionable wrong, although unattended by bodily injury or pecuniary losses. Inter alia, the court said: "Such injury is a wrong done to the wife, as an individual, as a person. The statute does

not specify that the wrong shall be a physical or bodily injury. On the contrary, it allows exemplary damages when 'the injury complained of shall be attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings.' These words clearly import wrongs and injuries other than mere bodily wounds or pecuniary losses. They include, as well, injuries affecting the mind and sensibilities of the individual, which are often more grievous and painful than mere material injuries." In *Favorite v. Cottrill*, 62 Mo. App. 119, 123, plaintiff sued for the destruction of his business as a billposter. The jury returned a verdict of \$1 as compensatory damages, and \$5,000 as exemplary damages. A remittitur was made in the trial court, and judgment entered for \$2,490. The evidence showed substantial damages, but, on account of a defect in the pleadings, the court excluded it from the consideration of the jury, and charged that the recovery of compensatory damages could not exceed a nominal sum, and that exemplary damages might be awarded. Exemplary damages were awarded. The point was made on appeal that the instruction as to exemplary damages was error because it permitted nominal damages to constitute the basis of exemplary damages. The court, after adverting to the conflict of authority upon this question, held that the judgment should stand, and, *inter alia*, said: "Here the injury inflicted was not theoretical or fanciful, but quite substantial, and the plaintiff was only precluded from recovering substantial damages because of the state of the pleadings. We will therefore overrule the assignment." In *Robinson & Pattison v. Goings*, 63 Miss. 500, 504, Goings sued to recover damages for taking forcible possession of his wagon, team, and three bales of cotton. The evidence showed that plaintiff started his wagon loaded with three bales of cotton for delivery to a third party. When the wagon reached the store of defendants, it was stopped, and the cotton forcibly thrown off and rolled into their shed. The driver returned to the home of plaintiff with his wagon and team. Later the cotton was delivered by the defendants to the third party, upon the order of plaintiff. The evidence did not show actual damages to plaintiff in any particular sum. Plaintiff was awarded punitive damages in the sum of \$125. It was contended that the facts did not justify an award of punitive damages because there was only a nominal injury to plaintiff. The court held that, although the extent of the injury was uncertain, it was a real injury, and was a basis for punitive damages. In the course of the opinion it said: "One in the orderly and lawful prosecution of his business cannot be said to be only nominally injured by the unwarranted and illegal seizure and detention of his prop-

erty by another, so as to interrupt the course of business of the owner."

In the case before us the finding of the court and the undisputed evidence show that appellee sustained actual damages, although the money extent thereof was not found. The finding further was that such damage was inflicted under circumstances justifying the award of exemplary damages, and exemplary damages were awarded. We think the judgment on the first ground of action, awarding \$500 as exemplary damages, should stand.

2. The second cause of action was to recover of appellants the value of a pistol and knife taken from the person of appellee at the time of the arrest mentioned in the first cause of action. The pistol was found to be of the value of \$16, and the knife of the value of \$1, and judgment went for \$17 on the second cause of action in favor of appellee and against appellants. The evidence, without conflict, showed that the pistol, at the time of the seizure, was being carried by appellee in violation of the statute against carrying concealed weapons. *Mills' Ann. St. Rev. Supp.* § 1364. There was no criminal charge preferred against appellee for carrying concealed weapons, and it is not claimed that the pistol was being held to be used as evidence upon the trial of such charge.

Appellants contend that as to this cause of action the judgment was wrong, because, under the undisputed facts, the pistol was taken from the person of appellee while carrying it in violation of the statute against carrying concealed weapons, and that the mere occurrence of such facts divested appellee of his title, and worked a forfeiture of his interest in the pistol in favor of the county. Appellee contends that a judicial proceeding establishing a violation of the statute, as the conviction of appellee of the crime of carrying concealed weapons, was necessary to work the forfeiture; that, as there had not been such conviction, the ownership of the pistol was still in appellee. Decisive of the contention of the respective parties is, was a conviction in a criminal proceeding for carrying concealed weapons necessary to work the forfeiture, or can the fact of a violation of the statute be availed of, if established by other evidence than a judgment of conviction?

The statute prescribes: "If any person * * * shall within any city * * * carry concealed upon his * * * person any pistol * * * such person shall upon conviction thereof * * * be punished by imprisonment in the county jail, * * * or by a fine * * * or by both such fine and imprisonment. * * * All concealed weapons taken from parties violating this section shall be forfeited to the county and confiscated and sold at auction for the benefit of the school fund of the county in which the offense is committed." This section in effect says that any pistol taken from any party

carrying it concealed upon his person within any city shall be forfeited to the county and confiscated, and sold at auction for the benefit of the school fund of the county in which the offense is committed. This statute, by its terms, makes the occurrence of the facts constituting its violation work a forfeiture. It does not make the forfeiture dependent upon a conviction. To construe the statute as requiring a conviction as a condition precedent to a forfeiture thereunder would be to supply a provision it has not.

The question before us is not a new one. In *American & Eng. Ency. of Law* (2d Ed.) vol. 13, p. 58, it is said: "While a forfeiture at common law does not operate to divest the title of the owner until, by a proper judgment in a suit instituted for that purpose, the rights of the state have been established, it is otherwise where a statute in terms denounces a forfeiture of the property as the penalty for a violation of law, without alternative value or other qualifications or provisions, or language showing a different intent; for in such case the forfeiture takes place absolutely and instantaneously on the commission of the offense, or at such other time and upon such other conditions as the statute may name."

Wilkins v. Despard, 5 Durnford & East's Reports (5 Term Reports) 65, was trespass, by an owner against the governor of a foreign country belonging to Great Britain, for seizing and selling his sloop. The defense was that the owner's title was divested by a forfeiture to the defendant and the Crown through a violation, by the owner, of the navigation act. Under the provisions of that act, if the facts existed set up in the answer, the sloop and its cargo became forfeited to the Crown and the defendant. It was contended by the owner that the existence of the facts constituting a violation of the navigation act, "without any sentence of condemnation of the said cargo and the said sloop . . . being rendered by any court having competent jurisdiction in that behalf, would not work a forfeiture." The court held that the violation of the act worked the forfeiture, and that the violation could be shown as any other fact, and that a previous judicial determination of a violation of the statute was not necessary to its operating to effect a forfeiture.

Fontaine v. Phoenix Insurance Company, 11 Johns. 293, was an action on a policy of insurance covering the schooner *Phoenix*. The vessel was practically lost. A question was whether the plaintiff at the time of the loss had an insurable interest in the vessel. The defense was that the title to the schooner had been forfeited to the United States prior to her loss for a violation of the exclusion act, and that her title was in the United States under such forfeiture at the time of the loss. The sixth section of that act (Act March 1, 1809, c. 24, 2 Stat. 529) provides that any vessel receiving cargo in violation of that act

shall be forfeited to the United States. It was contended that a proceeding in condemnation, or some other judicial proceeding, was necessary to determine that there had been a violation of that act, and that the facts, without a judicial determination of their existence and that they amounted to a violation of the act, would not work a forfeiture. The court held that the mere existence of the facts operated as a forfeiture, and that a previous judicial determination that such facts constituted a violation of the statute was not a condition precedent to their operating to divest the title of the former owner. The court approves *Wilkins v. Despard*, supra, and in speaking of the ruling there says: "It is decided that, if a ship be seized as forfeited under the navigation act, the owner cannot maintain trespass against the party seizing, although the latter does not proceed to condemnation; for by the forfeiture the property is divested out of the owner."

Kennedy v. Strong, 14 Johns. 128, was an action of trover for certain merchandise. The defendant, a shipowner, who had converted the merchandise, set up that the same had been shipped in violation of the exclusion act, and that therefore the title to it had been forfeited to the United States. The plaintiff contended that the shipment of the goods in violation of the act did not, without a judgment establishing such violation, divest his title. The court held that a judgment by condemnation, or otherwise, establishing such violation, was not necessary to the facts constituting the violation operating as a forfeiture. In the course of its opinion the court said: "That point has been settled in this court and in the Supreme Court of the United States. The forfeiture takes place on the commission of the act prohibited, and by the forfeiture the property is immediately divested out of the owner before any seizure or suit."

In *Bennett v. American Art Union*, 5 Sandf. 614, 631, plaintiff, in effect a subscriber of the art union, a corporation, sought an injunction to restrain the distribution by lot of certain works of art which that corporation had purchased. One ground for the court's denying the writ of injunction was that the plaintiff had no interest in the property because the title of the company to the property had become forfeited to the state through a violation of the statute. The court, among other things, said: "It was so vested by the force of the forfeiture which the statute declares of 'all property that shall be offered for sale or distribution contrary to its provisions'—a forfeiture which, by the express words of the law, may attach as well before as after the determination of the chance upon which the distribution depends. It has, indeed, been insisted by the counsel for the plaintiff that the forfeiture which the statute creates, whatever may be its effect by relation, does not attach, so as to divest the title of the owner, until, by a proper judg-

ment in a suit instituted for that purpose, the rights of the state have been established; but, although it is undoubtedly true that a forfeiture at common law does not operate to change the property until some legal step has been taken by the government for the assertion of its rights, there is a material distinction between a common-law and a statutory forfeiture, to which the learned counsel failed to advert. When a forfeiture is given by statute, the rules of the common law are dispensed with, and the thing forfeited may either vest immediately or upon the performance of some future act, according to the will of the Legislature. This depends entirely upon the construction of the statute. * * *

There are many decisions in England and in the United States which establish that where, by the words of the statute, a forfeiture is attached to the commission of the offense, its immediate operation is to divest wholly the title of the owner, so as to deprive him of the right of maintaining an action or defense, to which, as owner, he would otherwise be entitled."

Oakland R. R. Company v. Oakland Fruit Valley Railway Company, 45 Cal. 365, 13 Am. Rep. 181, and *Borland v. Lewis*, 43 Cal. 569, also support the conclusion we have reached. In the course of its opinion in the former case the court used the following language: "Now while a forfeiture at common law does not operate to divest the title of the owner until, by a proper judgment in a suit instituted for that purpose, the rights of the state have been established, it is otherwise when the forfeiture is declared by a statute. In the latter case the title to the thing forfeited immediately vests in the state upon the commission of the offense or happening of the event for which the forfeiture is declared, or at such other time and upon such other condition as the statute may name. * * * In some of the cases the question has been directly presented whether, after the forfeiture has taken place, but in the absence of any judgment declaring the forfeiture, the former owner could maintain any action in reference to the forfeited property, and it was held that he could not." In the latter case the provisions of the statute, declaring a forfeiture upon the existence of certain facts, was availed of by defendant in an ejectment case. See, also, *United States v. Bags of Coffee*, 8 Cranch, 398, 3 L. Ed. 602.

The statute under consideration divides into two parts—the one providing that upon conviction the defendant shall be fined or imprisoned, or both; the other complete in itself saying that a violation of the statute shall work a forfeiture. We repeat it is not provided that this violation, to be effective, shall be established in any particular manner. The provision simply is that, if the violation exists, it will work a forfeiture. It has been shown in this case that there was a violation of the statute. Its effect, then, according to the terms of the statute, was to divest the title of the pistol from the

former owner, and invest it in the county. We think the judgment for the return of the pistol, or its value, should have been for appellants, the defendants. As to the knife, the evidence has not shown that it was within the statute.

The judgment below will be affirmed as to the first cause of action, and reversed as to the second.

Judgment affirmed in part, and reversed in part.

The CHIEF JUSTICE and MAXWELL, J., concur.

34 Colo. 380

CHICAGO, B. & Q. R. CO. v. CAMPBELL.

(Supreme Court of Colorado. Nov. 6, 1905.)

1. RAILROADS—OPERATION OF TRAINS—SPEED—NEGLIGENCE—KILLING CATTLE.

In an action against a railroad company for killing stock on its right of way, the railroad was not guilty of negligence per se in running its train at a speed of 50 miles per hour as it approached the place of the accident, in the country, where it was not covered by any speed ordinance or statute.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1484.]

2. SAME — FAILURE TO FENCE — STATION LIMITS.

A railroad company is not guilty of negligence warranting a recovery for the killing of stock on its right of way, because of its failure to fence its track within station limits, where it was left unfenced for the accommodation of shippers.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1439, 1441, 1442.]

3. SAME—FAILURE TO AVOID INJURY.

Defendant's engineer held not guilty of negligence in failing to discover a cow on the track in time to avoid injuring her.

Appeal from Arapahoe County Court; Ben B. Lindsey, Judge.

Action by R. W. Campbell against the Chicago, Burlington & Quincy Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Wolcott & Vaile, Wm. W. Field, and W. N. Vaile, for appellant.

GODDARD, J. Action brought by appellee against the appellant to recover the value of a cow killed by a locomotive engine operated by the employes of the appellant. From the evidence it appears that on the 9th of July, 1900, the appellee was carrying on the dairy business on a farm a mile and a half west of Barr, Colo., and the same distance from the railroad of appellant; that he was in the habit of allowing his cows to run at large in that vicinity. On the evening of that day his cattle were grazing on the appellant's right of way, three-quarters of a mile southwest of Barr Station. The track of appellant is fenced outside of the station limits, but is unfenced within such limits in order that shippers may approach the side track located there for the purpose of loading grain, stock, etc. The engineer testified

that when he first observed the cattle, a half mile down the track, he was running at the usual rate of 50 miles an hour; that none of the cows were on the track, but were grazing on both sides; that he immediately began to reduce the speed of the train by means of the air brakes, so as to get the train under control, and had reduced the speed to five miles an hour when he saw the cow which was killed approaching the track; that he then applied the brakes with full force, but that she went onto the track not exceeding 50 or 60 feet in front of the engine, and that it was impossible to stop in that distance. This evidence is corroborated by the fireman, and there is no evidence to the contrary. It also appears that an alarm bell is started at Denver and rings continually while the train is in motion, and was so ringing when the train passed the point where the animal was crossing the track; that the engineer blew the station whistle one mile from the Barr station—about one-quarter of a mile from the place where this animal was struck; and that the stock alarm was blown for this particular cow when she started to cross the track. In answer to special questions submitted, the jury found that the appellant was in fault in three particulars: First, that the engineer discovered the cow on the track in time to avoid injury to her; second, was negligent in running the train at the speed shown by the evidence; third, in failing to fence the track at the point where the cow was killed.

These answers plainly disclose that the jury utterly disregarded the evidence introduced, and in two instances, at least, ignored the instructions given by the court. They were expressly instructed that negligence on the part of the appellant could not be predicated upon the running of the train at any rate of speed consistent with its duty to the public as a common carrier. In the circumstances of this case, this was a correct statement of the law. A railroad company has a right to run its trains at any speed it may deem proper, when they are not passing through an incorporated city or town, which is authorized to, and has, prescribed the limit of speed within such municipality. The law places no restriction upon the rate of speed at which trains may run across the country, and no rate of speed is, per se, negligence, except where the law of the state, or municipal corporation authorized to do so, prescribes a limit. *Maier v. A. & P. R. R. Co.*, 64 Mo. 267; *Doggett v. R. R. Co.*, 81 N. C. 459; *Warner v. N. Y. & C. R. R. Co.*, 44 N. Y. 465; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb. 90, 56 N. W. 796, 57 N. W. 522.

The jury were also correctly instructed that negligence could not be predicated upon the failure of the appellant to fence its track at the point where the cow was alleged to have been killed, yet in face of this instruction the jury say that the company was negligent in this respect, and evidently

base their general verdict upon their mistaken notion that the company was in fault in these particulars. There is certainly no evidence to sustain their finding that the engineer discovered the cow on the track in time to avoid injury to her. On the contrary, the evidence is undisputed that the engineer used all possible effort to stop the train after the animal went upon the track, and did all within his power to avoid the injury.

It is unnecessary to discuss the other objections urged against the judgment, since those noticed are fatal to a recovery in this case. The court below erred in refusing to direct a verdict in favor of appellant. The judgment is reversed.

Reversed.

GABBERT, O. J., and BAILEY, J., concur.

THOMPSON v. PURDY.

(Supreme Court of Oregon. Oct. 3, 1904.)

On petition for rehearing. Denied.

For former opinion, see 77 Pac. 113.

WOLVERTON, J. In a petition for a rehearing counsel for appellant challenges the correctness of this court's holding in three particulars. As to the first two, it seems to us, after all, that the argument now advanced is but an elaboration upon that contained in the brief submitting the cause, and we see no reason for receding from the determination originally reached.

As to the third, it is submitted that the verdict is in excess of the judgment prayed for in the complaint, a question now made for the first time. This is true, if interest be computed at the rate of 6 per cent. per annum. The pleader has made some mistakes; but, taking into account the allegations of the complaint, it will be found that the computation at 6 per cent. exceeds the verdict. The prayer demands interest, however, at the rate of 8 per cent. per annum, which, if added to the principal sums named, will exceed the verdict; hence it becomes apparent that the verdict is not in excess of the judgment prayed for in the complaint, in any view that might be taken as to the rate of interest recoverable. Consequently there is no error in the former conclusion.

Rehearing denied.

REID v. ALASKA PACKING CO.

(Supreme Court of Oregon. Nov. 27, 1905.)

1. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—WARRANTY OF GOODS SOLD.

A selling agent for a corporation which deals only in Alaska salmon has no authority to sell for the corporation salmon taken from other than Alaskan waters, or to warrant that the salmon sold by him shall be equal to salmon not found in Alaskan waters, and not dealt in by the corporation.

2. SAME—EXCESS OF AUTHORITY—DISAFFIRMANCE BY PRINCIPAL.

Where an agent, either of an individual or of a corporation, exceeds his authority in contracting for his principal, the principal, upon being fully informed of the facts, must, within a reasonable time, disaffirm the act of his agent, where his silence might operate to the prejudice of innocent parties, or he may be held to have ratified such unauthorized act, and such ratification will be equivalent to a precedent authority.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 641, 642.]

3. CORPORATIONS—AUTHORITY OF OFFICERS—RATIFICATION OF AGENT'S ACTS.

A secretary of a corporation, whose duties are prescribed by the by-laws and who is without authority to make any contracts on behalf of the corporation, unless authorized by the board of directors, cannot ratify an unauthorized contract made by an agent of the corporation.

4. PRINCIPAL AND AGENT — UNAUTHORIZED ACTS OF AGENT—RATIFICATION BY PRINCIPAL.

Where a corporation promptly disaffirmed the unauthorized act of its selling agent in warranting goods sold, its act in shipping the buyer samples of its goods did not constitute a ratification of the agent's unauthorized act in making the warranty.

5. SAME—LIABILITY OF PRINCIPAL.

A principal is not bound by the acts of his agent unless they are within the real or apparent scope of the authority of such agent, and one dealing with an agent of a corporation is bound at his peril to ascertain the extent of the agent's authority, and is chargeable with knowledge thereof.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 529.]

6. SAME — DISAFFIRMANCE BY PRINCIPAL — DUTY TO COMMUNICATE.

Where a buyer knew or was chargeable with knowledge that the seller's agent had no authority to bind the seller by a warranty clause in the contract of sale, it was the duty of the buyer, if it wished to rely upon the warranty, to ascertain whether the agent's act had been ratified by the seller, and in the absence of knowledge by the seller that the buyer was relying upon the warranty it was under no duty to advise the buyer of its disapproval of the agent's act.

Appeal from Circuit Court, Clatsop County; Thomas A. McBride, Judge.

Action by Reid, Murdoch & Co. against the Alaska Packing Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The plaintiff is a Chicago company, engaged in buying and selling salmon, and the defendant is an Oregon corporation, with its principal office in Astoria, but engaged in packing salmon in Alaska. In March, 1899, defendant employed C. M. Webber & Co., brokers in Chicago, to act as its agents "in selling its salmon" in Illinois and adjoining states. The contract of brokerage was negotiated through Frank Patton, of Astoria, who, under arrangements with Webber & Co., was to receive one-half the commissions on sales made by them under the contract and act as their Coast representative. On March 29th Webber & Co. wired Patton of an offer of the plaintiff to buy 2,500 cases "Alaska salmon quality guar-

anteed fully equal to best Puget Sound Sockeye." Patton, thinking that he could place this offer, so advised Webber & Co., and on April 3d they wired him that they had sold, subject to confirmation, "2,500 cases one-pound red Alaska salmon, talls, unlabeled, loss vessel or destruction of cannery cancels contract, all other conditions, terms, guaranties, shipments, as per our telegram 29th ultimo, 30th ultimo, confirmed." This sale was satisfactory to Patton, and he requested that contracts therefore be forwarded to him. Thereupon Webber & Co. entered into a contract with the plaintiff to sell and deliver to it, for account of the defendant, 2,500 cases of salmon, shipments to be made as early as any Puget Sound salmon; but, in place of stipulating for Alaska salmon, they agreed that defendant would sell and deliver "2,500 cases one-pound, tall, fancy sockeye salmon, * * * quality to be equal to the Best Puget Sound Fancy Sockeye"—a quality and kind of fish not found in Alaska, or packed or dealt in by the defendant. A written memorandum of the contract was forwarded by Webber & Co. to Patton, who delivered it to the officers of the defendant; but they refused to accept or confirm it because the company did not pack or deal in sockeye salmon, or salmon of the quality specified therein, and it would not agree to furnish fish of that kind and quality. The memorandum was thereupon returned to Webber & Co., and on April 29th, at their request, the contract with plaintiff was modified by stipulating that the fish might "be packed in Alaska," but should "be exactly like Puget Sound Fancy Sockeye." The fish packed by the defendant were not of the quality called for in the contract, and it refused to furnish or deliver any other fish, whereupon the plaintiff brought this action to recover damages for a breach of the contract. The defendant denied that it ever made or authorized the making of the contract in question, or approved or ratified the same, or that it ever became bound by it; and this was the principal question on the trial. At the close of plaintiff's testimony the court granted an involuntary nonsuit, and the plaintiff appeals.

Frank Spittle, for appellant. G. C. Fulton, for respondent.

BEAN, J. (after stating the facts). Webber & Co. had no authority to sell for defendant sockeye salmon, or to warrant that the quality of the fish which they agreed to sell to the plaintiff should be equal to the best Puget Sound Fancy Sockeye. They had nothing but a power to sell fish packed by the defendant company, and had no authority to warrant that such fish should be of a quality not found in Alaskan waters or packed or handled by the defendant. A mere selling agent, without express power to warrant, cannot give a warranty which will bind his principal, unless the sale is of a class which is ordinarily accompanied by a warranty. *Smith v. Tracy,*

36 N. Y. 79; *Watt v. Borne*, 123 N. Y. 592, 25 N. E. 1063.

In order, therefore, to make the defendant liable on the contract, it was necessary for the plaintiff to show that it had ratified or affirmed it. There is no contention that the contract was expressly ratified, but it is claimed that there was evidence tending to show an implied ratification by silence and acquiescence. The evidence to support this position consists of the testimony of Patton, of Moen, the president of the defendant, and of Frost, a member of the firm of Webber & Co., and some letters and telegrams. Patton testified that he was acting for Webber & Co., attending to their business on the Coast; that he received from them and delivered to the officers of the defendant a written memorandum of a contract made on its behalf with the plaintiff; that the officers did not seem qualified to accept it because, as they said, the company was selling red Alaska salmon only; that they would present the matter to the board of directors and it would take some action in the premises; that he was afterwards advised that the contract was rejected, as he understood it, by the board of directors, and in the latter part of April the memorandum was returned by him to Webber & Co. Moen, who was the president of the defendant at the time, testified that he saw the memorandum of the contract in the office of the company shortly after it was received from Patton; that he told Patton that he objected to it because of the quality of fish specified; that a meeting of the board of directors of the company was immediately called, and the contract was rejected; that the memorandum was sent back to Webber & Co., and they were advised that it would not be accepted or ratified; that the memorandum afterwards came back to the company, through Patton, who delivered it to the secretary, but that the contract was never accepted or ratified, although the memorandum remained in the office for some time. On April 24, 1899, the secretary of the defendant wrote Webber & Co., acknowledging the receipt, through Patton, of a contract with the plaintiff for 2,500 cases of salmon, one-pound talls, at \$1 per dozen, *f. o. b.* Astoria, and on the 19th of June advised them that at a recent meeting of the board of directors the contract made through them with the plaintiff was considered, and that, as the defendant was not a packer of the kind of salmon specified, it could not accept the contract. Mr. Frost, a member of the firm of Webber & Co., came West about this time to adjust the misunderstanding, if possible. He testified that, immediately upon his arrival at Astoria, a meeting of several of the directors of the defendant, the secretary, Mr. Patton, and himself, was held in Patton's office; that the only question in dispute was the provision in the contract concerning the quality of fish to be delivered,

as the right of Webber & Co. to make the sale was admitted; that witness explained to the parties present that, owing to the delay of the defendant in objecting to the terms of the contract, it had become fixed, and stated to them that Webber & Co. had in their office in Chicago a written statement from the buyer of the plaintiff that he understood that the salmon might be packed in Alaska; that it was thereupon agreed that, if Webber & Co. would send to the defendant this paper or a sworn copy, it would approve the contract. Whether the statement or memorandum referred to by Frost was ever sent to the defendant is not shown by the testimony, but probably not, or, if it was, it was not satisfactory; for on June 28th the contract was returned to Frost by the secretary of the company in a letter saying, among other things: "We do not think it necessary to explain the matter of sockeye any further." The matter seems to have stood in practically this condition until September 9th, when the defendant shipped a sample of its salmon to the plaintiff and wired asking about labeling and shipping. The sample did not equal Puget Sound Fancy Sockeye, and the defendant was informed by plaintiff of that fact and that it must have the quality called for, when it wired that "Samples sent equal best packed. We consider contract cancelled." There was some further correspondence between the plaintiff and defendant in reference to the dispute, but it has no particular bearing on the question now under consideration.

The single question is whether this testimony was sufficient to carry the case to the jury on the question of ratification. The rule is elementary that when an agent, in contracting for his principal, exceeds his authority, the principal, upon being fully informed of the facts, must, within a reasonable time, disavow or disaffirm the act of his agent, especially in cases where his silence might operate to the prejudice of innocent parties, or he will be held to have ratified and affirmed such unauthorized act, and such ratification will be equivalent to a precedent authority. *Mechem, Agency*, §§ 155, 157; *Saveland v. Harlow*, 40 Wis. 431, 438; *Heyn v. O'Hagen*, 60 Mich. 150, 26 N. W. 861. This rule is as applicable to corporations as individuals (*Currie v. Bowman*, 25 Or. 304, 35 Pac. 848; *Shepard v. Briggs*, 26 Vt. 149), and has its foundation in the doctrine of equitable estoppel. It proceeds upon the maxim that, if one remains silent when in conscience he ought to speak, he will be debarred from speaking when in conscience he ought to remain silent. But, in this case, the evidence shows that the defendant did not remain silent when informed that Webber & Co. had exceeded their authority by warranting the quality of the fish which they agreed to sell to the plaintiff on the defendant's account. On the contrary, it immediately repudiated the act and has con-

tinuously disaffirmed the contract. Patton, through whom the business was transacted, was informed, when he delivered the memorandum of the contract to the officers of the defendant, that they could not accept or ratify it, because the defendant was not packing or dealing in fish of the quality specified therein; and Moen, the president of the company, when advised of the contract, immediately disaffirmed it and it was afterwards formally rejected by the board of directors.

The acknowledgment on April 24th by the secretary of the defendant of a copy of the contract through Patton, and his failure to notify Webber & Co. that it had been disaffirmed or rejected until June 19th, is no evidence of a ratification by the defendant. Webber & Co. had been advised previous to that time, through their correspondent, Patton, that the defendant had disaffirmed and disavowed the contract. The secretary's duties were prescribed by the by-laws of the defendant, and he had no authority whatever to make any contracts for or on behalf of the company, unless authorized by the board of directors, and so could not ratify an unauthorized contract made by some other agent. Nor was the shipment by defendant to plaintiff of samples of fish in September a recognition or ratification of the warranty clause in the contract previously made with it by Webber & Co. Webber & Co. had authority to bind the defendant by contracting for the sale of its salmon. The defendant had promptly disavowed and disaffirmed their unauthorized act in making the warranty; but it had not repudiated the entire contract on that account, nor is there any evidence that the plaintiff had declined to be bound by the contract without such warranty. The shipment of the samples was due to the desire of the defendant to comply with a contract which its agents, Webber & Co., had authority to make, and not in affirmation or ratification of their unauthorized acts.

It is contended that the defendant should have notified the plaintiff of its disaffirmance of the contract, and that by its omission to do so it ratified and affirmed it. A principal is not bound by the acts of an agent unless within the real or apparent scope of the authority of such agent (2 Page, Contracts, § 967), and one dealing with an agent of a corporation is bound at his peril to ascertain the extent of the agent's authority and is chargeable with knowledge thereof. *Hotel Co. v. Furniture Co.*, 78 Mo. App. 135; *Busch v. Wilcox*, 82 Mich. 336, 46 N. W. 940; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78. The plaintiff therefore knew, or was chargeable with knowledge, that Webber & Co. had no authority to bind the defendant by the warranty clause in the contract, and that such clause could have no force or effect unless subsequently ratified or affirmed by the defendant.

It was the duty of the plaintiff, if it relied upon the warranty, to ascertain whether the

unauthorized act of the agent in making it had been approved by the principal; for, without such approval, it was invalid. There was no evidence that defendant knew that plaintiff was relying on acting upon the warranty clause. It was not its duty, therefore, to advise them of its disapproval. It was sufficient when it promptly disaffirmed and disavowed the unauthorized act of its agent and refused to be bound thereby. As is said by the Supreme Court of Vermont: "It is the duty of one trading with an agent who has only a limited and special authority to make inquiry as to the extent of the agent's authority; if he omits inquiry, he does so at his peril. It is not the duty of the principal, upon hearing of the sale by the agent, to seek the purchaser and give him notice of his claim, and his omission to do so, his mere silence, are not ordinarily to be construed as a ratification of the sale. If special circumstances may be supposed to exist, which would make it the duty of the principal to give such notice, none such are proved in this case." *White v. Langdon*, 30 Vt. 599, 603.

It follows that the judgment of the court below must be affirmed, and it is so ordered.

LIVESLEY v. LITCHFIELD et al.

(Supreme Court of Oregon. Nov. 27, 1905.)

1. ELECTIONS—QUALIFICATIONS OF VOTERS—CONSTITUTIONAL PROVISIONS.

The qualifications of a voter, as defined in Const. Or. art. 2, § 2, declaring that in all elections, not otherwise provided for by the Constitution, every white male citizen of the United States of the age of 21 years and upwards, who shall have resided in the state during the six months immediately preceding such election, and every male of foreign birth of the age of 21 years and upwards, who shall have resided in the state during the six months immediately preceding such election, who shall have declared his intention to become a citizen of the United States one year preceding such election conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote at all elections authorized by law, are intended to apply to the election of all officers, whether provided by the Constitution or by a law authorized thereby, unless authority for the exemption can be found under the Constitution itself.

2. SAME—PAYMENT OF TAXES.

Const. Or. art. 6, § 6, provides that there shall be elected in each county by the qualified electors thereof at the time of holding general elections certain enumerated county officers. Article 6, § 7, declares that such other county, township, precinct, and city officers as may be necessary shall be elected in such manner as may be prescribed by law. Article 11, § 2, recites that corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes, and that all laws pursuant to such section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights. *Held*, that such provisions did not vest in the Legislature power to create corporations for municipal purposes or to prescribe and define the qualifications of electors at elections held therein, and hence the charter of the city of Salem

(Sp. Laws, Or. 1903, 351), prohibiting any person from voting at a city election who has not paid, unless he be exempt therefrom, a road poll tax for the year in which he offers to vote, is invalid, as in conflict with Const. Or. art. 2, § 2.

Appeal from Circuit Court, Marion County; George H. Burnett, Judge.

Action by Charles S. Livesley against G. P. Litchfield and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

The object of this proceeding is to test the constitutionality of the provision in the charter of the city of Salem prohibiting any person from voting at a city election "who has not paid, unless he be exempt therefrom, a road poll tax for the year in which he offers to vote." Sp. Laws Or. 1903, 351. The plaintiff, who resided in the city and possessed all the qualifications of a voter therein, except he had not paid a poll tax, tendered his vote at a regular election for city officers, held on December 5, 1904, but a majority of the judges of election refused to receive his ballot or permit him to vote, and he thereupon brought this action against them to recover damages. It resulting adversely to him, he appeals.

S. T. Richardson and W. Ellis Richardson, for appellant. H. J. Bigger, for respondents.

BEAN, J. The general rule is that the electorate of a state or any of its governmental subdivisions is created and defined by fundamental law, and that the source of all authority to vote at any popular election is the state Constitution. Any citizen possessing the qualifications of an elector as defined by that instrument, and who is not disqualified by any of its provisions, is entitled to the right of suffrage, and it is not within the power of the Legislature to deny, abridge, extend, or change, the qualifications so prescribed. Cooley, Const. Lim. (7th Ed.) 899; 10 Am. & Eng. Enc. Law (2d Ed.) 576. Section 2 of article 2 of the Constitution of this state reads: "In all elections not otherwise provided for by this Constitution, every white male citizen of the United States, of the age of twenty-one years and upwards, who shall have resided in the state during the six months immediately preceding such election, and every white male of foreign birth of the age of twenty-one years and upwards, who shall have resided in this state during the six months immediately preceding such election, and shall have declared his intention to become a citizen of the United States one year preceding such election, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote at all elections authorized by law." This provision is by its terms expressly made applicable to all elections not otherwise provided by the Constitution. To empower the Legislature, therefore, to add to or abridge the qualifications of a voter

as thus defined, some other provision of the Constitution must be pointed out which confers such authority in express terms, or by necessary implication. The only provisions bearing on the question now under consideration to which our attention has been called are section 2, art. 11, and sections 6 and 7 of article 6, which are as follows:

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights." Const. Or. art. 11, § 2.

"There shall be elected in each county, by the qualified electors thereof, at the time of holding general elections, a county clerk, treasurer, sheriff, coroner, and surveyor, who shall severally hold their offices for the term of two years." Id. art. 6, § 6.

"Such other county, township, precinct, and city officers as may be necessary shall be elected or appointed in such manner as may be prescribed by law." Id. art. 6, § 7.

In support of the judgment of the court below it is contended that the sections just quoted vest in the Legislature plenary power to create corporations for municipal purposes, and to prescribe and define the qualifications of voters at elections to be held therein, and *Harris v. Burr*, 32 Or. 348, 52 Pac. 17, 39 L. R. A. 768; *Buckner v. Gordon*, 81 Ky. 665; *McMahon v. Savannah*, 66 Ga. 217, 42 Am. Rep. 65; *Town of Valverde v. Shattuck*, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208; *Hanna v. Young*, 84 Md. 179, 35 Atl. 674, 34 L. R. A. 55, 57 Am. St. Rep. 396; and *State v. Dillon*—32 Fla. 545, 14 South. 383, 22 L. R. A. 124, are cited in support of this position. *Harris v. Burr*, supra, involved the validity of an act of the Legislature conferring upon women the right to vote at school district elections, and the court, after reviewing at length the legislation in respect to the qualifications of voters at school elections prior to, at the time, and since the adoption of the Constitution, concluded that in view of such legislation and of the fact that the Constitution does not name or mention school officers or school elections, but in express terms relegates to the Legislature the duty of establishing "an uniform and general system of common schools" (Const. Or. art. 8, § 3), it was competent for it to prescribe the qualifications of a voter at a school district meeting. "The power ascribed to the Legislature under the Constitution," says Mr. Justice Wolverton, "to provide for the establishment of a uniform and the general system of common schools, carries with it plenary power to establish the unit of that system, denominated a school district, to determine what officers shall administer its affairs, who and what manner of persons shall be eligible to office, and how and by whom they should be chosen. The elective franchise conferred by section 2, art. 2, does

not, nor was it intended to, fix and define the qualification of voters at school meetings, but was designed only to govern in all general and special elections not otherwise provided for by the Constitution, and applies to the election of all officers known to the Constitution, as well as to such as may be provided for thereunder, aside from those provided for under the special power of the Legislature to establish a uniform and general system of common schools." It will thus be seen that this case proceeds wholly on the theory that the Constitution has in express terms authorized and empowered the Legislature to establish a system of common schools, and that it intended and did confer upon that body the power to declare the qualifications of voters for district officers. Such elections are therefore "otherwise provided" by the Constitution and expressly exempted from the operation of section 2, art. 2. But no such provision is to be found in the Constitution as it respects municipal corporations. The Legislature has power to create such corporations by special laws, and "to prescribe by law" the "manner" of the election or appointment of the officers thereof. The power thus conferred is not like that to establish and organize school districts, but more nearly resembles that granted for the organization of counties. A municipal corporation is but a governmental agency or local organization for governmental purposes. Its officers are none the less governmental officers because elected or chosen by the people of a particular locality. It is difficult, if not impossible, to conceive that, when section 7 of article 6, declares that the officers of a city may be elected or appointed as prescribed by law, it did not contemplate that the election, if held, should be by the qualified electorate of the municipality, for, as said by Mr. Justice Christianity, in *People v. Hurlburt*, 24 Mich. 44, 9 Am. Rep. 103, "It may be said with certainty that, wherever in the Constitution the election of an officer is provided for, it means an election by the electors of the state, if it be a state office, or of the district or political subdivision for which he is to be elected, unless the Constitution itself, as to any particular election, provides otherwise."

The authority given by section 7 of article 6 to prescribe "the time and manner" in which municipal officers may be elected or appointed does not, we think, include the power to determine what shall constitute a legal voter. The Constitution of Michigan declares that the Legislature shall "provide for the incorporation and organization of cities and villages," and that "judicial officers of cities and villages shall be elected and all other officers shall be elected or appointed at such time and in such manner as the Legislature may direct." The Legislature passed an act conferring upon women the right to vote in all village and city elections, but it was held invalid because in violation of the section of the

Constitution prescribing who shall be electors and entitled to vote in all elections. The court said: "The authority to direct the time and manner in which judicial officers shall be elected, and the other officers elected or appointed, does not involve the power to determine who shall constitute the electorate. The word 'manner,' it is true, is one of large significance, but it is clear that it cannot exceed the subject to which it belongs. It relates to the word 'elected.' The Constitution had already provided for electors, and when it provides that an officer shall be elected it certainly contemplates an election by the electorate which it has constituted. No other election is known to the Constitution, and, when it provides that the Legislature may direct the manner in which an officer shall be elected, it simply empowers the Legislature to provide the details for the holding of such election. The machinery of government differs in its details in cities, villages, and townships, and there must necessarily be differences in methods and officers to administer the election laws." *Coffin v. Elec. Commissioners*, 97 Mich. 188, 194, 56 N. W. 567, 568 (21 L. R. A. 662).

The same construction was given to the word "manner" in a like constitutional provision by the Supreme Court of Illinois, in *People v. English*, 139 Ill. 622, 29 N. E. 678, 15 L. R. A. 131. In that case the relator, a female, claimed the right to vote for county school superintendent. The Constitution provided that "there may be a county superintendent of schools in each county, whose qualifications, duties and compensation and the time and manner of his election and term of office shall be prescribed by law." The Court held the law conferring the right upon women to vote for such officer unconstitutional, saying: "The Constitution having thus made provision for such officer, and for his and her 'election,' and having prescribed, in section 1 of article 7 (Ill. Const.), the qualifications essential to entitle a person to vote at 'any election,' it must be presumed that it was and is the true intent and meaning of that instrument that no person shall have the right to vote for a county superintendent of schools who does not possess such qualifications. * * * Said section 5 (art. 8) provides, not only that the qualifications, powers, duties, compensation, and term of office of the county superintendent of schools shall be prescribed by law, but also that the 'time and manner of election' of such superintendent 'shall be prescribed by law.' What is meant by the expression 'manner of election'? Was it intended thereby to give to the Legislature the power of prescribing the qualifications which would entitle persons to vote at any election for such county superintendent? The word 'manner' is usually defined as meaning way of performing or executing, method, custom, habitual practice, etc. * * * [It] indicates merely that the Legislature may provide by

law the usual, ordinary, or necessary details required for the holding of the election."

The Michigan and Illinois cases referred to are much to the purpose in the present discussion, because the courts of each of these states has held that under a Constitution like ours, imposing on the Legislature the duty of providing for and establishing a common school system, it is competent to confer the right to vote at school elections upon women, and these cases were relied upon as supplying the conclusion reached in *Harris v. Burr*, supra; *Plummer v. Yost*, 144 Ill. 68, 33 N. E. 191, 19 L. R. A. 110; *Belles v. Burr*, 76 Mich. 1, 43 N. W. 24. The cases cited from these states illustrate and point out the distinction between the right to vote at school district meetings and at an election for city and municipal officers. The Kentucky, Maryland, Georgia, Colorado, and Florida cases all involved the right to vote at municipal elections, but the decisions were made under Constitutions essentially different from ours. The Constitution of Kentucky provided that "every free white male citizen," etc., "shall be a voter" (3d Const. Ky. art. 2, § 8), without undertaking to designate at what election or for what officer the vote might be cast, and the court held, considering this section in connection with other provisions of the Constitution, that it was intended to apply only in the election of constitutional officers, as distinguished from those created by legislative act. Our Constitution, however, prescribes the qualifications of voters "in all elections not otherwise provided by this Constitution," and "at all elections prescribed by law," so that, in place of being applicable to constitutional officers only, it is expressly made applicable to all elections authorized by law, unless the Constitution itself otherwise provides. The power to take from or add to the qualifications of a voter, as prescribed in section 2 of article 2, at any election, must be found in that instrument. The qualification of a voter as thus defined is intended to apply to the election of all officers, whether provided by the Constitution or by a law authorized thereby, unless authority for the exemption can be found in the instrument itself.

The Constitution of Maryland named and defined the qualifications of voters in the state at large and in the city of Baltimore, and in general terms authorized the creation of other corporations for municipal purposes, thus leaving to the Legislature, so the court held, the power to add to the qualifications of voters residing within the corporate limits of a town so created any reasonable restriction it might deem proper. The Constitution of Georgia, after defining the qualification of voters, empowered the Legislature to prescribe from time to time for the registration of all voters. It was held that a law requiring the payment of a certain sum in lieu of poll tax as a condition to the right of registration for a city election was not adding

to the qualification of voters, but was a mere statutory requirement, designed "to secure the discharge of the duties citizens owed the municipal government and to protect the purity of the ballot." The Colorado Constitution defined the qualification of voters "at all elections," and the court held that it applied only to elections of "public officers," and not to a law for the dissolution and annexation of contiguous cities and towns. The Florida Constitution defined the qualification of electors at all elections "under this constitution," and it was held that it did not apply to municipal elections because they were not held under the Constitution. None of the cases are, therefore, in point or authority under our Constitution, which has specially prescribed the qualification of voters at all elections not otherwise provided in that instrument itself.

Without pursuing the discussion further, we are all agreed that the provision of the Salem charter in question is void, and this conclusion finds support in *St. Joseph, Mo., Ry. Co. v. Buchanan County Court*, 30 Mo. 486, *Allison v. Blake*, 57 N. J. Law, 8, 29 Atl. 417, 25 L. R. A. 480, and *People v. Van Bokkelen*, 73 N. C. 198, 21 Am. Rep. 465, in addition to the authorities already referred to.

The judgment of the court below will be reversed, and the cause remanded.

SPRAGUE et al. v. JESSUP.

(Supreme Court of Oregon. Nov. 27, 1905.)

1. SPECIFIC PERFORMANCE — PROCEEDINGS — EVIDENCE.

The mental condition of a party, against whom the specific performance of an oral contract to convey land is sought, is an element to be considered in determining the circumstances attending the making of the agreement, to discredit the transaction.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 100.]

2. SAME—SUFFICIENCY.

In a suit for specific performance of a contract, evidence held sufficient to establish a parol agreement for sale.

3. SAME — CONTRACTS ENFORCEABLE — PART PERFORMANCE—POSSESSION.

Possession of premises by the purchaser, in connection with payment of part of the price and a tender of the balance, is such part performance as to entitle him to a decree for specific performance.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 318; vol. 44, Cent. Dig. Specific Performance, § 130.]

Bean, J., dissenting.

Appeal from Circuit Court, Marion County; William Galloway, Judge.

Bill by George D. Sprague and others against Sophronia Jessup. From a decree for plaintiffs, defendant appeals. Affirmed.

This is a suit to enforce the specific performance of an alleged oral agreement to convey real property. The facts are: That the defendant, Mrs. Sophronia Jessup, a widow, was on January 13, 1902, the owner

in fee of the east half of lots 7 and 8 in block 7, in the city of Salem, the possession of which she delivered to Mrs. Margaret Fennell, who, on the following day, moved into the house on the land, which she occupied until September 20, 1903, when she died intestate, leaving two sons, two daughters, and three grandsons, the latter being the children of a deceased daughter, all of whom, since the death of their ancestor, have had control of the premises. Mrs. Jessup commenced an action against these heirs and their tenants April 8, 1904, to recover the possession of the real property, and the defendants therein having answered, also as plaintiffs herein, filed a complaint, in the nature of a cross-bill in equity, alleging that the possession of the premises was delivered to Mrs. Fennell pursuant to the terms of a parol contract, whereby Mrs. Jessup stipulated to convey the land to her March 1, 1902, by a good and sufficient deed, in consideration of \$5,350, of which sum \$200 was paid January 13, 1902, \$2,500 was payable March 1st of that year, and the remainder March 1, 1903, the last payment to be secured by a mortgage of the real property, and to bear interest for one year; that Mrs. Fennell, on March 1, 1902, tendered to Mrs. Jessup \$2,500, and also offered to execute the mortgage specified, but the latter refused to make the deed, whereupon the entire sum, including interest, was deposited with the clerk of the circuit court for Marion county as a consideration for the conveyance. The answer denied the material allegations of the complaint, and, the cause being tried, Mrs. Jessup was required to execute to the heirs of Mrs. Fennell a warranty deed to the premises, from which decree she appeals.

L. H. McMahan, for appellant. George G. Bingham and P. H. D'Arcy, for respondents.

MOORE, J. (after stating the facts). It is admitted that the sum of \$200 was received by Mrs. Jessup January 13, 1902, but it is insisted by her counsel that this sum was paid on account of the purchase of certain carpets, furniture, etc., that the possession of the premises was delivered to Mrs. Fennell pursuant to a lease thereof, and that no agreement was entered into for the sale of the real property. These statements are denied by plaintiffs' counsel, who maintain that Mrs. Jessup agreed to sell the premises and certain carpets, furniture, etc., to Mrs. Fennell for an entire consideration of \$5,350, receiving in part payment a sum of money evidenced by the following memorandum: "Salem, Oregon, Jan. 13, 1902. Received of Mrs. M. Fennell \$200, to bind bargain on house. Mrs. S. Jessup"—and that the possession of the real property was delivered to the purchaser in pursuance of a parol agreement to convey the premises to her.

The testimony shows that for some time

prior to January 13, 1902, Mrs. Jessup had been trying to sell her real property, for which she asked \$5,500, and that Mrs. Fennell desired to purchase it, but was unable to do so, unless she could sell a farm for which she had been demanding \$5,000. The latter was offered \$4,500 for her property, and, concluding to accept the bid, she so notified the persons making it, who gave her \$50 on account of the purchase, agreeing to pay \$2,500 March 1, 1902, and the remainder in a year therefrom. Mrs. Fennell, having effected a sale of her farm, immediately paid Mrs. Jessup \$200, taking the receipt hereinbefore set out, and three days thereafter a contract was prepared, which contained, *inter alia*, the following clause: "In case the said Fennell shall not be able to sell her farm on or about the 1st day of March, 1902, and make payments herein agreed, then it is understood that the said Fennell has the right to occupy the said real estate from January 15, 1902, to April 15, 1903, at \$20 per month, the amount paid on the above to be applied on the furniture purchased." Mrs. Jessup refused to sign such writing, and so notified Mrs. Fennell, who thereafter made some changes in and improvements upon the house. It is impossible to reconcile the conflicting testimony given by the respective parties. Mrs. Fennell's daughters, who conducted the negotiations for her, each testify that the consideration agreed upon for the purchase of the land in question was \$5,350, including the carpets and furniture, and that of this sum they paid for their mother the specified \$200. Mrs. Jessup testifies that she leased the premises to Mrs. Fennell for a term of 15 months, and gave possession thereof, receiving \$200 for the carpets and furniture which she sold. The testimony further shows that Mrs. Jessup, going to a room by herself, prepared the receipt mentioned, but she says she wrote it at the request of Mrs. Fennell's daughter, who suggested the form thereof. As an excuse for incorporating into the receipt the words "to bind bargain on house," Mrs. Jessup further states that before January 13, 1902, she had never transacted any business, that her husband died about three months prior thereto, after an illness of about a year, and that his sickness and death so injured her health and affected her mind that, with her ignorance of business affairs, she wrote the receipt as requested. The use of the phrase "to bind bargain on house" might relate to a lease of that building, if the \$200 had been paid on account thereof, but these words are rendered inapplicable to such a contention by Mrs. Jessup's testimony, which is to the effect that the sum was paid for the carpets and furniture. The wording of the receipt, therefore, corroborates the theory of the plaintiffs that the payment, which it evidences, was made as a part of the purchase price of the premises.

The mental condition of a party, against whom the specific performance of an oral contract to convey land is sought, is an element to be considered in determining the circumstances attending the making of the agreement, to discredit the transaction. *Waterman, Spec. Perf. § 159.* No testimony was given tending to show to what extent Mrs. Jessup's mind was affected by the care of her husband during his last illness, or to what degree her reason was impaired in consequence of his death, except her general statements as indicated. As tending to show that Mrs. Fennell's understanding in relation to the agreement entered into January 13, 1902, was for the purchase of the property, the testimony discloses that she sold her farm for \$500 less than she had been asking for it, in order to raise the money with which to purchase the property in question. It further appears that in September, 1901, she rented, for the term of one year, a new cottage, for which she purchased new carpets, and caused them to be laid on the floors, secured new shades, which she hung at the windows, procured wood for use in the winter, which she caused to be sawed, split, and stored away, and that she was living in the cottage with her family when she entered into the contract alleged in the complaint. Mrs. Fennell moved into the Jessup house January 14, 1902, and, as she could use only one of her new carpets therein, she sold the others, and the window shades that she had used in the cottage for a few months, at about one-third of their original cost, and also moved the wood which she had stored for winter's use. It would appear that after January 13, 1902, when the receipt was given, Mrs. Fennell, fearing that the persons who had agreed to purchase her farm might forfeit the small payment made and fail to keep their part of the contract, sought to avoid a suit by Mrs. Jessup for specific performance by treating the agreement to purchase the property in question as a lease thereof, in case Mrs. Fennell could not raise the money, and to consider the payment of \$200, made on account of the purchase, as the consideration for the carpets and furniture. Mrs. Winnifred O. Barr, a daughter of Mrs. Fennell, testified, however, that the writing was suggested by Mrs. Jessup, and the latter does not contradict the statement. An attorney who prepared the contract testified that he made it at Mrs. Barr's solicitation, but that the provision quoted, binding upon Mrs. Jessup, was inserted without prompting from any one. The memoranda referred to tend to corroborate Mrs. Jessup's theory, but the modification adverted to, never having been consummated, did not constitute a contract or change the terms of the agreement of January 13, 1902.

The denial of Mrs. Jessup, and the assertion of Mrs. Fennell's daughters, in respect to the agreement claimed to have been entered into, require a consideration of the cir-

cumstances attending the transaction and of the testimony, which corroborates or contradicts that of the respective parties. It seems improbable that Mrs. Fennell, when she had rented a new cottage which she had completely furnished, and which she was entitled to occupy for about nine months, should desire to move into another rented house, when, by so doing, it would entail such an expense as she incurred. So, too, it appears inexplicable that she should agree to sell her farm for \$500 less than she had been demanding for it, when she was under no obligation to do so, unless the sale was effected to enable her to purchase Mrs. Jessup's property. As a circumstance tending to show the value of Mrs. Fennell's farm, the testimony shows that in a few months after she disposed of it, without any improvement having been made thereon, one of the purchasers conveyed an undivided one-third interest therein to his co-tenants for \$2,000, thus indicating that the land was worth more money than she received for it. The receipt given to evidence the payment of \$200, though not conclusive, is an admission corroborative of the testimony of plaintiffs' witnesses to the effect that Mrs. Jessup purposely signed it, as therein stated, "to bind bargain on house." Gideon Steiner, who had been engaged in business in Salem many years, appearing as plaintiffs' witness, testified that, having met Mrs. Jessup on the street, she informed him that she had sold her property, and, in answer to his inquiry as to whether she had not received about \$5,000 for it, replied: "Yes; I got more than that." Fred Hurst, a real estate dealer, as plaintiffs' witness, testified that Mrs. Jessup listed her property with him for sale; that he found a buyer therefor who would pay \$5,000, and so notified her by telephone, whereupon she replied that she had secured a purchaser, and hung up the receiver without disclosing who it was. Mrs. Jessup, referring to the statement respecting the sale of the property imputed to her by Steiner, testified that she did not remember of having any such conversation with him, and she does not attempt to deny Hurst's statement that she informed him she had secured a purchaser for the property.

We think a careful examination of all the evidence, viewed in the light of the circumstances attending the transaction, necessarily leads to the conclusion that Mrs. Jessup, on January 13, 1902, agreed to sell to Mrs. Fennell her real property and the carpets and furniture in her house for \$5,350, receiving the sum of \$200 in part payment thereof, and that the purchaser and her family moved into the house in pursuance of the terms of such agreement, and not in accordance with any lease thereof. The certainty of such a contract must be established by evidence sufficient to satisfy a court of equity of the truth of the allegations of the complaint. *Odell v. Morin*, 5 Or. 96; *Plymale v.*

Comstock, 9 Or. 318. If the denial of a party against whom the specific performance of an oral contract to convey real property is sought to be enforced is sufficient to defeat the right, it is quite probable that this equitable remedy would soon cease to be efficacious. It is possible that the conclusion we have reached may be doing an injustice to Mrs. Jessup, whose statements made under oath in relation to the lease of the premises may be true, and the testimony of plaintiffs' witnesses in respect to the alleged sale of the land false; but courts are governed by judges who are only human, and whose deductions, based on issues of fact, depend upon evidence which they deem to be true, and, if they mistake in their honest convictions in respect to the testimony produced, the fault lies in the method of determining the fact, rather than in the agency employed.

It will be remembered that all the permanent changes to the house were made by Mrs. Fennell after she knew that Mrs. Jessup had refused to sign the written memorandum. The part execution of an oral contract to convey land, which is sufficient to take the case out of the statute of frauds, must be some act done upon the premises with the actual or constructive assent of the party against whom the specific performance of the terms of the agreement is sought to be enforced. *Waterman*, Spec. Perf. § 261; *Wagonblast v. Whitney*, 12 Or. 83, 6 Pac. 399. In the case at bar there is nothing but the mere possession of the premises by Mrs. Fennell that can be regarded as having been taken with the knowledge and consent of Mrs. Jessup, and it remains to be seen whether or not that act, in connection with a payment of a part of the purchase price and a tender of the remainder, constitutes such part performance of the oral agreement as to entitle plaintiffs to the equitable relief invoked. The parties to this suit not being related by affinity or consanguinity, no presumption of a license to occupy the premises can be indulged as in cases where the owner of real property permits a person to whom he owes a legal or a moral duty to take possession thereof, in which latter instance, possession, in the absence of valuable improvements to the estate, is not a sufficient part performance. *Barrett v. Schleich*, 37 Or. 613, 62 Pac. 792; *Pugh v. Spicknell*, 43 Or. 489, 73 Pac. 1020, 74 Pac. 485. A text-writer, in speaking of the acts which amount to part performance of an oral contract to convey real property, says: "Possession alone of land, under a verbal contract, when delivered to the vendee, * * * is an act of part performance which takes the case out of the statute of frauds, even without the additional circumstances of the payment of consideration or the making of improvements. This rule is settled by an overwhelming weight of authority in England and in this country, but has been disapproved by

the courts of one or two states, which have, until recently, only possessed a very limited equity jurisdiction." *Pomeroy*, Spec. Perf. of Contracts (2d Ed.) § 115. The cases cited by the learned author in the notes to this section amply support the legal principle announced.

We think the testimony shows that the parol agreement relied upon is certain and definite in its terms, that the acts proved as part performance were done under and in pursuance of the identical contract alleged in the complaint, and that a refusal to execute the deed agreed upon would operate as a fraud upon the plaintiffs, and hence the decree should be affirmed; and it is so ordered.

BEAN, J. (dissenting). The specific performance of a parol contract for the conveyance of real estate will not be enforced under any circumstances, unless the terms of the contract are shown, by full, complete, and satisfactory proof, to have been so precise that neither party could reasonably misunderstand them. *Odell v. Morin*, 5 Or. 96; *Wagonblast v. Whitney*, 12 Or. 83, 6 Pac. 399; *Knight v. Alexander*, 42 Or. 521, 71 Pac. 657. I am not satisfied that this requirement has been met by the testimony in this case.

FLOOD v. TEMPLETON et al. (Sac. 1,391.) (Supreme Court of California. Dec. 18, 1905.)

1. PLEADING—AMENDMENT—EFFECT ON DEMURRER.

Where amendments of a complaint, made after the overruling of a demurrer interposed to the complaint, consist merely of minor interlineations, which in no way affect the grounds of demurrer, it is not necessary for defendant, in order to save the rights acquired by the demurrer, to demur to the complaint as amended.

2. SAME—WAIVER OF DEFECTS—FAILURE TO DEMUR.

Under Code Civ. Proc. § 434, providing that if no objection to a complaint is taken, either by demurrer or answer, defendant must be deemed to have waived the same, excepting the objection to the jurisdiction, and that the complaint does not state facts sufficient to constitute a cause of action, the failure of the complaint to state facts sufficient to constitute a cause of action may be raised at any time.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1366.]

3. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—NECESSITY OF SHOWING EQUITY.

Under Civ. Code, § 3391, which precludes specific performance as against a party to a contract who has not received adequate consideration, or as to whom the contract is not just and reasonable, a contract to devise land to plaintiff in consideration of the latter's failure to interpose a set-off and plea of limitations, constituting a partial defense to an action by the promisor to foreclose a mortgage on the land in question, cannot be specifically enforced against the executor and devisees or heirs of the promisor, in the absence of a showing as to what the land was worth at the time of the contract, or of anything to show that plaintiff

suffered any detriment or that the promisor gained any advantage by the contract.

4. SAME—ADEQUACY OF LEGAL REMEDY.

An agreement by a mortgagor not to assert a fixed monetary demand against the mortgagee's claim on foreclosure, and not to plead limitations as against another specific part of the mortgagee's claim, in consideration of an agreement by the mortgagee to devise the mortgaged property to the mortgagor, cannot be specifically enforced against the executors and heirs or devisees of the mortgagee, as the mortgagor's remedy at law by an action for damages is adequate and complete.

In Bank. Appeal from Superior Court, Glenn County; Oval Pirkey, Judge.

Action by Mary Flood against Charles Templeton, as executor of James Sullivan, deceased, and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

R. L. Clifton and McCoy & Gans, for appellants. Frank Freeman, for respondent.

HENSHAW, J. Plaintiff's action is to enforce an alleged agreement made between herself and James Sullivan in his lifetime, whereby Sullivan agreed by his last will and testament to devise to plaintiff real property described in the complaint. Defendants' demurrer to the complaint was overruled, and they answered by denial, and by cross-complaint sought to quiet title to the property which was then in possession of Mary Flood under lease. Trial was had, and the court gave judgment for plaintiff as prayed for, and from that judgment, and from the order denying their motion for a new trial, defendants appeal.

The complaint does not disclose any ground for equitable relief, and defendants' demurrer to it should have been sustained. Plaintiff alleges that she was the owner of a certain piece of property and was in possession of it; that on the 4th day of February, 1899, she owed Sullivan upon her promissory note, secured by mortgage upon this land, \$9,696 principal and \$5,226 interest; that upon the 1st day of January, 1899, Sullivan had become indebted to her in the sum of \$5,875.50 for board, lodging, washing, nursing, etc., and for the pasturing of his stock upon plaintiff's land; that no balance had been struck in their accounts, and that their accounts were open, mutual, current, and undetermined; that Sullivan, in February, 1899, made demand upon plaintiff for the payment of her indebtedness; that the first installment of the promissory note, amounting to the sum of \$969.07, was at that time barred by the statute of limitations. Thereupon plaintiff and deceased entered into the following agreement: "That the said Sullivan should proceed to foreclose the mortgage given to secure the note hereinbefore set out, which said note and mortgage are herein marked 'Exhibit A,' and obtain a judgment and deed, through foreclosure proceedings, to the said land and premises then

owned by the said Mary Flood and hereinbefore described, and that the said Mary Flood should refrain from pleading the statutes of limitations as a bar to said first installment due on said note, and should refrain from setting up as a set-off to the said foreclosure proceedings the said amount of \$5,875.50, which was then due from the said Sullivan to the said Mary Flood, and, in consideration of the said Mary Flood not so pleading the statutes of limitations or setting up said set-off in said foreclosure proceedings, the said Sullivan agreed that after he obtained title to said premises in said foreclosure proceedings he would rent to the said Mary Flood the said premises herein described, as long as she, the said Mary Flood, lived, for the sum of \$400 a year, and that he would make and leave at his death a last will in favor of the said Mary Flood, devising and bequeathing to her, the said Mary Flood, all of the said land and premises hereinbefore described and described in said mortgage, so that the said Mary Flood, upon the death of the said Sullivan, should become the owner in fee of the whole of the said land and premises clear of incumbrance." The complaint then avers the foreclosure proceedings, the performance upon the part of plaintiff of the obligations imposed upon her by the agreement, the leasing of the property to her, and her occupation of it until the death of Sullivan, his failure to devise her the property, and the consequent injury. The original complaint set forth the agreement between the parties, as above quoted. To this the demurrer was interposed and overruled. Subsequently, during the course of the trial, plaintiff was permitted to amend, and did amend, in the following particulars: She was allowed to add an interest charge to the amount which she claimed, \$5,875.50, so that the complaint read that there was due to her from Sullivan the amount of \$5,875.50 "and interest thereon"; and, further, she was allowed to amend the allegation as to Sullivan's promise, so as to make it read that Sullivan would rent to Mary Flood the premises herein described "so long as she, the said Mary Flood, lived," instead of reading "so long as he, the said Sullivan, lived."

Respondent interposes a preliminary objection to the consideration of the demurrer, upon the ground that an amended complaint supersedes the original complaint, and that, as defendants did not demur to the amended complaint, they waived their demurrer by this omission. Some force might attach to this argument, if the amended complaint in any vital respect changed the issues or relieved the original complaint from the objections pressed by the original demurrer, but in this case there was no amended complaint. There were merely brief amendments by way of interlineations made to the original complaint, and those amendments in

no way relieved from, nor even affected, the grounds of demurrer which had been urged against the pleading. In such cases it is well settled that, not only is a new demurrer unnecessary, but that it is not error for the court to refuse, upon application, to permit a new demurrer to be presented. 6 Ency. of Pl. & Pr. p. 381; *Stanton v. Kenrick*, 135 Ind. 382, 35 N. E. 19; *Hawthorne v. Siegel*, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291. Moreover, and finally, it may be said upon this point that the demurrer is a general one, and charges a failure in the complaint to state facts constituting a cause of action; and this may be urged at any time without demurrer. Code Civ. Proc. § 434; *Ryan v. Holliday*, 110 Cal. 335, 42 Pac. 891.

It is a rule of equity, embodied in section 3391 of the Civil Code, that specific performance cannot be enforced against a party to a contract if he has not received adequate consideration for the contract, and if the contract is not as to him just and reasonable. In other words, the complaint must show that the party against whom enforcement is sought has received adequate consideration, and that the contract is just and reasonable. In the complaint at bar there is an absence of averment to show any of these things. It is made to appear that plaintiff was indebted to the defendant in the sum of \$14,922, against which plaintiff claimed the set-off of \$5,875 and an additional reduction in the sum of \$969, as to which she could plead the statute of limitations. There is no averment that this \$14,922 was not justly owing to Sullivan. Indeed, the averments of the complaint show that it was, and certainly no equity is disclosed by the intimation that plaintiff would have availed herself of the strictly legal defense of the statute of limitations to a money demand admitted honestly due the creditor. This, however, is a minor matter, and it is mentioned merely in passing. The consideration moving from the plaintiff, therefore, is found in her agreement to forbear to urge her set-off and to plead the statute of limitations against Sullivan's foreclosure. But there is no allegation as to the value of the land. It is not made to appear whether Sullivan gained much, or little, or anything at all, by the forbearance. For aught that is shown, even if plaintiff had successfully interposed this set-off and her plea of the statute of limitations, foreclosure would still have resulted, and it is not made to appear that plaintiff would have bought in the property at foreclosure, that the property was worth more than it would have been foreclosed for, or, in short, that plaintiff suffered any detriment or deceased gained any advantage thereby. As this court has said in *Bruck v. Tucker*, 42 Cal. 346: "The court is to be satisfied that the contract is founded upon, not merely a valuable, but an adequate, consideration. But how are we to be so satis-

fied here, where there is an absence of all averment upon that point." *Windsor v. Miner*, 124 Cal. 492, 57 Pac. 386; *Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231.

But in another respect, even more fatal to its sufficiency, is the complaint radically defective. While it seeks the specific performance of a contract to devise real property by last will without allegation as to the value of the property at the time of the agreement, nor, indeed, at any other time, it bases the right to compel this performance upon plaintiff's forbearance merely in the matter of a money demand. Equity, it is true, does entertain contracts for specific performance to convey the whole or any portion of the promisor's property by will, but it decrees such performance, first, only upon clear proof of fairness, justice, and adequacy, and where the rights of innocent third parties are not imperiled, and, second, it does so only where the plaintiff cannot be compensated in money. These cases usually arise where the service is of some extraordinary nature which cannot be, and in the contemplation of the parties was never expected to be, paid for in money, as where home ties are broken, and minors go to live with an adult upon his promise that he will stand in loco parentis and will to them his property in return for their filial services during his lifetime. As was said by this court in *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369: "Specific performance is not to be decreed under strict rule and formula. Every consideration which may be properly urged upon the court is to be weighed and passed upon, and it will be decreed only when no other adequate relief is available to plaintiff, and even then it will be denied, if it operates by way of a hardship upon the innocent." The jurisdiction of a court of equity to decree specific performance does not, as was said in *Senter v. Davis*, 88 Cal. 450, depend at all upon the question whether the contract relates to real or personal property, but altogether upon the question whether the breach complained of cannot be adequately compensated in damages. If it can, the action has no place in a court of equity, and the plaintiff's remedy is strictly in law. Equity is designed only to supplement the deficiencies of the law. So it will be found that, in all of the cases in which specific performance of these agreements to leave property by will has been upheld by the courts, there has been the element of peculiar personal services, fully performed and incapable of compensation in money. Such was the case in *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369, and that, also, of *McCabe v. Healy*, 138 Cal. 81, 70 Pac. 1008. It is said in *Jaffe v. Jacobson*, 48 Fed. 21, 1 C. C. A. 11, 14 L. R. A. 352: "In all the cases called to our attention in which relief was afforded, it appears that the promisees had substantially discharged the obligations which they had severally assumed. In most, if not all, in-

stances they had lived in the promisor's household as members of his family, and had rendered faithful and effectual services for a long period of years. It was not possible, therefore, to administer adequate relief otherwise than by decreeing specific performance." In *Burns v. Smith*, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653, it is said: "We come to this conclusion more readily, as we are of the opinion that the parties to the alleged contract never contemplated that the services of plaintiff were to be, or could be, compensated in money." In *Healy v. Simpson*, 113 Mo. 340, 20 S. W. 881, the court said: "And, when the mother sent her child to dwell in another's family in a distant state, she yielded much affection and love; and Brewster, by the same act, gained the companionship of one who added much, no doubt, to his enjoyment of life. * * * In the very nature of things, nine years in the life of a child so changed conditions that it is out of the power of an earthly tribunal to restore the parties to their original situation and environment, and the courts, therefore, compel them to stand upon and abide by the record they have made." So in *Stellmacher v. Bruder*, 89 Minn. 507, 95 N. W. 824, 99 Am. St. Rep. 609. The consideration for the deceased's promise being board, lodging, care, etc., it was alleged in the complaint that it was impossible to estimate the value in money, or by any pecuniary standard. The court, holding that the complaint did not state facts sufficient to constitute a cause of action, and that the demurrer thereto was properly sustained, said: "If the consideration for the contract be labor and services which may be estimated, and their value liquidated in money, so as reasonably to make the promisee whole, specific performance will not be decreed. But where the consideration of the contract is that the promisee shall assume peculiar and domestic relations to the promisor, and render to him services of such a peculiar character that it is practically impossible to estimate their value by any pecuniary standard, specific performance will be decreed. * * * There being no element of a peculiar personal and domestic relation in the contract, as alleged in the complaint under consideration, it does not appear upon the face thereof that the plaintiff cannot be fairly compensated in money for her uncle's breach of his oral contract." In the complaint before us we are not left in any embarrassment or doubt as to the nature of the service. There was no service at all. A married woman or widow was occupying a piece of land mortgaged to the deceased, and forbore to press a fixed monetary demand in consideration of his agreement to deed her the property upon his death. He failed to do so. The value of the forbearance is established in the terms of her complaint. Her damages for deceased's alleged breach can, with equal readiness, be found, and compensation made in money.

Plaintiff's forum is therefore a court of law, and not a court of equity; and the judgment and order appealed from are reversed, with directions to the trial court to sustain the demurrer to the complaint.

We concur: MCFARLAND, J.; VAN DYKE, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.

(148 Cal. 357)

TATUM et al. v. ACKERMAN. (S. F. 2,991.) (Supreme Court of California. Dec. 15, 1905.)
SALES—ACTION FOR PRICE—AGREEMENT FOR TERM OF CREDIT.

An action to recover the price of goods sold affirms and counts on the contract of sale, including all of its terms, and where the contract provides unconditionally for a term of credit to be given the purchaser the action cannot be maintained until such term has expired, in the absence of fraud inducing the credit, even though the purchaser has repudiated the contract and refused to accept or pay for the goods.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 990.]

Beatty, C. J., and Van Dyke, J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Henry L. Tatum and others against Albert H. Ackerman. Judgment for plaintiffs, and defendant appeals. Reversed. Rehearing denied January 12, 1906.

Naphtaly, Freidenrich & Ackerman, for appellant. J. P. Langhorne, for respondents.

ANGELLOTTI, J. This action was brought to recover \$1,581.98 and interest, in which sum, it was alleged in the complaint, the defendant "became and was indebted to plaintiffs * * * for and on account of goods, wares, and merchandise sold and delivered by plaintiffs to defendant." The allegations of the complaint were specifically denied by the answer, and, in addition, a breach of warranty was alleged, viz., that an engine, which was one of the articles sold, failed to satisfy the plaintiffs' warranty, and thereupon the defendant had rescinded the purchase and had attempted to return the engine to the plaintiffs. It appeared upon the trial that defendant, upon the alleged ground as to the breach of warranty as to the engine, refused to accept or keep any of the merchandise sold and delivered to him, but shipped all the articles from Usal, Cal., to San Francisco, addressed to the plaintiffs. Plaintiffs refused to receive the goods back from the defendant, but attached them on the institution of this action. On the trial defendant did not introduce any proof as to the alleged breach of warranty, and the court found that the engine was as represented by the plaintiffs. The merchandise had been sold by the plaintiffs to the defendant upon a credit of 60 days from September 24, 1900. This action was commenced within said 60

days, viz., on the 5th day of November following, but the court found that the defendant had refused to keep the merchandise and had shipped it back to the plaintiffs, with the intention of abandoning and repudiating his purchase thereof, and that he did repudiate such purchase, and that prior to and at the time this action was commenced he did not intend to pay plaintiffs at any time or at all for the said merchandise, and gave judgment for plaintiffs as prayed for in their complaint. This appeal is taken from the judgment and from an order denying defendant's motion for a new trial.

The contention on this appeal is that the action was prematurely brought—that an action upon the contract of sale for the purchase price of the articles sold could not be maintained until the expiration of the time of credit allowed thereby—and this contention presents the only question to be determined. It is, of course, not disputed that, where goods are sold on credit, an action cannot ordinarily be maintained for the purchase price until the term of credit has expired. Until such time the obligation to pay has not matured, and there has been no breach of contract as to payment. But it is alleged that the credit here was conditioned upon the acceptance of the goods by the vendee, and his payment for them at the expiration of the term of credit, and that by his refusal to accept he necessarily waived the condition as to credit, and, in effect, declared that he did not intend to pay for the goods at all. The stipulation here as to credit was absolutely unconditional, unless such a condition as is here claimed is necessarily implied in every contract of sale upon credit where no condition is expressed in the contract, for it is not claimed that there was any such express condition in the contract under consideration. We know of no rule of law that will warrant us in holding that such a condition may be so implied from the mere sale of goods on credit, and no case is cited supporting any such theory. In the American note in Bennett's *Benjamin on Sales* (7th Ed.) p. 795, the rule is stated as follows, viz.: "If credit was unconditionally given by the contract, an action for the full price cannot be maintained under any circumstances before the time of credit has expired. Such action affirms and counts upon the very contract of sale, time of credit included. The fraud or insolvency of the buyer, or abandonment of the contract does not alter the term of credit." Mechem states the rule in substantially similar terms, declaring that, by his action for the price, the vendor affirms the contract and must affirm it as an entirety. Mechem on *Sales*, §§ 1410, 1411. Some authorities hold that, where the credit was obtained by fraud, the stipulation as to credit may be alone rescinded, and an action brought at once for the price. These cases

regard the credit stipulation as an independent one, capable of rescission by itself where it was induced by fraud, without disaffirmance of the sale. Such is the well-settled rule in New York. See *Heilbronn v. Herzog*, 165 N. Y. 98, 58 N. E. 759, and in some other states; volume 48, Cent. Dig. § 990. But this doctrine can, of course, have no application to a case where there was no fraud at the time the contract was made.

It appears to be universally recognized that where the credit is unconditional, if it was not obtained by fraud, or based upon a consideration which has failed, or has not been waived, an action will not lie on the contract for the purchase price until the expiration of the term of credit. See 24 Am. & Eng. Ency. of Law (2d Ed.) p. 1122. Here, as we have seen, the credit was unconditional, and there was no fraud. Nor was there any express consideration for the credit. The credit was undoubtedly given in consideration of the purchase of the goods by the defendant, but plaintiffs, maintaining an action on the contract for the price, and insisting upon the contract, are not in a position to insist that this consideration has failed. Nor was there any waiver of the credit. An attempted repudiation of the contract in toto by the vendee is no waiver of the single stipulation as to credit. The plaintiffs refused to acquiesce in such repudiation and insist that the contract shall be enforced according to its terms, which they have the right to do, but they have no right to make a new contract for the defendant. If, against the will of the vendee, the contract is to stand, the vendee may still insist that it shall stand according to its terms. Construing the refusal to keep the goods and their return as notice on the part of defendant that he would not pay upon the expiration of the term of credit, plaintiffs are not relieved from the effect of the stipulation as to credit. Section 1440 of the Civil Code, relied on by them, has no application to cases where performance is not yet due upon the part of the party who has previously given notice that he will not perform when such performance is due. In such cases, when performance on his part is due, and not before, if such notice has not been retracted, the other party may enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party. Such is the whole effect of this section. See in this connection *Keller v. Strasburger*, 90 N. Y. 379.

As contended by plaintiffs, there can be no doubt of the right of a vendor, where the vendee refuses to take the goods sold and delivered, and repudiates the contract, to elect to treat the contract of sale as still in full force, and the goods as belonging to the vendee, and to sue on the contract for the entire contract price. But this does not mean that he may sue for the contract price before it is due according to the terms of the

contract, and we have not been able to find any case so holding. The case of Brady v. Isler, 9 Lea (Tenn.) 358, is precisely in point. There the vendee abandoned possession of the goods, and the vendor repossessed himself thereof, and elected to resell the goods and sue for the difference between the price received upon the resale and the contract price. The action was brought before the expiration of the term of credit, and it was held that the action was premature and must fail. The court said: "It will be observed that no part of the purchase money was due at the time of the resale of the goods. And in such case the vendee has not been guilty of any breach of the contract as to payment, although he may be in default in respect to his refusal to receive the goods, or, rather, in the abandonment of their possession." The court further, in effect, said that in the aspect of the case contended for by plaintiff, that the contract was valid and subsisting, the money was not due upon it when suit was brought, and that it is essential that it should be due before suit is brought to enforce the collection. We see in this case no possible answer to the objection that the action was brought to recover money alleged to be due upon a contract, before it became due under the terms of the contract. Upon the repudiation of the contract by the vendee, the vendors might have elected to keep the property as their own, and at once sue for damages on account of the breach, but this action cannot, under the most liberal rules as to construction of pleadings, be held to be such an action. It was simply and solely an action on the contract for the purchase price, based upon the promise of defendant to pay, and the evidence shows, without conflict, that, according to the terms of the contract, the liability had not accrued at the time the action was commenced.

The judgment and order denying the new trial must be reversed; and it is so ordered.

We concur: SHAW, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

BEATTY, C. J. I dissent. This is not strictly an action upon the express contract for the sale of the machinery, but is in form and substance an action in assumpsit on an implied contract to pay for the value of goods sold and delivered, and is based upon the claim that the plaintiffs had a right under the circumstances to rescind the stipulation for a credit of 60 days. There is abundant authority for the proposition that one who has sold goods or loaned money on a credit fraudulently obtained may, upon discovery of the fraud, sue in assumpsit before the credit has expired. There is no doubt authority to the contrary; one of the most noted cases being *Galloway v. Holmes*, 1 Doug. (Mich.) 390. But, on the other hand, the doctrine is sustained by the highest courts

of New York, Massachusetts, Alabama, and perhaps other states, and it commends itself to me as a just and reasonable doctrine. It is founded upon the right of rescission. When a party has been induced to enter into a contract by fraud, he is entitled to rescind that contract by his own act, and, if upon such rescission he has a legal claim against the other party, he may proceed to enforce it by any appropriate action. The foundation of the doctrine being the right of rescission, it should be applied to any case where the right exists. In New York it has been extended to a case in which after the sale of the goods the purchaser made a transfer of his property in fraud of his creditors. *Arnold v. Shapiro*, 20 Hun, 478. In that case the court said: When a "fraudulent disposition of the property has taken place at the time of the making of the contract, the fact itself would also avoid credit obtained by means of its concealment in incurring the liability. *In principle the same effect should also follow such a disposition of the debtor's property, after he has contracted the debt and secured the credit, for it is always implied in such transactions that the debtor will make no disposition of his property which will operate as a fraud upon his creditor.*" I have italicized that part of the opinion which states the principle governing cases of this character; which principle, in my opinion, clearly embraces the present case, for here, according to the facts found by the court, the debtor, after obtaining the credit, did make a disposition of his property which would "operate a fraud" upon the creditor. He represented in purchasing the engine that it was to be employed in logging. Instead of putting it to work where it would earn money and enable him to meet his obligation to pay for it at the expiration of the term of credit, he shipped it back to San Francisco, in violation of his contract and at the cost of the plaintiffs, obliging them to pay the freight to prevent its being sold to pay charges, and when it was attached by them they were compelled, of course, to discharge the lien of the carrier. The case is the same in all respects as that of a mechanic who buys a kit of tools on credit, representing that he is going to work at his trade, and who, instead of going to work, pawns the tools and pays another creditor with the money so obtained. I say the two cases are the same because there is nothing in this record to show that the defendant had any means of meeting his obligation, except the proceeds of the business in which he represented the machinery was to be employed. He certainly impaired, by his own fault, his means of paying his debt as represented to the plaintiffs, and, if what he did gave them the right to rescind, I cannot see why, in view of the principle of the cases referred to, he could not maintain this action. Did he, then, have a right to rescind? I think he had under

subdivision 2 of section 1689 of the Civil Code.

In asking and obtaining a credit, a purchaser of goods always represents himself as having, or being able to provide, the means of discharging his obligation at maturity, and whatever representation he makes affecting his prospective ability to pay constitutes the basis upon which the credit is accorded. If, then, he materially impairs his ability to meet his obligation, and by an inexcusable breach of the contract renders the security of his creditor worthless or precarious, there is at least a partial failure of consideration for the credit, and it will be noticed that one authority cited in the main opinion (24 Am. & Eng. Ency. of Law [2d Ed.] p. 1122) includes, among the exceptions to the rule stated, the case in which there has been a failure of consideration for the credit. It may be said that the reasoning upon which I hold this action to have been well brought is technical. I concede it, but I call attention to the fact that the main opinion rests its conclusion upon purely technical grounds. The right of plaintiffs to sue at the time they did is conceded, but their action is defeated because, as it is held, they have sued on the contract, instead of in tort. If we are to be technical, I think we should give the preference to a technicality that results in upholding a just claim against one who has, as appears by the findings of the superior court, wantonly violated his contract, to the serious injury of innocent parties. There may not be any precise precedent to sustain this action; but, if I have succeeded in showing that the right of rescission is the basis of the rule which allows a creditor to sue in assumpsit regardless of an unexpired credit expressly stipulated, I have shown that this case is within a principle sustained by abundant precedent, and, the principle applying, a court constituted like this should not be afraid to make a precedent which in all like cases would tend only to the promotion of justice.

I concur in the foregoing: VAN DYKE, J.

148 Cal. 384

ARONSON v. LEVISON et al. (S. F. 4,374.)
(Supreme Court of California. Dec. 18, 1905.)

1. APPEAL — JUDGMENTS — GUARDIAN AD LITEM—SERVICES.

Where, in a suit to quiet title, a guardian ad litem was appointed at plaintiff's instance for a minor defendant, and after hearing the court entered judgment in favor of plaintiff, quieting his title to the premises, and added to the judgment a provision requiring plaintiff to pay the sum of \$200 to such guardian ad litem for his services, such part of the judgment was not appealable as a special order made after final judgment, within Code Civ. Proc. § 939.

2. SAME—COSTS AND EXPENSES.

Such portion of the judgment was merely for costs or expenses taxable against plaintiff,

not amounting to \$300, which was therefore insufficient to confer jurisdiction on the Supreme Court of the appeal.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by A. Aronson against Henriette Levison and others. From that portion of a judgment in favor of plaintiff which required him to pay certain fees to a guardian ad litem appointed at his instance, he appeals. On motion to dismiss. Granted.

Edward Mills Adams and Charles W. Slack, for appellant. George E. Merrill, for respondent.

VAN DYKE, J. This is a motion to dismiss the appeal. The appellant, plaintiff in the court below, brought an action to quiet title as to certain real estate in the city and county of San Francisco, and among the defendants in said action was Robert John Levison, a minor. On the application of the plaintiff in the court below to have a guardian ad litem appointed for said minor defendant, the court appointed George B. Merrill, an attorney in said city and county as such guardian ad litem. After the hearing of the cause in the court below, before rendition of judgment, said Merrill, as guardian ad litem, applied to the court, upon notice to the plaintiff, to fix his compensation as such guardian ad litem of Robert J. Levison, minor. In accordance with said notice, the court, after hearing, the plaintiff being present, ordered that the plaintiff pay to said George B. Merrill the sum of \$200 for his services as guardian ad litem. Thereafter the court entered judgment in favor of the plaintiff, quieting his title to the premises in question, and added to said judgment as part thereof the following, to wit: "And a guardian ad litem for said defendant Robert J. Levison, a minor, having been appointed in this action upon the application of said plaintiff, it is ordered that said plaintiff pay to said George B. Merrill, Esq., guardian ad litem as aforesaid, the sum of \$200 for his services as guardian ad litem." The plaintiff, as stated in his notice, "appeals to the Supreme Court of the state of California from the part hereafter set forth of the judgment and decree heretofore duly given and made by said court in the above-entitled action, dated and filed May 15, 1905. * * * Said part of the judgment and decree so appealed from is in the following words and figures, to wit: [Then reciting the portion of the judgment already referred to, ordering the payment by the plaintiff to the guardian ad litem of the sum of \$200 for his services as such guardian.]"

The respondent, Merrill, moves the court to dismiss the appeal on the ground that no appeal is provided by law from the part of the judgment as mentioned in the notice of appeal. The portion of the judgment ordering the payment to the guardian ad litem,

appointed at the request of the plaintiff, is not, properly speaking, a part of the judgment on the merits of the case. This is practically admitted on the part of the appellant. The compensation of a guardian ad litem is in the nature of expenses or costs, and an incident to the action, and forms no part of the cause of action or defense thereto. The appellant seems to rely upon *Harron v. Harron*, 123 Cal. 508, 56 Pac. 334. That case reviews and overrules the previous cases of *Langan v. Langan*, 83 Cal. 618, 23 Pac. 1084, and *Fairbanks v. Lampkin*, 99 Cal. 429, 84 Pac. 101. In *Harron v. Harron*, as stated in the opinion: "The order appealed from is a special order made after final judgment." Such an order is made appealable by an express provision of statute (Code Civ. Proc. 939), and the jurisdiction to entertain the appeal is not dependent upon the amount of money named in the order. In the *Encyclopedia of Pleading and Practice* (volume 10, p. 685) it is said: "Under the statutes of some states the plaintiff, or the person who procured the appointment of the guardian ad litem, is required to pay the latter's costs and expenses." And in *Smith v. Smith*, 69 Ill. 308, the court say: "Under the Illinois statute the guardian ad litem is to be paid by the party on whose motion he was appointed, and to be taxed in the bill of costs." And in *Snyder v. Fidelity Trust*, 14 Ky. Law Rep. 615, it is held: "A guardian ad litem is to be allowed a reasonable fee to be paid by the plaintiff and taxed as costs." And in *Carter v. Montgomery*, 2 Tenn. Ch. 455, it is said: "The party beneficially interested is compelled to bring the infant into court, and must pay necessary expenses of the proceedings, including reasonable compensation to the guardian ad litem in the nature of taxable costs." "Costs are those expenses incurred by parties in prosecuting or defending suits or proceedings in law or equity which are recognized and are allowed by law." 5 *Ency. Pl. & Pr.* 106. In this case no memorandum of such costs was required to be made by the guardian ad litem, as in ordinary cases after entry of judgment, as the matter was fixed by the court before the entry of judgment and decree, and incorporated in said judgment, as already shown. The appeal not being from an order made after final judgment, but from a portion of the judgment itself, and for costs or expenses of the action, not amounting to \$300, this court has no jurisdiction of the appeal.

The appeal must therefore be dismissed, and it is so ordered.

We concur: McFARLAND, J.; LORIGAN, J.

SHAW, J. I concur in the judgment dismissing the appeal. Properly speaking, the order making the allowance against the plaintiff for the services of the guardian ad litem of the defendant Robert John Levison, ap-

pointed as such upon the motion of the plaintiff, is not a part of the judgment in favor of the plaintiff and against the defendants. Neither the other defendants, nor the minor defendant, were parties to the proceeding upon which said allowance was made. It was not allowed as part of the costs in the cause taxable in favor of the plaintiff, nor as costs in any sense, and the amount allowed was not in fact taxed as costs either against the plaintiff or the defendants, nor included in any judgment in favor of the plaintiff against the defendants. The case simply amounts to this: that the plaintiff procured Mr. Merrill to act in his behalf by taking the appointment of guardian ad litem for a minor defendant in the action. For the services thus performed at plaintiff's request, the plaintiff would perhaps be responsible to the extent of their reasonable value. Whether or not the court has jurisdiction in the action in which such services are rendered to make an order fixing the amount of such services rendered by the guardian ad litem, and to make an order that the party who procured the appointment should pay the amount fixed to the person who served as guardian ad litem, is a question which need not be here decided. There is an intimation to the effect that the court may have power to make such an allowance against the estate of the ward, in *Cole v. Superior Court*, 63 Cal. 90, 49 Am. Rep. 78. Aside from this, I know of no authority on the subject. But even if the court has jurisdiction to make such an order, it is not a part of the proceedings between the plaintiff and the defendant. The guardian ad litem could perhaps maintain an independent action against the party procuring his appointment to recover the value of his services. The fact that the order was made in the course of an auxiliary proceeding in the action in which the services were rendered makes it no more a part of the judgment as between the parties, or of an order after such judgment, than would be a judgment in an independent action to recover for such services. The reason why this court has no jurisdiction of the appeal in the present case is that the order is in effect an independent judgment in favor of George B. Merrill against A. Aronson for the sum of \$200 in money, and that the jurisdiction of this court on appeals from money judgments is limited to cases where the judgment amounts to \$2,000, and that the appellate jurisdiction of the district courts of appeal in such cases is limited to cases in which the judgment amounts to \$300 and does not amount to \$2,000; and hence we can neither entertain the appeal in this court, nor, under the provision of the late amendment to the Constitution, transfer it to the district court of appeal for consideration in that court.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; HENSHAW, J.

148 Cal. 368

SULLIVAN et al. v. SAN FRANCISCO GAS & ELECTRIC CO. et al. (S. F. 4,187.)

(Supreme Court of California. Dec. 18, 1905.)

INJUNCTION—CRIMINAL PROSECUTION.

Injunction will not lie to restrain the prosecution of house movers for violating Pen. Code, § 593, imposing a penalty on every person who unlawfully and maliciously removes or obstructs any electric line, though it is alleged that they are not guilty of such violation; there being no question as to the validity of the statute.

(Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 178, 179.]

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by D. J. Sullivan and others against the San Francisco Gas & Electric Company and others. From an order for injunction during the pendency of the action, defendants appeal. Reversed.

Page, McCutchen & Knight and I. Harris, for appellants. Sooy & Dorn and C. W. Eastin, for respondents.

SHAW, J. This action was begun in the superior court of the city and county of San Francisco for the purpose, as stated in the prayer of the complaint, of enjoining the defendants and each of them "from making or filing any criminal complaint, or issuing or serving any warrant of arrest, or arresting plaintiffs, or either of them, by reason of the taking down, cutting, or removal by any of said plaintiffs of the electric wires of the defendant, the San Francisco Gas & Electric Company." The court, upon application therefor and after a hearing, made an order for an injunction as prayed for, during the pendency of the action. From this order the defendants have appealed.

According to the allegations of the complaint and the proofs at the hearing, the plaintiffs are severally pursuing the occupation of house movers in the city of San Francisco, and have, and procure from the city as often as may be necessary, permits to move, over and upon the public streets of the city, the houses which they may be employed to move, and that in so doing the wires of the defendant, the San Francisco Gas & Electric Company, which overhang the streets, interfere with the moving of the houses, so that it is necessary to cut and temporarily remove the wires while the houses are being moved along the particular street over which the wires extend. The plaintiffs, or some of them, have cut these wires in some instances, and have been arrested therefor at the instigation of the electric company, and charged with violating the provisions of section 593 of the Penal Code. It is alleged that the further cutting of such wires will frequently be necessary in the business in which the plaintiffs are engaged; that they cannot carry on the business without doing so; that the electric

company threaten similar criminal prosecutions against plaintiffs for each instance of interference with the said wires; and that the plaintiffs in good faith claim and believe that they have the lawful right to cut and remove such wires for said purposes, and have cut them and propose to continue so to do under and in pursuance of said belief and claim. Section 593 is as follows: "Every person who unlawfully and maliciously takes down, removes, injures, interferes with or obstructs any line erected or maintained by proper authority for the purpose of transmitting electricity for light, heat, or power, or any part thereof, or any insulator or cross-arm, appurtenance or apparatus connected therewith, or severs or in any way interferes with any wire, cable, or current thereof, is punishable by imprisonment in the state prison not exceeding five years, or by fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding one year." The San Francisco Gas & Electric Company, in the course of its business, maintains wires strung on poles, over, across, and along the streets of the city, for the purpose of supplying the city and its inhabitants with electric light, and, under the provisions of the state Constitution (article 11, § 19), it has the right to use the streets for that purpose, subject to such regulations as may be made by the municipal authorities. It may be conceded, for the purposes of this case, that the plaintiffs also have the right to use the streets for the purpose of moving houses thereon from place to place in the city, subject to such regulations as the city authorities may impose. It is not contended that section 593 is invalid or unconstitutional. Indeed, this could not well be claimed, for it forbids only the unlawful and malicious removal or interferences with the wires, and, even if such wires constituted unlawful obstructions in the street, they would still be private property, and the unlawful and malicious injury of them would be a proper subject for punishment under the police power of the state. The case of the plaintiffs, therefore, is an application to a court of equity for an injunction to prevent the officers and courts of the municipality, and the person whose property is injured, from instituting, entertaining, or maintaining criminal prosecutions against the plaintiffs for alleged violations of the valid criminal law of the state. As a ground for the application for this relief, the plaintiffs assert that they have not been guilty of such offense, and will not in the future be guilty thereof; that, although they have injured the wires of the electric company and propose to continue to injure them from time to time, they have not done so and will not in the future do so, either unlawfully or maliciously, and consequently are not and will not be guilty of any offense under the law; and that they have been, and will here-

after be, prosecuted for such acts committed without malice and lawfully, and that such prosecution will be without reasonable or probable cause, and to the injury or destruction of their right to carry on their business of house moving and their civil right to use the streets for that purpose.

The statement of the case is sufficient to show that it is without merit. Courts of equity will in proper cases enjoin the attempt to enforce a law or ordinance making certain acts a criminal offense and imposing a punishment therefor, where the law or ordinance is invalid, and its enforcement will injure or destroy the plaintiffs' property or property rights. The recent authorities are practically unanimous on this proposition. Some of the decisions even go so far as to hold that injunction will lie where the enforcement of the invalid law does not directly affect property, or rights thereto, but operates upon the plaintiff's business, and thereby causes him material and irreparable loss. *City v. Beckham*, 118 Fed. 899, 55 C. C. A. 333; *Mills v. Chicago (C. C.)* 127 Fed. 781; *Greenwich Ins. Co. v. Carroll (C. C.)* 125 Fed. 121. But upon this latter point there is a conflict, and the weight of authority and reason seems to be to the contrary. *Brown v. Mayor*, 140 Ala. 590, 37 South. 173; *Bainbridge v. Reynolds*, 111 Ga. 758, 36 S. E. 935; *Mayor v. Patterson*, 109 Ga. 370, 34 S. E. 600; *Coykendall v. Hood (Sup.)* 55 N. Y. Supp. 718; *Davis Mfg. Co. v. Los Angeles*, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778; *Ex parte Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; *Oughton v. Dahmer*, 70 Miss. 602, 13 South. 237, 21 L. R. A. 84, 85 Am. St. Rep. 686, and cases cited in note thereto on page 677. These, however, are all cases where the penal law was considered invalid. The single case of *Shinkle v. Covington*, 83 Ky. 420, in which the law was declared valid, was based on peculiar circumstances, and has no application to the case at bar, even if it is conceded to be correctly decided. But in the case now before the court there is no question concerning the validity of the law, and the defendants cannot be justly found guilty of a violation thereof, unless they act unlawfully and maliciously. We know of no principle of jurisprudence which authorizes a court of equity, on the ground that it will prevent a multiplicity of actions, or that it will prevent an injurious interference with plaintiff's business, to proceed to investigate as to the truth of criminal charges that have been or may be preferred against him, to hear the evidence in regard to his guilt or innocence, to determine in advance of the decision of the lawfully constituted criminal courts the question of his guilt or innocence of pending charges and his probable guilt or innocence of future charges, and, if found in his favor, to forestall the action of the law courts and enjoin the enforcement of a constitutional and valid law against him on the sole ground that

there is not, and never will be, sufficient evidence of his guilt. This, in substance, is the relief which the plaintiffs demand. The answer to the application is that the plaintiff's remedy in the courts of law is complete and adequate. Every person is subject to the chance that he may be prosecuted for some offense of which he is not only not guilty, but as to which there is no reasonable or probable cause to believe him guilty. The prosecution must, of course, be in some court having jurisdiction of the offense. In that court he has an opportunity to make his defense to the charge, to rebut the evidence against him, and introduce evidence in his favor. The presumption that such court will give him a fair trial and decide justly in his case is as strong as the presumption that a court of equity will fairly try and justly decide his application for an injunction involving the same facts. There is no rule which permits a person to substitute a court of equity for the courts of law in the decision of such matters of fact, and, by anticipatory action therein, take from the regularly constituted criminal courts their jurisdiction of the particular offense in question. All persons must submit to the due process of law in the courts vested with lawful jurisdiction of legal offenses charged against them, and the fact that such courts may give an erroneous decision is no ground for relief in a court of equity by way of injunction to prevent them from acting at all, or to interfere with their judgments when made. As was said in *Davis v. American Society*, 75 N. Y. 362: "An innocent person, upon an accusation of crime, may be arrested and ruined in his character and property, and the damage he thus sustains is *damnum absque injuria*, unless the case is such that he can maintain an action for malicious prosecution or false imprisonment. He is exposed to the risks of such damage by being a member of an organized society, and his compensation for such risks may be found in the general welfare which society is organized to promote."

The case seems to have grown out of a dispute between the plaintiffs and the electric company concerning the amounts which house movers should pay to the company for the expenses and damages caused by the cutting of the wires when necessary, the right of the company to demand a deposit in advance to cover such expense, and concerning the question which party has the paramount right to use the streets for the purposes of their business. The object apparently sought by the suit is a judicial determination of these questions in a court of equity, to be used as a precedent in the criminal courts upon the trial of prosecutions under section 593, or which would have the effect of deterring the defendants from beginning such prosecutions. The superior court is as competent to decide such questions when sitting as a criminal court in the trial of a criminal cause as it would be upon the trial of a

suit in equity, and there is no reason why the plaintiffs should not be restricted to the criminal courts for the preservation of their rights and the maintenance of their defenses. However desirable and beneficial such a pre-determination by a court of equity would be, it gives no right to invoke equity jurisdiction. The order granting the injunction is reversed.

We concur: McFARLAND, J.; ANGEL-LOTTI, J.; LORIGAN, J.; HENSHAW, J.

2 Cal. App. 167

HERMAN WALDECK & CO. v. PACIFIC COAST S. S. CO.

(Court of Appeal, First District, California. Nov. 10, 1905.)

1. CORPORATIONS — ACTIONS — DOMICILE — FINDING.

In an action against a foreign corporation, an allegation of the state under the law of which the corporation was organized being unnecessary, it was immaterial to the validity of the judgment against the corporation that the court failed to find whether or not the defendant was organized as alleged.

2. EVIDENCE — STATEMENT BY AGENT — PAST EVENTS—HEARSAY.

In an action against the owners of a vessel for injuries to sheep pelts, alleged to have been caused by negligent stowage, a letter written to plaintiffs by defendant's agents, through whom plaintiff had made a claim for damages, purporting to state the facts concerning the shipment and the manner in which the pelts were stowed, was a mere narrative of past events, not a part of the *res gestæ*, and inadmissible.

3. SAME.

Admissions of an agent are admissible only when made in regard to a transaction in the course of his agency pending at the very time the declarations are made, and unless so connected with the transaction cannot bind the principal, though they are explanatory of an act previously done by the agent in the exercise of his agency.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 908-915.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerri-gan, Judge.

Action by Herman Waldeck & Co. against the Pacific Coast Steamship Company. From a judgment for plaintiff, defendant appeals. Reversed.

George W. Towle, Jr., for appellant. Naph-taly, Freidenrich & Ackerman, for respondent.

HALL, J. This is an appeal from a judgment for plaintiff, taken within 60 day after rendition of judgment, and is before this court upon the judgment roll and a bill of exceptions.

The action was for damages to sheep pelts owned and delivered by plaintiff to defendant at Tacoma, to be thence carried by defendant, as a common carrier, on the steamship Walla Walla, to San Francisco. It was alleged that defendant negligently and

carelessly stowed said pelts in the bottom of the hold of said steamship, and carelessly and negligently piled thereon a great quantity of other freight, thereby subjecting the pelts to a great heat, in consequence of which a large number of the pelts became rotten and worthless. The complaint alleged "that the defendant now is, and at and during all the time hereinafter stated was, a body corporate, duly created, formed, and organized under the laws of the state of New York." Defendant, in its answer, admitted that it was a corporation, but denied that it was organized under the laws of the state of New York. The court found that defendant was a corporation, but failed to find as to whether or not it was organized under the laws of the state of New York, and for this failure appellant claims that the findings do not support the judgment. There is no merit in this contention. It was unnecessary for plaintiff to allege of what state defendant was a corporation. It was sufficient that it was a corporation. Of what state it was a corporation was peculiarly within the knowledge of defendant, and any error in such immaterial allegation of the complaint, or any lack of finding thereon, could not have prejudiced defendant or affect the judgment. The evidence showed that the pelts were shipped from Spokane by rail to Tacoma, and there reshipped by the steamship Walla Walla to San Francisco. The shipment of sheep pelts consisted of 26 bales of dry pelts, and 39 bales of salted pelts. It is fair to say that there is some conflict as to whether the 39 bales were what are known as "green" pelts or "salted" pelts, but from all the evidence it is fair to infer that they were, when shipped, salted pelts. When the pelts arrived at San Francisco, they were much damaged, being heated and rotten. It was claimed that this was caused by the manner in which they had been by the defendant stowed on the Walla Walla, especially in that great quantities of other freight were piled on top of the pelts, so as to subject them to much pressure, besides excluding a free circulation of the air about the bales of pelts. Plaintiff receipted for the pelts as damaged, and made a claim therefor on the defendant through its agents, Goodall, Perkins & Co.

Plaintiff offered in evidence a letter addressed to plaintiff and signed "Goodall, Perkins & Co. B." This was objected to as hearsay, incompetent, and immaterial, and the objection was overruled and exception reserved by defendant. In this ruling the court erred in a matter prejudicial to defendant. The letter purports to state the facts concerning the shipment of the pelts and the manner in which they were stowed on the Walla Walla, among other things, stating that "the pelts in question were stowed in the bottom of the hatch, over that was tarpaulins, then a large quantity of grain, another tarpaulin, and on top a large ship-

ment of lime and the hatch covering all." The statements in the letter were narratives of past events, and no part of the *res gestæ* of the shipment or stowing of the pelts. The admissions of an agent, not connected with the transaction to which they refer, cannot bind his principal, even though made in explanation of an act previously done by him while in the exercise of his agency. The declarations of an agent are admissible only when made in regard to a transaction, in the course of his agency, pending at the very time of the declarations, and where the statements or declarations are a part of the *res gestæ*. *Beasley v. S. J. Fruit Packing Co.*, 92 Cal. 388, 28 Pac. 485; *Crawford v. Transatlantic Fire Ins. Co.*, 125 Cal. 609, 58 Pac. 177; *Lissak v. Crocker Est. Co.*, 119 Cal. 443, 51 Pac. 688; *Birch v. Hale*, 99 Cal. 299, 33 Pac. 1088; *Durkee v. C. P. R. R. Co.*, 69 Cal. 533, 11 Pac. 130, 58 Am. Rep. 562; *Boone v. Oakland Transit Co.*, 139 Cal. 490, 73 Pac. 243; *Luman v. Golden A. C. M. Co.*, 140 Cal. 700, 74 Pac. 307. The facts above quoted, concerning the manner in which the pelts were stowed, were subsequently embraced in hypothetical questions put by plaintiff to expert witnesses, to which replies were made both by a witness for the plaintiff and for defendant to the effect that such a method of stowing salted pelts would cause them to heat, ferment, and rot. Subsequently evidence was given by witnesses for defendant differing materially from the statement in the letter as to how the pelts were stowed. It is thus clear that the error was prejudicial.

No other error was committed in the admission of evidence, and we think the evidence sustains all the findings attacked, in that the evidence is either conflicting, or of such a character that different conclusions as to the ultimate facts involved might be reasonably drawn therefrom. No good purpose would be subserved by a discussion of the evidence, and, as the judgment must be reversed for the error above pointed out, such discussion might prejudice the rights of the parties on a new trial.

The judgment is reversed.

We concur: HARRISON, P. J.; COOPER, J.

2 Cal. App. 96

PEOPLE ex rel. HARDACRE v. DAVIDSON et al.

(Court of Appeal, Third District, California. Oct. 27, 1905.)

1. APPEAL—REVIEW—CONFLICTING EVIDENCE.

Where there is evidence to support the finding of the lower court, it cannot be disturbed on conflicting evidence.

2. CONSTABLES—HOLDING OVER—SURRENDER OF OFFICE.

Where a constable at the close of his term, turned over to a person holding a certificate of election his badge, pistol, and handcuffs, and accepted from such person an appointment as deputy, and took the oath and thereafter acted

as such, he thereby surrendered and abandoned the office, and could not thereafter claim that he was holding over after his term.

3. SAME—HOLDING OVER AFTER EXPIRATION OF TERM—EVIDENCE OF ABANDONMENT OF OFFICE.

Code Civ. Proc. § 1870, subds. 1, 2, provides that evidence may be given upon a trial of the following facts: (1) The precise fact in dispute; (2) the act, declaration, or omission of the party as evidence against such party. In an action to oust one from office of constable who claimed to hold over after the expiration of his term, it appeared that he had vacated the office, given his successor his badge, pistol, and handcuffs, accepted an appointment as deputy constable, taken the oath as such deputy, and thereafter continued to act as such. *Held*, that there was no error in admitting the certificate of appointment of defendant as deputy, although the oath subscribed by him erroneously described the office.

4. SAME—ABOLISHMENT OF OFFICE.

Pol. Code, § 879, provides that every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified. County Government Act, § 56, as amended in 1901 (St. 1901, p. 685, c. 234), provides that in townships having a population of less than 6,000 persons there shall be but one constable. *Held*, that, where the effect of the amendment was to abolish two offices which previously existed, it created a new office, which could only be filled by election or appointment, and a former "incumbent could not hold over."

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by the people of the state of California, on the complaint of W. B. Hardacre, against H. L. Davidson and others. From a judgment for plaintiff, defendant W. J. Hersom appeals. Affirmed.

C. H. Fairall, for appellant. U. S. Webb and C. W. Norton, for respondent. Ashley & Neumiller, for defendants Davidson and Peters.

MCLAUGHLIN, J. This action was brought to oust the defendants from the office of constables of O'Neal township, in San Joaquin county. Section 56 of the county government act, as amended in 1901 (St. 1901, p. 685, c. 234), provides that in townships having a population of less than 6,000 persons there shall be but one constable. Prior to that amendment there were two constables in said township. At no time prior to the general election held November 4, 1902, did the population of O'Neal township equal 6,000 persons. Notwithstanding this fact, the board of supervisors of said county issued a proclamation calling for the election of two constables for this township as of yore. Ballots were printed directing the voters to vote for two, and the defendants Davidson and Peters were declared elected upon a canvass of the returns. Certificates of election were issued to them and they qualified, and in January, 1903, entered upon the discharge of the duties pertaining to said office. At the time of such election defendants Davidson and Hersom were duly elected and qualified constables of said township. Davidson was re-elected, but Hersom was not

a candidate. For the purposes of this appeal, it is admitted that the election was void and that the certificates of election issued to Davidson and Peters amounted to nothing. The court found that appellant Hersom, "on or about the 7th day of January, 1903, surrendered and abandoned the office of constable of said township to defendant Frank Peters upon the apparent election of said Peters to said office at such general election held on November 4, 1902, and thereafter accepted from said Peters an appointment as deputy constable, under said Peters, for said township, took his oath of office as such deputy and filed the same in the county clerk's office of said county, and thereafter acted as such deputy for Frank Peters." As a conclusion of law it was recited that by reason of such surrender and abandonment appellant was not entitled to hold and did not hold such office. The sufficiency of the evidence to support the finding is assailed, and it is claimed that the conclusion is not justified by the finding.

The evidence is entirely sufficient to support the finding. True there is a slight conflict, but there is some evidence to sustain the finding, and under such circumstances it cannot be disturbed. Appellant vacated the office, gave Peters his badge, pistol, and handcuffs, acquiesced in Peters' desire to appoint him a deputy, and on January 7, 1903, took the oath as such deputy, and thereafter continued to act as such. This, to my mind, conclusively shows a surrender and abandonment, for a man claiming to be or assuming to act as principal would hardly accept a deputyship under his rival. *Warden v. Bayfield*, 87 Wis. 181, 58 N. W. 248. This brings the case at bar strictly within the decision in *Drew v. Rodgers*, 118 Cal. 395, 46 Pac. 740, 50 Pac. 668, which seems conclusive of the question presented. Then, too, there is evidence that he was acting as such deputy as late as October 17, 1903, thus bringing the facts within the earlier case of *People v. Hartwell*, 67 Cal. 12, 6 Pac. 873. There was no error in admitting the certificate of appointment of appellant as deputy constable. The appointment was signed by Peters, and the oath subscribed by appellant, and the description of the office in the oath could not affect its relevancy as evidence, even if such description was erroneous. Code Civ. Proc. § 1870, subds. 1, 2.

But it seems to us that under the admitted facts before us in this case appellant could not hold over under section 879, Pol. Code, even if he had absolutely refused to recognize the validity of the election and had disputed the claim of Peters as his successor. Up to the first Monday of January, 1903, there were two offices and two officers. After that time, under the law, there could be but one office and one officer. This new office is entirely distinct from each of the pre-existing offices.

Certainly one at least of the latter ceased to exist, and, as neither was expressly continued, there is no alternative but to say that both were abolished. But taking the view most favorable to appellant's contention, and treating these two offices as merged in one, instead of being entirely abolished, the same conclusion must follow. True the two offices were identical, as far as designation is concerned, with the single office created through the merger resulting from the amended law. But it is clear that, when these two offices were merged in one, neither preserved its identity. And, the identity of each being lost, it is manifestly impossible to determine which, if any, of the offices continued. There being but one office, there can be but one officer or incumbent. And yet reference to another appeal in this same case discloses a scramble to hold over; defendants Davidson and Hersom each claiming such right. Now both cannot be so entitled, for both cannot hold one office. Neither can claim a superior right, because neither can say that the particular office occupied by him continues. Forfeiture by one or the other is a false quantity in determining the legal right to hold over under section 879 of the Political Code. The rule which gives such a right is inflexible and unchangeable, and the only fact to be considered in determining such right is the one fact mentioned in the statute as creating such right. The same rule which would apply if each had conserved whatever right he had must apply under all circumstances, for the right either exists as a matter of law, or it does not exist at all. The sins of omission or commission laid at the door of one claimant cannot increase or diminish the rights of the other, because the law alone creates the right whenever the condition arises, and extrinsic facts cannot create or change a law. Such a right must be fixed, definite, and capable of legal ascertainment. It must vest with absolute certainty in some individual, and there cannot be two who could under any state of facts be equally entitled. In the very nature of things, there could be no such certainty under the circumstances above narrated. It must therefore follow as a matter of law that while the new office possesses all the powers of the pre-existing offices, for all purposes of process and jurisdiction, as the successor of both, the effect of the amendment was to abolish the two offices previously existing, at least as far as the right to hold over is concerned, and to create a new office which could only be filled by election or appointment. *Proulx v. Graves*, 143 Cal. 247, 76 Pac. 1025; *People v. Chaves*, 122 Cal. 138, 54 Pac. 596; *Kilburn v. Conlan*, 56 N. J. Law, 350, 29 Atl. 162; *Barkley v. Levee Com.*, 98 U. S. 258, 23 L. Ed. 893; *People v. Jones*, 17 Wend. (N. Y.) 82; *People v. Morell*, 21 Wend. (N. Y.) 563; *Matter of Gertum v. Board*, 109 N. Y. 174, 16 N. E. 328; *Carter v. Board*, 7 Neb. 42; *State v. Bailey*,

37 Ohio St. 98; Richmond Mayoralty Case, 19 Grat. (Va.) 673; *Quigg v. Evans*, 121 Cal. 547, 53 Pac. 1093.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

2 Cal. App. 100

PEOPLE ex rel. HARDACRE v. DAVIDSON et al.

(Court of Appeal, Third District, California, Oct. 27, 1905. On Rehearing, Nov. 25, 1905.)

1. PLEADING—AMENDMENT—COMPLAINT.

In an action to oust defendants from the office of constable of a certain township, the complaint showed that certificates of election were issued to two of defendants, that they qualified and entered upon the discharge of their duties pertaining to said office, and that at the time of the election such township was only entitled to elect one constable under County Government Act, § 56, as amended by St. 1901, p. 685, c. 284, which provides that in townships having a population of less than 6,000 persons there shall be but one constable. At the close of plaintiff's case a motion for non-suit was made, whereupon the complaint was amended by stating that "upon nearly all the ballots so cast in said township at said election two candidates were voted for for the office of constable for said township, and that all such ballots, together with those upon which but one candidate was voted for, for the office of constable, were regularly counted and return made of the contents thereof to the board of supervisors." *Held*, that such amendment did not change the cause of action and was properly allowed.

2. OFFICERS—ACTION FOR RECOVERY OF OFFICE—COMPLAINT.

A complaint, in an action to oust certain persons from office, showing that two of defendants had been declared elected to one office and had received certificates and qualified, and that both were performing the duties thereof and were usurpers and intruders, and averring that one received the highest number of votes, but not stating which received the highest number of legal votes, was sufficient, in the absence of a demurrer.

3. SAME—RIGHT TO ELECT—EVIDENCE OF POPULATION.

Where the right of a township to elect two persons to a certain office depended upon the population of the township at the time of the election, the census taken some months afterwards was inadmissible.

4. APPEAL—REVIEW—FINDINGS NOT NECESSARY TO DECISION.

Where a finding of the lower court, supported by the evidence, is ample to sustain the judgment, it becomes immaterial whether other findings stand or fall, and the sufficiency of the evidence to support such other findings will not be reviewed.

5. ELECTIONS—CERTIFICATE OF ELECTION AS PRESUMPTIVE EVIDENCE OF RIGHT.

The rule that a certificate of election, issued by the proper authority, is *prima facie* or presumptive evidence of right to the office, cannot apply where two certificates were issued to two persons for the same office.

6. SAME—RECORD OF RETURNS OVERCOME BY EXTRINSIC EVIDENCE.

Pol. Code, § 1282, provides for the record of the returns of elections by the board of supervisors. Code Civ. Proc. §§ 1920, 1926, provide that entries in public or official books or records in the course of official duty are *prima facie*

evidence of the facts stated therein. *Held* that, although the record of the board showed the number of votes cast for each candidate for a certain office and that one of them received the highest number of votes, such evidence was overcome by other undisputed evidence showing that the number of registered voters in the township and the number of ballots cast at the election were greatly less than the number of votes counted and shown by the record.

7. SAME—ILLEGAL VOTES—DESTRUCTION OF BALLOTS.

In an action to oust certain persons from an office, it appeared that the election and the issuance of certificates to defendants were on the theory that two candidates were to be elected to the office. Election officers from different precincts testified that nearly all the voters marked their ballots for two candidates, and that all such ballots were counted for two. None of them pretended to say how many ballots were cast for only one candidate. The ballots had been destroyed, and there was no method of determining that the name of the candidate having the highest number of votes did not appear on the illegal ballots. *Held*, that the whole vote must be rejected.

8. EVIDENCE—CHARACTER OF SECONDARY EVIDENCE OF CONTENTS OF BALLOT.

Where the ballots cast at an election had been destroyed before trial of an action to oust certain persons from office, evidence of the election officers that nearly all of the ballots were marked for two candidates was the best in degree that existed.

9. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of testimony of election officers that nearly all of the voters marked their ballots for two candidates, even if erroneous, was harmless, where it was shown from records and other evidence that the number of votes counted greatly exceeded the number of ballots cast.

10. OFFICERS—RIGHT TO ELECT DEPENDENT ON POPULATION—CENSUS AS EVIDENCE.

Where the right to elect certain officers in a township depended upon the population, it was proper to admit evidence touching the population as shown by the last federal and state census preceding the election.

11. SAME—ELECTION PROCLAMATION.

The election proclamation issued by the board of supervisors cannot be considered as any evidence that the population of a township was more than 6,000.

12. OFFICES—ACTION FOR RECOVERY OF OFFICE—LIMITATIONS APPLICABLE.

An action to oust certain persons from office on the ground that their election was illegal is not barred until four years, under Code Civ. Proc. § 343, providing that actions for relief not hereinbefore provided for shall be commenced within four years after the cause of action shall have accrued.

On Rehearing.

13. ELECTIONS—ILLEGAL BALLOTS—EFFECT.

In an action to oust defendants from the office of constable, it appeared that the canvassing board counted 447 more votes than there were ballots cast; the election having been conducted on the theory that two candidates were to be elected to such office, and nearly all the ballots being marked for two candidates. This number was greater than any one candidate received. *Held* sufficient to show that the illegal ballots were sufficient in number to make a difference in the result of the election.

14. SAME—SUFFICIENCY OF EVIDENCE AS TO DIFFERENT PRECINCTS.

In an action to oust defendants from the office of constable, it appeared that the election and the issuance of certificates to defend-

ants were on the erroneous theory that two candidates were to be elected. Election officers from certain precincts testified that nearly all the voters in such precincts marked their ballots for two candidates, and that all such ballots were counted for two; but there was no direct testimony that this was the case in four precincts. Held sufficient to indicate that the conduct of the election was substantially the same in all precincts, and to overcome the presumption that the election was legally conducted in these four precincts.

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by the people, on relation of W. B. Hardacre, against H. L. Davidson and others. From a judgment for plaintiff, defendants H. L. Davidson and Frank Peters appeal. Affirmed.

Rehearing denied by Supreme Court, December 26, 1905.

Ashley & Neumiller, for appellants. U. S. Webb and C. W. Norton, for respondents. C. H. Fairall, for defendant Hersom.

McLAUGHLIN, J. We have this day affirmed the judgment in this action as to defendant Hersom. See 83 Pac. 159. The present appeal is by the other defendants, on grounds not presented or considered on Hersom's appeal. Here, as there, it is conceded that under section 56 of the county government act, as amended in 1901 (St. 1901, p. 685, c. 234), but one constable could legally be elected at the general election held November 4, 1902, if the evidence shows that the population was less than 6,000 at that time. The complaint, in addition to facts considered on the former appeal, contained the following averments vital to this decision: "That at said election so held on said day defendant H. L. Davidson received the highest number of votes cast for constable of said O'Neal township, in the county of San Joaquin, state of California, and defendant Frank Peters received the next highest number of votes cast for constable of said township, *but on information and belief plaintiff alleges that upon nearly all the ballots so cast in said O'Neal township, at said election, two candidates were voted for for the office of constable for said township, and that all such ballots, together with those upon which but one candidate was voted for for the office of constable, were regularly counted and return made of the contents thereof to the board of supervisors of said San Joaquin county*"; that the board of supervisors duly and regularly canvassed the returns of said election, and thereupon regularly issued to said defendants H. L. Davidson and Frank Peters certificates of election as constables of said township; that said Peters and said Davidson duly qualified, and on January 5, 1903, usurped, intruded into, and unlawfully exercised and held, and still pretend and claim to exercise and hold, such office of constable. Judgment was entered ousting appellants, and from such judgment and the

order denying their motion for a new trial, they appeal.

At the close of plaintiff's case a motion for a nonsuit was made, and thereupon the complaint was amended by inserting the language above italicized. Appellants objected to such amendment, at that stage of the case, as tending to make a material difference in the status of and issues in the case. The amendment did not change the cause of action, and the objection interposed was properly overruled. *Lee v. Murphy*, 119 Cal. 367, 51 Pac. 549, 955. It is urged that the complaint states no cause of action. It appearing therefrom that two persons had been declared elected to one office, and had received certificates and qualified, and that both were performing the duties thereof, and were usurpers and intruders, the mere averment that one received the highest number of votes, without stating which received the highest number of legal votes, might be ground for a special demurrer for ambiguity or uncertainty, but, in the absence of such demurrer, the complaint was sufficient. *Treanor v. Williams*, 145 Cal. 318, 78 Pac. 884; *People v. Woodbury*, 14 Cal. 46; *People v. Reclamation Dist. 136*, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085; *People v. Clayton*, 4 Utah, 473, 11 Pac. 213.

It is next claimed that the evidence is insufficient to sustain the findings. We think the evidence sufficient to support the finding that at the time the election was held the township contained a population of less than 6,000 persons. The census taken some months afterward could have no bearing on this issue, and the other enumerations sustain the finding. This finding being ample to sustain the judgment in this regard, it is immaterial whether the other finding as to the specific number of inhabitants stands or falls. *Hayden v. Collins* (Cal. App.) 81 Pac. 1120; *Costa v. Silva*, 127 Cal. 354, 59 Pac. 695; *Clavey v. Lord*, 87 Cal. 421, 25 Pac. 493. And this rule renders immaterial other findings assailed but not specifically mentioned in this opinion. The vital question in the case is presented by the contention that the findings adverse to the right of appellants to hold such office are not supported by the evidence, and that the facts so found do not support the conclusions of law and judgment. The only way to prove the right or absence of right to occupy a public office is to present facts upon which a claim of right to hold such office depends. The only evidence pertinent to such claim must relate to election, appointment, or the right to hold over after the expiration of the term. The appellants do not pretend to claim as appointees, and we have this day held that under the peculiar circumstances of this case neither of the occupants under the old system could hold over. *People v. Hersom*, supra. This boils our inquiry down to the single question of election. It must be conceded at the outset that but one person

could be legally elected to or hold the office of constable of O'Neal township, and it has been held that, as far as the proclamation is concerned, the election was valid as to such office. *Sanches v. Fordyce*, 141 Cal. 490, 75 Pac. 56. It is claimed, however, that a certificate of election issued by the proper authority is *prima facie* or presumptive evidence of such right. This is the rule in ordinary cases. But in the case at bar certificates were issued to two persons for the same office, and manifestly the presumption invoked cannot apply to both. It cannot be presumed that one of these certificates was properly, and the other improperly, issued, especially when it appears that both were issued advisedly and at the same time. Under such circumstances the presumption fails by reason of the inherent uncertainty and inconsistency of the action of the board of supervisors and its ministerial officer. The record of the board is invoked as proving that one of the appellants was elected and that the certificate was properly and legally issued to him. Such record contains a detailed statement of the vote in each precinct, and a summary of the vote in the district as follows: H. L. Davidson, 421 votes; Frank Peters, 812; J. B. Blankenship, 282; W. O. Looper, 300. Immediately following the tabulated statement of the vote was this official declaration of election: "On motion, duly carried, and in accordance with section 1236 of the Political Code of the state of California, the following-named persons, having received the highest number of votes for the offices for which they were candidates, were duly elected as follows: For constable in O'Neal township, H. L. Davidson; for constable in O'Neal township, Frank Peters." As but one person could legally be elected to the office, it is apparent that uncertainty and inconsistency again forbid any presumption in favor of either of the persons so declared elected. The tabulated statement, however, shows the number of votes cast for each candidate, and it is insisted that, as appellant Davidson received the highest number of votes, this record establishes his right to the office. Standing alone, the record would unquestionably have that effect. But it must be borne in mind that such records are only *prima facie* evidence of the facts recited. Code Civ. Proc. §§ 1920-1926; Pol. Code, § 1282 et seq.; *Merkley v. Trainor*, 142 Cal. 265, 75 Pac. 656. And other evidence in the record absolutely overthrows the *prima facie* effect of such record. Computation, based on the tabulated statement, shows that 1,315 votes were counted for said office by the canvassing board. The uncontradicted evidence of the county clerk proves that the number of registered voters in said township was 1003, and the number of ballots cast at said election, 868. It is thus made manifest that the board counted 457 more votes than were cast, and 512 more than the number of registered voters in the township. This again

sets us adrift on the sea of uncertainty, for there is nothing in the record of the board, or in the evidence, to warrant a conclusion as to the number of legal votes cast for either of the candidates named. The tabulated statement, thus impeached, becomes as impotent to prove the election of any one as the certificates and declaration of election just considered. Then, too, such extrinsic evidence not only overcomes the *prima facie* effect of the statement, but it shows that the basis of the certificates and declaration is absolutely unreliable and illegal. *Russell v. McDowell*, 83 Cal. 79, 23 Pac. 183.

The determination of a canvassing board, though ordinarily accepted as *prima facie* evidence of facts recited, fails to be evidence of any fact, when the presumption attaching to official records is destroyed by showing that illegality, uncertainty, and inconsistency, incapable of explanation, permeate and taint every proceeding as shown by such record. The right of any public official claiming to hold by election in such a proceeding as this rests primarily on evidence contained in public records we have mentioned; and, when it is shown that such claim has no foundation in these records, it follows as a necessary corollary that the claim falls with the foundation on which it must rest, and that, *prima facie*, the absence of any right to occupy the office is established. In other words, when this record, provided by law for such purpose, failed to show the election of either of the appellants, the contrary presumption arose, and, in the absence of other evidence sustaining their claim, this alone would justify the findings, conclusion, and judgment here assailed. It is said that the course pursued in *Russell v. McDowell*, supra, should have been followed by the learned judges of the trial court. But we do not see how this could be done without indulging in the wildest kind of guesswork. If this record presented the single fact that a definite number of illegal votes were counted, the novel method approved in that case might justly have been adopted. There, however, the court had seen and counted the ballots and knew exactly how many illegal votes had been cast. Here the ballots had been destroyed before the trial of the cause, and the court could not ascertain how many illegal ballots there were. It appears from the facts admitted and proved that the whole election, from proclamation to declaration of the result, and issuance of the certificates, was conducted on the theory that two candidates were to be elected in that township. Election officers from the different precincts testified that nearly all of the voters marked their ballots for two candidates, and that all such ballots were counted for two. But none of them pretended to say how many ballots were cast for only one candidate. The difference between this case and the case

cited is thus made apparent. There but one name appeared on each illegal ballot, and a pro rata deduction furnished a novel, and perhaps good, way out of a dilemma. There such method was at least harmless. Here two names appeared on every illegal ballot, and the number of "single shots," as counsel for appellant aptly styles the legal ballots cast, is unknown. It is not at all improbable that the names of the candidates having the highest number of votes appeared on every illegal ballot cast, and it is not impossible that the candidate having the lowest number may have received every legal vote. It will thus be seen that the trial court could have no definite starting point or basis to justify a pro rata deduction of illegal, or an apportionment of legal, votes. The only course, then, was to follow the other method suggested in *Russell v. McDowell*, at page 73 of 83 Cal., and page 184 of 23 Pac., and reject the whole vote.

It is said that the court erred in admitting the evidence of the election officers. The ballots having been destroyed, such evidence was the best in degree, and we can find no rule of law, nor can we think of any rule of public policy, forbidding such testimony. Be that as it may, however, in the absence of such testimony, the adverse presumption arising from the records, and testimony showing the general manner of conducting the election, and large number of votes counted as compared with the number of ballots cast, would defeat appellants' claims, and hence such testimony was harmless, even if it was all erroneously admitted. *Russell v. McDowell*, 83 Cal. 75, 77, 79, 23 Pac. 183; *McPhail v. Buell*, 87 Cal. 115, 25 Pac. 266; *Clavey v. Lord*, and cases cited *supra*. There was no error in admitting evidence touching the population as shown by the federal census and census taken in 1897.

The election proclamation issued by the board of supervisors cannot be considered as conclusive or any evidence that the population of the township was more than 6,000. The action was not barred by the statute of limitations. Code Civ. Proc. §§ 343-345.

The other rulings complained of were either correct, or, if erroneous, were harmless.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

On Rehearing.

McLAUGHLIN, J. A careful examination of the record, in the light of the petition for rehearing and recent decisions therein cited, has not shaken our confidence in the conclusion voiced in the decision filed herein. The cases of *People ex rel. Russell v. Town of Loyalton*, 82 Pac. 620, and *People ex rel. Martin v. Worswick*, 142 Cal. 76, 75 Pac. 663,

as far as applicable to the case at bar, simply lay down the rule that the burden is on the plaintiff to show that the illegal ballots were sufficient in number to make a difference in the result if deducted. We have never doubted either the existence or wisdom of this rule, nor do we question any of the rules laid down in cases of like character cited and examined. But the facts in the case at bar are very different from the facts in any case we have been able to find. In other cases the number of legal and illegal votes was ascertained, and there was some definite or certain basis for presumption or calculation. But in the case at bar there is nothing upon which the doctrine of probability, which always underlies a presumption, can rest. The certificates of election, standing alone, destroy each other, while the statement upon which such certificates must rest is impeached by proof that the canvassing board counted 447 more votes than there were ballots cast. This is more votes than any one candidate received altogether, and it needs only this statement to show that the illegal votes were sufficient in number to make a very great difference if deducted. It is conceded that the election officers proceeded upon the theory that two candidates were to be elected, and most of the ballots cast contained two names. There is nothing to show that any candidate received a single legal vote, and the evidence clearly shows that legal ballots were exceptions and illegal ballots were the rule.

It is said that there is no evidence showing that this was the case in four precincts. We inadvertently stated in the former opinion that officers of each precinct gave testimony to that effect. This was a mistake as to the four precincts referred to. But we think the general course pursued and the general theory upon which the election proceeded is sufficient to indicate that the conduct of the election was substantially the same in all precincts. Counsel say we should have indulged the presumption that the election was legally conducted in these four precincts, and hence have found for Davidson. But an examination of this question has demonstrated the dangerous uncertainty which would attend guesswork under such circumstances. If the votes cast in these four precincts were counted as tallied in the statement of the vote, a minority candidate, Peters, would have a majority of the votes. We think it sufficiently appears that neither of the claimants has a right to the office. Such rights depend on the records provided by law, and when it is shown that such records do not sustain a claim to public office, and are utterly unreliable, the claim falls. *Gibson v. Twaddle* (Cal.) 81 Pac. 727, has no application to cases of this character.

The rehearing is denied.

We concur: CHIPMAN, P. J.; BUCKLES, J.

2 Cal. App. 109

PEOPLE ex rel. HARDACRE v. REA et al.
(Court of Appeal, Third District, California.
Oct. 27, 1905.)

1. APPEAL—REVIEW—ERROR AFFECTING ONLY CO-PARTY.

Although Code Civ. Proc. § 808, provides that, when several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons in order to try their respective rights to such office or franchise, still on appeal the judgment must be considered several as to each defendant who appeals, and errors not prejudicing appellants cannot be considered.

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by the people of the state of California, on the complaint of W. B. Hardacre, against Samuel Rea and others. From a judgment against defendants Samuel Rea and L. E. Alling, they appeal. Affirmed.

Rehearing denied by Court of Appeal November 25, 1905; by Supreme Court December 20, 1905.

Ashley & Neumiller, for appellants. U. S. Webb and C. W. Norton, for respondents. Nicol & Orr, for defendant Town.

McLAUGHLIN, J. This is an action to oust defendant from the office of justice of the peace of O'Neal township, in San Joaquin county. The court rendered judgment ousting defendants Rea and Alling, and declaring that defendant Town was entitled to the office. From such judgment and an order denying their motion for a new trial, defendants Rea and Alling prosecute this appeal.

The court found that defendant Town and one Harelson were duly qualified justices of the peace for said township for the term ending January 5, 1903, that said Harelson died December 10, 1901, and that no successor was thereafter elected or appointed to fill the position thus made vacant. As conclusion of law it was found that defendant Town was entitled to hold over under section 879 of the Political Code. Aside from the office involved, this finding and conclusion constitute the only difference between this case and the case of People ex rel. Hardacre v. Davidson and Peters, Appellants (No. 108, this day decided) 83 Pac. 161. On the authority of that case it must here be held that neither of the appellants is entitled to hold said office.

The only question remaining is whether this court is bound to consider or determine the right of defendant Town to hold said office upon this appeal. The appellants do not assail the sufficiency of the evidence to support the finding, nor do they specify any errors in the admission of such evidence. The only assault made on the conclusion of law and judgment is that involved in the affirmative assertion of their right to hold such office. In fact, counsel for appellants, in their brief, admit that, if neither of their clients be held elected to such office, it can

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make no difference to either of them whether defendant Town is or is not entitled to hold the office. The relator has not appealed, and we do not see that the appellants are interested in the question. So far as they are concerned, the object of the action "is to determine their right to hold the office which they are charged with usurping." Whether the defendant Town is entitled to the office, or whether in the controversy between the relator and said defendant the court committed any error, is a matter which does not concern the appellants, and upon which they are not entitled to be heard.

Under the authorities we do not think it is either the privilege or duty of this court to consider errors relating to that portion of the judgment in favor of defendant Town. Code Civ. Proc. § 475; People v. Abbott, 16 Cal. 366; People v. Campbell, 138 Cal. 17, 70 Pac. 918; People v. Flemming, 100 Cal. 541, 35 Pac. 163, 38 Am. St. Rep. 310; People v. Superior Court, 114 Cal. 478, 46 Pac. 383; March v. Barnett, 114 Cal. 375, 46 Pac. 152; Coyle v. Lamb, 123 Cal. 264, 55 Pac. 901; McCreery v. Everding, 44 Cal. 285; McDonald v. Taylor, 89 Cal. 45, 26 Pac. 595; Tripp v. Duane, 74 Cal. 91, 15 Pac. 439; Ball v. Nichols, 73 Cal. 195, 14 Pac. 831; Western Lumber Company v. Phillips, 94 Cal. 56, 29 Pac. 328; Dougherty v. Henarle, 47 Cal. 9; Smith v. Hawkins, 127 Cal. 121, 59 Pac. 295. While all claimants and intruders may be made parties to an action of this character, still, on appeal, the judgment will be considered several as to each, and errors not prejudicing appellants cannot be considered. Code Civ. Proc. § 808. It must be admitted that the result is somewhat anomalous, when considered in the light of the decisions in the cases of People v. Davidson et al. (Nos. 104 and 108) 83 Pac. 159, 161, but rules of appellate practice so well established cannot be abrogated by this court.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

2 Cal. App. 65

MOONEY v. BOARD OF SUP'RS OF TULARE COUNTY.

(Court of Appeal, Second District, California.
Oct. 25, 1905.)

1. SCHOOLS AND SCHOOL DISTRICTS—HIGH SCHOOLS—OUTLYING TERRITORY—ATTACHMENT—BOARD OF SUPERVISORS—POWERS.

Under the constitutional provision prohibiting taxation without representation, the Legislature has no power to confer on the board of supervisors power to admit territory lying entirely without the boundaries of a municipality to a city high school district generally with the consequent burden of taxation on such outlying territory which might be imposed by the municipality of which it was not a part.

2. SAME—STATUTES—CONSTRUCTION.

Pol. Code, § 1670, subd. 22, provides that any school district adjacent to a high school

or joint union school district in the same or in an adjoining county may be admitted to the high school district, by action of the board of supervisors of the county in which the school district is located, on such terms as may be agreed on whenever a majority of the heads of families petition for such annexation, accompanied by a petition signed by a majority of the members of the high school board, etc. *Held*, that such section should be construed as authorizing merely a qualified admission of children residing in a school district adjoining a high school district on terms, where the general admission or annexation of territory was not permissible.

3. SAME—AGREEMENT—CONSTRUCTION.

Pol. Code, § 1670, subd. 22, provides for the qualified admission of an adjacent district school to an adjoining high school district on terms, and declares that thereafter the district shall be known as a joint union school district. *Held*, that where by an agreement pupils of the L. school district were admitted to the T. high school district, but pupils not residing within the latter were not permitted to attend the high school, except on payment of a tuition fixed by the high school board, the term "T. High School District" should not be construed as designating a new district; there having been no intention of the board of supervisors to unionize the two districts generally.

4. SAME—BOARD OF SUPERVISORS—ACTS—CONCLUSIVENESS.

Under Pol. Code, § 1670, subd. 22, authorizing the board of supervisors on petition to authorize the admission of a school district to an adjoining high school district on terms, a finding of facts necessary to the exercise of the board's jurisdiction on a petition under such section was conclusive.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Hugh M. Mooney against the board of supervisors of Tulare county. From a judgment for plaintiff, defendant appeals. Reversed.

D. McFadzean, J. W. Davis, and C. L. Russell, for appellants. Hannah & Miller and Maurice E. Power (Garber, Creswell & Garber and Sullivan & Sullivan, of counsel), for respondent.

ALLEN, J. The plaintiff obtained a writ of review from the superior court of Tulare county for the purpose of annulling an order of the supervisors of said county directing that Liberty school district shall become, and ordering the same to be made, a part of the Tulare high school district for high school purposes. Upon a return to the writ and a hearing thereon, the court rendered its judgment, annulling such order and all proceedings thereunder. From this judgment the respondents to the writ have appealed.

The return to the writ, which comprises the record before the board, shows that, upon presentation of a petition signed by certain of the heads of families in Liberty school district, the trustees of such school district and the trustees of the Tulare high school district joined in a petition to the board of supervisors of Tulare county, praying that Liberty school district be admitted to the Tulare city high school district, upon

certain terms theretofore agreed upon between the boards of trustees; that upon the hearing of such petition the board of supervisors found that the signatures to the petition signed by the heads of families were sufficient in number, that the terms agreed upon were proper and reasonable, that the districts were adjacent, and made the order above referred to. These proceedings before the board of supervisors were instituted under, and the authority for the order based upon, subdivision 22 of section 1670, Pol. Code, which provides: "Any school district adjacent to a high school, union, or joint union high school district in the same or in an adjoining county, may be admitted to said high school district by action of the board of supervisors of the county in which the school district is located, upon such terms as may be agreed upon between the trustees of the school district seeking admission and the high school board, whenever a majority of the heads of families, as shown by the last preceding school census, shall present to said board of supervisors a petition for such annexation, accompanied by a petition signed by a majority of the members composing the high school board of the district to which the admission is desired. * * * All the provisions relative to the levy and collection of tax necessary to maintain a union high school district, shall apply to the levy and collection of the tax required for a joint union school district, as in this section provided."

The paramount question involved upon this appeal relates to the extent of power, if any, conferred by such subdivision upon the board of supervisors in relation to the admission for high school purposes to a city high school of an adjacent school district lying entirely without the municipality. If the object and intent of the act is to admit generally, with the consequent burden of taxation upon the outlying territory which might be imposed by the municipality, of which it was not a part, and in the election of whose taxing or administrative officers it had no voice or share, we should have no hesitancy in determining that it would be in violation of the cardinal principle that "there shall be no taxation without representation"; and when we consider that portion of subdivision 22 in relation to the taxing power in the district created as being conferred upon those who levy taxes for union high schools, namely, the board of supervisors, we are impressed with the opinion that the Legislature never sought by this act to repeal those provisions of the municipal corporation act which conferred upon the legislative body of the municipality the power to levy taxes for all municipal purposes, of which the support and maintenance of the schools is a part. *Board of Education v. Board of Trustees*, 129 Cal. 600, 62 Pac. 173. Again, the subdivision refers to terms of admission to be

agreed upon. This is inconsistent with the idea of a general admission to the extent of its incorporation into the body of the city high school; for, if such incorporation were possible, the maintenance and support of the school district, and each and every part thereof, would be borne by all alike and properly within the district taxed as provided by section 1, art. 13, of the Constitution, and the corresponding benefits would, of necessity, extend to all within the territory so taxed. That this act shall have effect, therefore, it must be construed as providing for a qualified admission in cases where a general admission is not permissible, and that the Legislature was seeking to provide for the general admission of all children within a district entitled by reason of scholarship to high school training upon such terms as might be proper, supplementing those provisions of the school law, where in individual instances the board of trustees was authorized to admit children outside the high school district. Viewing the subdivision in this light, no reason is apparent why the power of admission upon terms should not be exercised. Looking into the return again, we find that by the agreement entered into between the Liberty school district and the Tulare high school district scholars in the eighth grade were to be admitted into the grammar school without tuition; that no pupil residing outside of the Tulare high school district should be permitted to attend said high school as a pupil, except upon payment in advance of the monthly tuition fee to be fixed by the high school board, nor even then, if their attendance for any cause was detrimental to the interests of the school.

Nor can we say that the term "Tulare High School District," employed in the agreement, had reference to such district after the admission therein of the adjacent district; for subdivision 22 designates such new district as a joint union school district. These conditions so agreed upon and incorporated in the order of admission by the board of supervisors negative any intention of general admission of Liberty high school district into the body of the city high school, or of assuming any taxing power by the city over the outlying district. Whatever may have been the intent, however, no power reposed in the supervisors to admit generally to the city high school such outlying territory in any manner other than upon terms equitable and just, which did not involve power of taxation. As we construe the act, it is eminently fair and confers a proper and constitutional power upon the board of supervisors; and their order of admission, while general in its terms, is shown to have been based upon an agreement, and such agreement forms a part of the order whereby pupils in Liberty school district are entitled to privileges of the city districts upon compliance with the terms of admission. The

petitions filed conferred upon the board of supervisors jurisdiction to act, to hear and determine the questions involved, and whatever facts it was necessary to find as prerequisite to the order were found in the exercise of their jurisdiction, and when so found are conclusive. *People v. Town of Loyalton* (Cal.) 82 Pac. 620.

Under this view of the case, the plaintiff is not shown to be injured or affected by the order in any respect. In his petition for the writ it is alleged that grievous and burdensome taxes will be imposed upon plaintiff's land lying outside the municipality for the support of the city high school. It is sufficient to say that, if such attempt be made by the city authorities to levy and collect taxes upon lands outside the Tulare high school district, then, and not until then, may plaintiff be heard in relation thereto. Entertaining the views hereinbefore expressed, it is unnecessary to consider or determine the many other interesting questions argued by counsel in their very well-considered briefs.

The judgment and order of the superior court are reversed, and the cause remanded, with directions to dismiss the writ.

We concur: GRAY, P. J.; SMITH, J.

2 Cal. App. 153

In re SMITH, Judge.

(Court of Appeal, First District, California.
Nov. 10, 1905.)

1. COURTS—JUDGMENT OF APPELLATE COURT—FINALITY—TRANSFER OF CAUSE.

Const. art. 6, § 4, provides that the Supreme Court shall have power to order any cause pending therein to be heard by a District Court of Appeal, and to order any cause pending before a District Court of Appeal to be heard by the Supreme Court, before judgment has been pronounced by a District Court of Appeal, or within 30 days after such judgment shall have become final therein, which judgment shall become final on the expiration of 30 days after the same shall have been pronounced. *Held*, that a judgment of a District Court of Appeal was not conclusive, nor was its opinion a conclusive declaration of the law applicable to the case, until 30 days had expired after its judgment was pronounced.

2. SAME—CONSTITUTION—CONSTRUCTION.

Const. art. 6, § 4, authorizes the Supreme Court to order the hearing and determination of any cause pending in a District Court of Appeal by the Supreme Court, within 30 days after the judgment of the District Court of Appeal shall become final, on the expiration of 30 days after the same shall have been pronounced. *Held*, that the provision that the judgment of the appellate court shall become "final therein" on the expiration of 30 days did not render such judgments conclusive at that date of the rights of the parties, but merely deprived the District Court of Appeal of any further power to set it aside or modify it; the Supreme Court being still entitled, within 30 days after the judgment became final, to order the cause to be heard and determine the same itself.

3. SAME—SUPREME COURT RULES—CONSTRUCTION—REMITTITUR.

The word "remittitur," used in Supreme Court rule 34 (78 Pac. xiii), providing that,

when a judgment of a District Court of Appeal becomes final therein, the remittitur shall not be issued until after the lapse of 30 days thereafter, unless otherwise ordered, designates the judgment of the appellate tribunal which is authenticated to the court from which the appeal is taken, and corresponds to "mandate," used in the practice of the United States Supreme Court.

4. SAME—APPLICATION.

Supreme Court rule 34 (78 Pac. xiii), providing that, when a judgment of a District Court of Appeal becomes final therein, the remittitur shall not be issued until 30 days thereafter, applies to all judgments of the Supreme Court and of the District Court of Appeal, whether rendered in the exercise of their appellate or original jurisdiction.

5. SAME—REHEARING—POWER TO GRANT.

The authority of the Supreme Court to provide for a rehearing in a case where it has pronounced judgment, and to stay the issuance of a remittitur until its decision on a petition for rehearing, exists, though the Constitution contains no provision therefor.

6. MANDAMUS—ACTS OF JUDGES—STAY OF PROCEEDINGS.

Where a trial judge was directed by mandamus to forthwith secure the services of some other judge to preside at the trial of a certain cause, and to hear all proceedings therein or show cause before the Supreme Court on a specified date why he should not do so, the writ operated as a stay of all action on his part until the rendition of the judgment of the Supreme Court and the entry of the remittitur on such judgment in the superior court.

7. SAME—VIOLATION—CONTEMPT.

Mandamus was issued directing a trial judge forthwith to secure the services of another judge to hear all proceedings in a certain action or show cause before the Supreme Court on June 26, 1905, why he should not do so. On the return day he appeared and made return of his reasons for not obeying the writ, and on August 12th the opinion denying the petitioner's application for mandamus was filed. On August 25th, before remittitur had been filed in the superior court, the judge made an order that certain motions pending in the cause be set for hearing before him on August 29th, and announced that he would hear and determine the same. *Held*, that such order constituted a technical contempt.

Petition against Lucas F. Smith, judge of the superior court of Santa Cruz county, for contempt of the Supreme Court. Citation and order to show cause discharged.

Rehearing denied December 9, 1905.

D. M. Delmas and Wm. M. Aydelotte, for petitioner. Joseph H. Skirm, Chas. M. Cassin, and Benj. K. Knight, Dist. Atty., for respondent.

HARRISON, P. J. The respondent is the judge of the superior court for the county of Santa Cruz, and in an action pending in said court, wherein Elizabeth A. Noel is plaintiff and Theophilus Noel is defendant, the latter filed an affidavit to the effect that he could not have a fair and impartial trial of the cause or hearing of any motion therein before the respondent by reason of his bias and prejudice, and for that reason moved the court to secure the services of some other judge to act in his stead. This motion was denied by

the respondent, and thereupon, upon the application of the said defendant, this court issued a writ of mandate, directed to the respondent, commanding him that immediately after the receipt of said writ he do "forthwith secure the services of some judge of another court to preside at the trial of said cause and of all proceedings therein," or that he show cause before this court on June 26, 1905, why he should not do so. The writ was served upon the respondent June 2d, but he did not in any respect comply with its terms, and on the 26th day of June he appeared before this court and presented his reasons for not obeying the writ. After argument thereon the matter was submitted for decision and taken under advisement by the court, and on August 12th this court filed its opinion, holding that the petitioner for the writ of mandate was not entitled thereto, and denied his application therefor. On August 25th the respondent made an order in the superior court aforesaid that certain motions still pending in said court in the case of Noel v. Noel be set down for hearing before him on the 29th of August, and announced that he would then hear and dispose of the same. Upon presenting an affidavit of these facts this court, upon the motion of the defendant in said action of Noel v. Noel, issued a citation to the respondent, directing him to appear before it on September 11th to show cause why he should not be punished for contempt. On that day he appeared, and, in answer to the citation and in defense of his action, relied upon the opinion and judgment of the court rendered as aforesaid on August 12th.

Article 6, § 4, of the Constitution of this state declares: "The Supreme Court shall have power to order any cause pending before the Supreme Court to be heard and determined by a District Court of Appeal, and to order any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court. The order last mentioned must be made before judgment has been pronounced by a District Court of Appeal, or within thirty days after such judgment shall become final therein. Judgments of the District Courts of Appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced." By virtue of the last sentence thus quoted from the Constitution the judgment of a District Court of Appeal is not conclusive upon the rights or obligations of the parties to any cause or proceeding submitted for its decision, until the expiration of 30 days after such judgment is pronounced; and during that time the opinion which the court may give as the grounds of its decision does not become a conclusive declaration of the law applicable thereto, but may be changed, modified, or set aside (see *Broder v. Superior Court*, 103 Cal. 121, 87 Pac. 143), and consequently cannot be invoked in any other tribunal as evidence of those rights or obliga-

tions. Neither is the provision that the judgment of said court shall become "final therein" upon the expiration of 30 days to be construed as rendering such judgment conclusive at that date of the rights of the parties. The effect of this clause is to take from the District Court of Appeal any further power to set aside or modify its judgment; but, under the preceding sentence of the section quoted above, the Supreme Court, at any time within 30 days after the judgment shall have become "final therein," may still order the cause to be heard and determined by itself. Such an order will have the effect to set aside and vacate the judgment of the District Court of Appeal, and with it the value, as an authority, of the opinion upon which the decision was rendered. For the purpose of carrying this provision of the Constitution into effect, and affording to litigants an opportunity to obtain the judgment of the Supreme Court in a cause decided by a District Court of Appeal, the Supreme Court has adopted the following rule, which, under the constitutional provision authorizing that court to adopt rules for the government of the District Courts of Appeal, is a measure of the rights of litigants in those courts, viz.: "Rule 34. When a judgment of a District Court of Appeal becomes final therein the remittitur shall not be issued until after the lapse of thirty days thereafter unless otherwise ordered." 78 Pac. xlii.

Formerly, when a writ of error was issued out of the House of Lords to the Court of King's Bench, the original record was itself taken to that body with the return upon the writ, and the judgment of the House of Lords was afterwards entered upon this record with the recital that it is sent back—remittitur—to be carried into effect by the Court of King's Bench. In the meantime, and until the remittitur was entered in the latter court, the judgment was not under the control of that court or capable of being enforced by it. A similar procedure has prevailed in many of the jurisdictions of this country, even where the appellant jurisdiction has been exercised by means of an appeal instead of by a writ of error. In this state, and in many other jurisdictions, the original record remains in the court from which the appeal is taken, and a transcript thereof is filed with the appellate court for its consideration. By reason of these changes in procedure and in the mode by which the appellate tribunal obtains jurisdiction to review the judgment of the lower court, and also by reason of the increased exercise of its appellate jurisdiction in modern days by controlling in advance the action of inferior courts, the word "remittitur" has received an additional meaning to that originally given to it; and, as used in the above rule, is the term employed to designate the judgment of the appellate tribunal which is authenticated to the court from which the ap-

peal is taken or over which its controlling jurisdiction is exercised, and corresponds to the "mandate" used in the practice of the United States Supreme Court. The rule itself is universal in its terms and applies to all judgments of the Supreme Court or of the District Courts of Appeal, whether rendered in the exercise of their appellate jurisdiction or by virtue of their original jurisdiction exercised for the control or direction of the action of the superior courts. The Constitution contains no provision authorizing the Supreme Court to grant a rehearing after a judgment has been rendered by it sitting in bank; but its authority to provide for a rehearing in a case where it has pronounced judgment, and to stay the issuance of a remittitur upon such judgment until after its decision upon a petition for rehearing, even where there is no constitutional provision on the subject, was very clearly and conclusively shown in the opinion of the Chief Justice in *Re Jessup*, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 6 L. R. A. 594. In that case the court, after rendering a judgment affirming the action of the lower court, granted a rehearing, and subsequently rendered a judgment reversing the order appealed from. Its power to do this was challenged by the losing party; but its action was held to have been authorized by virtue of the principle that "it is one of the inherent powers of every appellate court to revise, to modify and to correct its judgments so long as they are under its control"; that for the purpose of enabling it to exercise this power it may temporarily stay the issuance of a remittitur upon the judgment; that its jurisdiction over a case when once obtained continues until its remittitur is regularly issued; and that while a case remains within its jurisdiction it may grant a rehearing after a judgment has once been pronounced. In *Grangers' Bank v. Superior Court*, 101 Cal. 198, 35 Pac. 642, it was held that the same principle is applicable to judgments rendered by the Supreme Court in the exercise of its original jurisdiction as well as in the exercise of its appellate jurisdiction. It follows from the foregoing principles that, until the remittitur upon the aforesaid judgment given by this court on August 12th should be entered in the superior court for Santa Cruz county, the respondent was precluded from taking any judicial action in the aforesaid case of *Noel v. Noel*.

The suggestion made at the hearing herein that, inasmuch as no order had been made staying proceedings in the case of *Noel v. Noel* when the writ of mandate was issued, the respondent was at liberty to hear the motions, is not entitled to consideration. There were no proceedings in the cause to be stayed except such as would be taken in pursuance of an order of court made by the respondent; and the terms of the writ, wherein he was directed to "forthwith secure the services of some other judge of another county to pre-

side at the trial of said action and of all proceedings therein," are inconsistent with his retaining any authority to exercise judicial action in the case, and of themselves operated as a stay of all action by him therein. Permission was impliedly given him by the terms of the writ to delay a compliance with its directions until the return day thereof, and on that day to show cause, if any he had, why the writ should not be obeyed; but until this court should render its judgment that such cause had been shown and such judgment had become final the writ remained in full force; and, although a further delay in complying with its directions until the court should determine whether the cause shown by him was sufficient would be excusable, he was during all this time forbidden by the force of the writ from taking any affirmative action in disregard of its terms. It would not be contended for a moment that if, upon receipt of the writ in June, or at any time before the return day, the respondent had granted the motions then pending before him, or had himself entered upon the trial of the cause, such conduct would not have been in direct and flagrant violation of the writ and a contempt of the authority of this court. As above shown, however, such action would be equally in violation of the writ if taken at any time before the remittitur upon the judgment therein should be entered in the superior court. In this connection it is not inappropriate to observe, although it has no bearing upon the decision herein, that, after this court had rendered its aforesaid judgment and since the hearing upon this citation, the Supreme Court ordered the application for the mandate to be heard and determined by itself, thus vacating the judgment rendered by this court and leaving the writ of mandate with the same effect as when originally issued. It must be held, therefore, that in making the order of August 25th appointing a day for hearing the aforesaid motions in said cause of Noel v. Noel, and declaring that on that day he would personally hear and dispose of the same, the respondent acted in disregard of the writ of mandate and in violation of the order of this court. But while we are compelled to hold that in this violation of the order of the court the respondent was technically guilty of contempt, we are at the same time satisfied that his action was the result of an erroneous interpretation of the terms of the writ and of the law applicable thereto, made by him in good faith, and that his action was not taken by reason of any disrespect to this court or with any intention to disobey its order; and for these reasons we are not inclined to visit his action with any penalty by way of punishment.

The citation and order to show cause herein are discharged.

We concur: COOPER, J.; HALL, J.

2 Cal. App. 154

McCARTY v. WILSON.

(Court of Appeal, Third District, California.
Nov. 9, 1905.)

1. EXCEPTIONS, BILL OF—FILING—SERVICE—TIME—STATUTES.

The right of a party to an election contest to serve and file a bill of exceptions after an adverse judgment is granted by Code Civ. Proc. § 650, providing that a party desiring to have exceptions taken at the trial settled in a bill of exceptions must, within 10 days after the judgment and motion therefor, prepare and serve the draft of the bill, unless time for so doing is extended by the judge, or by stipulation of the opposing attorney, and not by section 649, declaring that a bill containing the exception to any decision may be presented for settlement at the time the decision is made, and, after having been settled, shall be signed by the judge and filed with the clerk, etc.

2. SAME—EXTENSION OF TIME—CONDITIONS—JURISDICTION.

The court has jurisdiction to make an order extending the time within which a party is entitled to serve and file his draft of a bill of exceptions conditional.

3. SAME—DISCRETION—EXERCISE.

Where, in an election contest, the Supreme Court, having before it the merits of the contest, had decided that contestant was elected to the office, and on the second trial contestee prevailed, and contestee failed to serve and file a draft of his bill of exceptions within the time required and the appeal might result in contestee holding the office until the close of the term, it was not an abuse of the trial court's discretion to make an order extending the time within which contestee's bill of exceptions could be served and filed conditioned on his surrendering the office to contestant pending appeal; contestant being required to give security to repay emoluments received in case contestee prevailed in the appeal.

Appeal from Superior Court, El Dorado County; H. D. Arnot, Judge.

Election contest by T. E. McCarty against S. B. Wilson. From an order extending the time within which defendant could file and serve his draft of a bill of exceptions on conditions specified, after an adverse judgment, he appeals. Affirmed.

William F. Bray and W. C. Burgess, for appellant. Charles A. Swisler and Abe Darlington, for respondent.

CHIPMAN, P. J. This cause is an election contest for the office of superintendent of schools for El Dorado county, arising at the election held November 4, 1902. At the first trial judgment went in favor of the contestee, who had been declared elected and to whom a certificate of election had been issued, but on appeal to the Supreme Court the judgment was, on February 23, 1905, reversed. 82 Pac. 243. At the second trial judgment went for contestant on June 12, 1905, annulling contestee's certificate of election and setting aside his election to said office. On June 17, 1905, contestant served and filed notice of entry of judgment, and contestee having failed to serve his draft of bill of exceptions within

10 days, and having failed to apply to the court or to counsel for contestant for an extension of time, contestee on July 1, 1905, applied to the court for relief under section 473, Code Civ. Proc. The court granted contestee's motion on the following condition: "The respondent [contestee] shall within 8 days let the contestant into the possession of the office in controversy, and permit the contestant to fully enjoy the emoluments thereof pending an appeal of this case to the District Court of Appeal and to the Supreme Court of the United States, should said last appeal be taken. Before surrendering said office, as here required, the contestant, McCarty shall give security to the respondent, Wilson that if said appeals, or either of them, are successful, that said contestant will pay to the respondent within 10 days after the coming down of the remittitur therein the same emoluments of the said office that the respondent would have been entitled to had he remained in said office during the time contestant shall have been in possession thereof, together with respondent's costs on appeal. If said appeals, or either of them, are unsuccessful respondent shall pay to the contestant contestant's costs on appeal, the respondent to give security to contestant for the payment of costs. If respondent shall fail within 8 days to do this, his motion for time to file and serve a bill of exception herein will be denied. Doing this he will be granted 10 days, and such additional time as may be necessary within which to file and serve his bill of exceptions." Contestee appeals from this order.

1. Appellant contends that the bill of exceptions was settled and filed within 30 days after notice of judgment, and hence the court erred in refusing to allow it. The contention is based upon the assumption, first, that the case falls under section 649, Code Civ. Proc., which prescribes no time within which the exception shall be settled, but that it may be settled within a reasonable time; and, second, that under section 650, Code Civ. Proc., the bill may be settled and filed at any time within 30 days. Appellant is clearly in error in this contention. The case falls under section 650, and that section requires that the party, who desires to have exceptions taken at the trial, settled in a bill of exceptions, must within 10 days after the entry of judgment and motion therefor, prepare and serve the draft of the bill, unless the time for so doing is extended by the judge or by stipulation of the opposing attorney. *Scott's Estate*, 128 Cal. 579, 61 Pac. 98; *In re Clary's Estate*, 112 Cal. 292, 44 Pac. 569.

2. The grounds for asking the court to relieve contestee from his neglect to comply with the statute amounts to little more than excusable forgetfulness or failure to observe the flight of time, arising out of occupation in

other cases. The facts are such as would ordinarily have justified the court either to grant or refuse the motion without such abuse of discretion in either case as would warrant reversal. The real point involved is whether the court abused its discretion in making its order conditional. Appellant claims that it is an unreasonable condition and that the order should, on this ground, be reversed. That the court had the power to make its order conditional we have no doubt. *Watson v. San Francisco*, etc., R. R. Co., 41 Cal. 21, *Youngman v. Tonner*, 82 Cal. 611, 23 Pac. 120, and *Douglass v. Todd*, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247, are instances where conditions have been imposed in granting relief under section 473, Code Civ. Proc.

Each case must be governed by its own facts and circumstances, which are seldom found to be the same in any two cases. In the present instance the Supreme Court had before it the merit of the controversy so far as the controverted ballots were concerned, and decided that contestant was elected to the office. At the second trial contestant prevailed and was declared entitled to the office, and contestee's certificate of office was annulled. There is nothing now before us on this motion to show that any question will be presented on the appeal from the judgment not already decided by the Supreme Court. Indeed, the present transcript does not show that an appeal has been taken from the judgment. Our records elsewhere show that such appeal has been taken, but that transcript is not referred to or made part of this appeal and cannot be looked to. For aught that appears the appeal from the judgment may be upon wholly insufficient grounds and may, through delay, result in contestee holding the office until the close of the term. Under such circumstances we cannot say that the court abused its discretion or imposed an unreasonable condition in requiring contestee to surrender the office to contestant pending the appeal; especially as the court required contestant to give security that he would repay to contestee whatever emoluments of the office contestant received should contestee prevail in his appeal.

It is claimed that the court did, in fact, settle the bill of exceptions. It does not so appear. The bill is not made part of this record nor does the indorsement of the judge thereon, if he made any, appear. Counsel for contestant state in their brief, and it is not denied, that the court certified the bill to be correct, but expressly refused to settle it because not filed and served within the statutory time, and because the contestee refused to comply with the conditions upon which the court ordered that the time, within which to file and serve the bill, would be extended. This statement accords with the order found in the record. This proceeding

would not have been initiated if the court had in fact settled the bill. The purpose of contestee's motion, as stated therein, is to obtain time in "which to prepare, file, and serve his said exceptions."

The order is affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

2 Cal. App. 165

MCDONALD v. CALIFORNIA TIMBER CO.
(Court of Appeal, First District, California.
Nov. 10, 1905.)

1. DISMISSAL AND NONSUIT—RIGHT TO DISMISS—STATUTES.

Code Civ. Proc. § 581, provides that an action may be dismissed by plaintiff by written request to the clerk at any time before trial on payment of costs, provided a counterclaim has not been made or affirmative relief asked. *Held*, that the provision requiring a written request filed with the clerk was neither mandatory nor exclusive, and that plaintiff was entitled to move for a dismissal in open court and for an order of dismissal, with the same effect as though made by an entry in the clerk's register.

2. SAME—EX PARTE PROCEEDINGS.

An application by plaintiff to dismiss his action is an ex parte proceeding, of which defendant is not entitled to either notice or hearing.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dismissal and Nonsuit, § 65.]

3. SAME — APPLICATION FOR CHANGE OF VENUE.

Under Code Civ. Proc. § 581, entitling the plaintiff to dismiss before trial on payment of costs, unless a counterclaim has been pleaded or affirmative relief asked, plaintiff was absolutely entitled to dismiss the action after the filing, but before the hearing, of defendant's application for a change of place of trial.

Appeal from Superior Court, Santa Cruz County, Lucas F. Smith, Judge.

Action by John R. McDonald against the California Timber Company. From an order denying a motion to change the place of trial, defendant appeals. Affirmed.

Charles B. Younger, Jr., for appellant.
Charles M. Cassin and Benjamin K. Knight, for respondent.

HARRISON, P. J. The plaintiff brought this action in the superior court of the county of Santa Cruz to recover damages from the defendant sustained by reason of a personal injury caused by the negligence of the defendant. September 12, 1903, the defendant filed and served a demurrer to the complaint, together with an affidavit of merits, and a demand in writing that the cause be transferred for trial to the city and county of San Francisco, and on the same day gave notice to the plaintiff that on September 21, 1903, it would move the court to change the place of trial to the city and county of San Francisco upon the grounds, set forth in the affidavits annexed to said notice of motion,

that the residence of the defendant is in that city and county by reason of that being the place designated in its articles of incorporation as its principal place of business, and that the injuries sustained by the plaintiff were not received in the county of Santa Cruz. September 19, 1903, upon motion of the plaintiff, the court made an order dismissing the action, and judgment thereon was rendered on September 21st. Upon the hearing of the motion to change the place of trial the court denied the same upon the ground that the action had been dismissed before the motion was brought on for hearing. From this order the defendant has appealed.

Section 581, Code Civ. Proc., declares that an action may be dismissed: "(1) By the plaintiff himself by written request to the clerk filed among the papers in the case at any time before trial upon payment of costs; provided a counterclaim has not been made or affirmative relief asked by the cross-complaint or answer of the defendant." Under these provisions the only limitation upon the right of the plaintiff to dismiss his action is that the defendant has filed a counterclaim or asked for affirmative relief. The provision in the section that the plaintiff file a written request with the clerk is not mandatory or exclusive. The plaintiff could move for the dismissal in open court, and have its order made and entered with the same effect as though made by an entry in the clerk's register. *Richards v. Bradley*, 129 Cal. 670, 62 Pac. 316.

The defendant cannot, by making a demand for a change of the place of trial and giving notice thereof, deprive the plaintiff of the right thus given to dismiss the action, or oust the court of jurisdiction to hear an application therefor. If his demand be well founded and his motion granted, any judicial action of the court affecting his rights adversely would be set at naught, and for this reason it is held that under a proper exercise of its discretion the court is required to hear and determine the motion before taking any other judicial action in the cause; but this rule has no application to an ex parte proceeding at the instance of the plaintiff, or to any proceedings in which the rights of the defendant are not adversely affected, or upon which he is not entitled to be heard. An application of the plaintiff to dismiss his action is ex parte, upon which the defendant is not entitled to be heard, and may be made or granted without any notice to him. The motion of the defendant was therefore properly denied. After the judgment dismissing the action there was no cause to be tried, and, consequently, there was no place of trial to be changed.

The order is affirmed.

We concur: HALL, J.; COOPER, J.

2 Cal. App. 148

FRIES v. AMERICAN LEAD PENCIL CO.(Court of Appeal, Third District, California.
Nov. 9, 1905.)**MASTER AND SERVANT—INJURIES TO SERVANT
—INFANT EMPLOYEES—FAILURE TO WARN—
NEGLIGENCE.**

Plaintiff, a boy nine years old, was employed by defendant to work in a sawmill, and commenced work at 7 in the morning under the direction of his brother, who was 18 years of age, near one of the saws. He was unadmonished and unskilled, and about 1½ hours after he began work two of his fingers were cut off by his hand coming in contact with the saw. Held that, notwithstanding he testified that he knew the saw was dangerous, such facts justified a finding that defendant was negligent in permitting the child to work in such place un instructed and un warned.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 314, 316½, 601–609.]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by Alec Fries, by Mary Fries, his guardian ad litem, against the American Lead Pencil Company. A judgment was rendered in favor of plaintiff, and defendant appeals. Affirmed.

Rehearing denied by Supreme Court, January 8, 1906.

L. L. Cory, for appellant. A. M. Drew and F. H. Short, for respondent.

McLAUGHLIN, J. This is an action to recover damages for injuries sustained by plaintiff while employed by defendant in a sawmill, or factory, where lumber was being sawed into small slabs called "pencil boards." From a judgment in favor of plaintiff, defendant appeals.

The record here discloses the facts recited in the decision upon a former appeal in this case. 141 Cal. 612, 75 Pac. 164. Other additional and pertinent facts are gathered from the uncontradicted evidence of an older brother of plaintiff, named Jack, who was working in the factory, and who testified as follows: "Mr. Jones had told me what work he wanted Alec to do; that is, to bring the blocks over to me at the machine, and when they were cut up into slabs to tie them up into bundles, and take them away. When we went to the millroom where the saws were, Alec went with me. I guess there were five or six others there. There was a big circular saw and another saw that were cutting the slabs, with six or seven saws on it all at once cutting the slabs. They were all in the same room and the room was 50 by 40 feet, I should judge. There was considerable noise in the room. He was working four or five feet from me. The table where I was at work was three or four feet wide, machine and everything, and two feet to two feet and a half long. The saw was, I guess, a 10-inch saw in diameter. I did not tell him before anything about the danger of the machine, neither

did the superintendent, or the manager, Mr. Jones. No instructions were given to him at all, nor warning about the danger from the saw. His duty was really to work in picking up blocks and binding them into bundles and piling them up, and to bring me blocks on the other side of the table for sawing. * * * I had not got any blocks from the other saw when I called him over. When I ran out of blocks I called him to get some more blocks for me. Alec had no work to do about the machine or handle the machine or with the machine. He was working about a foot and a half to two feet from the end of the machine where I was working, about four feet away from me. As I ran the blocks through the machine and made the slabs they fell into a box below. It was Alec's duty to keep the box empty and pick out the slabs as they were cut up, and put them in bundles, and take them away. The saw was at the side of the machine and there was a fence over it. It is a kind of a protection to a person handling the machine so they would not cut their hands on it. Alec was picking up slabs when I called him over to me. I could hardly talk to him when he was four feet away, and had to have him come over nearer so I could talk to him. I could have talked to him at a distance of four feet if I talked pretty loud. I had to call him twice, and he heard me when I hallooed to him. When he heard me he came over to see me. As he came over, I don't know as he put his hand on the machine, but that was the way it happened. When he came over his hand went down on the machine—put his hand on the machine. In other words, the accident could not have happened unless he put his hand on the saw. It was running all the time, and had been so all the morning. It was perfectly visible to him, as well as anybody else that the saw was running. He was a boy of good eyesight, and the saw was running all right. The sole reason I called him over was to tell him to get blocks. The reason I did not tell him at the distance of four feet instead of calling him over, was because I did not want to halloo to him, and call the other boys' attention from their work." The manager, Mr. Jones, testified that he told Jack to bring his brother to work the evening before, and that the next morning he said to him: "You take him and put him to work under you. Instruct him how to tie the bundles up and carry them over and set them up against the wall." This is denied by both plaintiff and his brother, but all agree that at no time did any person warn plaintiff, who was but nine years old, that he would have to be careful when he was near the saws or moving about the table. It is apparent from the foregoing statement that while plaintiff had nothing to do with the operation of the saw, his duties called him dangerously close to where it was being

operated by his brother. Thus, unadmonished, uncautioned, and unskilled, this little boy commenced to work in that noisy room at 7 o'clock in the morning, under the direction of a brother, 18 years of age. About 1½ hours thereafter, two of his fingers were cut off by the small circular saw on the side of the table near which he was at work, under the circumstances above narrated.

The principal point urged by appellant is that, under the decision rendered upon the former appeal, the testimony of plaintiff is absolutely fatal to his right to recover. The evidence of plaintiff relied upon, is to the effect that plaintiff noticed the saw running and cutting boards; that he knew that it would cut fingers as well as boards; and that he would get hurt if he went near the saw or got against it when it was going. It is said that this shows that the child was of sufficient intelligence to be able to comprehend, and did in fact, comprehend the danger surrounding his occupation, and there being no evidence to the contrary, no negligence could be imputed to defendant if it did not give plaintiff instructions as to danger. But the decision upon the former appeal lays down the well-known rule that the tender years of plaintiff, his capacity for understanding and appreciating the dangers surrounding his employment, were potent factors in determining whether defendant was absolved from the duty of instructing plaintiff as to such dangers and the necessity for caution and care. In *Foley v. California Horseshoe Co.*, 115 Cal. 192, 47 Pac. 42, 58 Am. St. Rep. 87, the same learned justice who wrote the opinion on the former appeal, explained this rule in a masterly and comprehensive opinion. It was there said: "The question of the taking of a risk, the question of the assumption of responsibility in a given act, is determined as much upon the matter of judgment as upon the matter of knowledge. * * * Children are taught obedience. They are taught not to oppose their will and their judgment to those in authority over them; but in addition to this, and more important than all, the judgment of the child is the last faculty developed. * * * Knowledge he may have; facts he may acquire; but the ability to apply his knowledge or reason upon his facts, comes to him later in life. The very accidents of childhood come from thoughtlessness and carelessness which are but other words for absence of judgment. * * * Their conduct is to be judged in accordance with the limited knowledge, experience, and judgment which they possess when called upon to act and it must, from the nature of the case, be a question of fact for the jury, rather than of law for the court, to say whether or not, in the performance of a given task the child duly exercised such judgment as he possessed, taking into consideration his years, his experience, and his ability." This ex-

position of the law has been pronounced "unquestionably sound" in many well-considered cases. *O'Connor v. Golden Gate*, 135 Cal. 545, 67 Pac. 966, 87 Am. St. Rep. 127; *Mansfield v. Eagle Co.*, 130 Cal. 622, 69 Pac. 425; *Killelea v. Cal. Horseshoe Co.*, 140 Cal. 605, 74 Pac. 157. Had the jury, in the case at bar, before them facts or circumstances sufficient to justify the conclusion that plaintiff did not understand and appreciate the dangers surrounding him? We think they had. Appellant's contention rests upon a literal construction of plaintiff's words. But the jury knew that the child was only 9 years old when injured, though 13 years of age when testifying. His evidence justified the full application of their intuitive knowledge, that thoughtlessness is at once the source of happiness and danger to children of that age. His evidence as to knowledge is offset by the absence of judgment and want of appreciation eloquently attested by the fact that, notwithstanding his knowledge, and the natural tendency to shrink from pain and injury, he did the very thing which judgment born of reason would prompt him to avoid. After stating his knowledge touching the cutting power of the saw, in the same connection he artlessly said: "Jack called me, and I went over there, and leaned against the table, and got my hand against the saw, and that is the way my hand got cut." This is precisely what might be expected of a child of that age whose "thoughtlessness and carelessness are but other words for absence of judgment." And this is precisely what the appellant should have anticipated and guarded against, by impressing upon the mind of this mere child the lesson that he must carefully avoid coming in contact with the machinery or saws.

This is the very reason the law made it the duty of appellant to give cautionary instructions when this nine year old boy was employed and placed amid unusual surroundings in a noisy room, full of danger even to adults. The laws of nature constitute an integral part of the evidence in every case, and the jury had a right to view the acts of this child in the light of general and immutable laws governing the conduct, impulses, and mental development of children. They had a right to consider every fact and circumstance bearing upon his knowledge and appreciation of dangers surrounding him, and to measure his words by the standard of his acts. They saw him on the stand and heard him testify. With the knowledge of his mental capacity thus gained, they could measure both his words and acts with far more accuracy than an appellate court, having before it only a transcript of his evidence in narrative form. Having this knowledge, they could reason what an ordinary child would be likely to do when called to receive instructions from an older brother, whom he would naturally look up to, and whom he

had been given to understand he must obey. Children, under such circumstances, intuitively advance with upward look of expectancy or inquiry, and the jury could gather from his statements and acts that this was what he did, as he leaned forward to catch the words of command from his brother's lips. He had not been cautioned. On the contrary, he must have understood that he was to obey his brother, toward whom he was leaning in listening attitude when the accident occurred. It was suggested in oral argument that his brother was a fellow servant, and that his negligence contributed to plaintiff's injury. Conceding, solely for the purpose of answering this suggestion, that Jack occupied the position of a fellow servant when engaged in giving commands to the lad placed under him, still, the noise and circumstances considered, we do not think Jack was negligent. We therefore hold that there is sufficient evidence to support the verdict and judgment. If employers will aid and abet heartless and mercenary parents in taking little children from the playground and the schoolroom to place them in factories or mills where dangerous machinery is in operation, they can hardly expect courts to indulge in nice discriminations touching the quantum of care and caution to be expected of such children. Nor can they expect courts to place technical limitations on the right of a jury to weigh the words, acts, ability and capacity of children in the light of natural impulses, attributes and characteristics, in actions for injuries received during the course of an employment denounced by rules of humanity and by a law of this state. We have carefully examined the instructions complained of, and are satisfied that, read as a whole, the instructions contain a fair and correct statement of the law.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

2 Cal. App. 179

KINARD v. POLICE COURT OF CITY OF OAKLAND et al.

(Court of Appeal, First District, California.
Nov. 14, 1905.)

1. PROHIBITION — GROUNDS — ADEQUACY OF OTHER REMEDIES.

The question whether a prosecution of accused for a misdemeanor is barred, by reason of a former dismissal of a prosecution for the same offense, under Pen. Code, §§ 1385, 1387, declaring that an order of dismissal shall be a bar to another prosecution for the same offense, is a matter within the jurisdiction of the court; and a writ of prohibition will not lie to prevent it from exercising its jurisdiction, as accused has an adequate remedy by appeal.

2. SAME — EXCESS OF JURISDICTION.

The writ of prohibition only issues in cases where the inferior court is proceeding or is about to proceed in excess of its jurisdiction,

and it cannot be used to correct anticipated errors.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prohibition, §§ 36-56.]

Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

Petition for a writ of prohibition by C. E. Kinard against the police court of the city of Oakland and others. From a judgment denying the writ, the petitioner appeals. Affirmed.

C. E. Kinard, in pro. per. George Samuels, for respondent.

COOPER, J. Appeal from judgment and order denying writ of prohibition.

Petitioner alleges that he is being prosecuted in the police court of the city of Oakland, before Mortimer Smith, the judge of said court, upon a charge of misdemeanor in embezzling the sum of \$14, the property of one Holloway. He moved to dismiss the proceedings upon the ground that the charge was the same offense included in a prior charge against him in the police court, which prior charge was dismissed. His position is that, the prior charge being dismissed, such dismissal is a bar to any other or further prosecution for the same offense, under the provisions of sections 1385 and 1387, Pen. Code. If it be conceded that petitioner had been before the court on a prior charge for the same offense, and the charge dismissed, and that such dismissal constitutes a bar, it does not follow that the court has no jurisdiction. The court has power to hear and determine the charge, and any and all matters tending to show a prior acquittal, or that the offense is barred by prior proceedings. It is presumed that the police court will hear and determine all questions, and give a correct judgment thereon. On a motion to dismiss the court may not have had all the facts before it. On the trial the defendant will be entitled, if properly pleaded, to prove all the facts, and if they constitute a bar, and the court does not so hold, defendant will have a plain and speedy remedy by appeal.

The writ of prohibition will only issue in cases where the inferior tribunal is proceeding, or is about to proceed, in excess of its jurisdiction. It cannot be used for the purpose of correcting anticipated errors. *Raine v. Lawlor*, 82 Pac. 688.

The judgment is affirmed.

We concur: HARRISON, P. J.; HALL, J.

2 Cal. App. 179

McCARTHY CO. v. BOOTHE et al.

(Court of Appeal, Second District, California.
Nov. 10, 1905.)

1. ATTACHMENT—LIABILITY ON BOND—MEASURE OF DAMAGES.

The depreciation of attached shares of stock between the date of the attachment and the date of the release is within the undertaking for attachment made in the statutory form, binding plaintiff in attachment to pay all dam-

ages which the defendant may sustain by reason of the attachment, and also within Civ. Code, § 3300, providing that for the breach of an obligation arising on contract the measure of damages is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby.

2. SAME—DEFENSES.

In an action on an undertaking given by an attachment plaintiff on attaching shares of stock, it is no defense that plaintiff might have avoided the damages by giving the statutory bond under the provisions of the Code of Civil Procedure.

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by the McCarthy Company against C. B. Boothe and others. From a judgment for plaintiff, defendant appeals. Affirmed.

M. L. Graff and Lawler, Allen & Van Dyke, for appellants. Charles Silent, for respondent.

SMITH, J. Appeal from a judgment for the plaintiff, and from an order denying the defendants' motion for a new trial.

The suit was brought upon an undertaking for attachment, in the statutory form, in the sum of \$2,000, given by the defendants in the suit of one Humphris against the plaintiff herein. The facts shown by the findings are: The attachment was levied June 30, 1900, on 5,400 shares of the Westlake Oil Company and 7,060 shares of the Wilson Oil Company, the property of the defendant in that case, now plaintiff. Judgment was rendered for the defendant in the attachment case October 7, 1901. It appears also that on March 19, 1901, another attachment was levied upon the same property in a second suit between the same plaintiff and defendant, which is still pending. At the date of the attachment, June 30, 1900, the stock of the Westlake Oil Company was of the market value of 48 cents per share and that of the Wilson Oil Company of the value of 40 cents per share. But at the date of the second attachment the market value of the former shares had depreciated to 20 cents and that of the latter to 30 cents per share; and that the market value of both at the date of the judgment, October 7, 1901, had fallen to 5 cents per share. The aggregate depreciation of the stock at the former date was \$2,218 and at the latter \$4,793, and it was found that the plaintiff was damaged in the latter amount. Judgment was given for the amount of the undertaking, \$2,000. It is also found "that the plaintiff herein was during all of the said time engaged in the business of buying and selling shares of oil companies for profit; that it had bought said shares for resale and could have and would have sold the same, if it could have obtained possession and made delivery and transfer thereof." Some objection is made to this finding, but it seems to be fully supported by the evidence.

It is claimed by the respondent, and apparently admitted by the appellant, that in the case of attachment of personal property

generally the measure of damages is the difference in value of the attached property when seized and when restored, with the loss of its use meanwhile. *Waples on Attachment*, § 682; *Wade on Attachment*, § 302; *Coulson v. Panhandle National Bank*, 54 Fed. 859, 4 C. C. A. 616; *Frankel v. Stern*, 44 Cal. 173; *Elder v. Kutner*, 97 Cal. 494, 495, 32 Pac. 563; *Witherspoon v. Cross*, 135 Cal. 96, 67 Pac. 18. But it is claimed by the appellant that the rule is different in the case of an attachment of real property (*Heath v. Lent*, 1 Cal. 410; *Elder v. Kutner*, 97 Cal. 490, 32 Pac. 563), and that the case of an attachment of stock comes under the reasoning of the latter rule. But, assuming the rules as to personal and as to real property generally to be as above stated, we do not think this contention can be sustained; but, rather, we think that there is more reason for the application of the former rule to the case of an attachment of stock than in the case of personal property generally. For stock generally, more than other species of personal property, is bought for sale, and its principal value in general consists in its selling value; and not only is this destroyed by the attachment, but all the profits and dividends to accrue from it are impounded equally with the stock itself. Code Civ. Proc. § 698.

But in this case there is another feature which we regard as material, which is that it is found that the stock in question was bought for resale, and that the plaintiff "could have and would have sold the same if it could have obtained possession and made delivery and transfer thereof." And the loss thus incurred, we think, comes clearly within the obligation of the defendants to pay "all damages which [plaintiff] may sustain by reason of the attachment," etc., and within the provisions of section 3300 of the Civil Code as to the measure of damages for breach of contract. We do not deem it necessary to discuss the cases cited by the appellant from other states, which do not seem to have involved this particular feature of the case before us. But our position seems to be supported by the decision in *Girard v. Moore*, 86 Tex. 675, 26 S. W. 945, cited by the appellant in support of his contention that the rules as to stock and as to real estate are the same. For it is there, in effect, held as to both species of property that the "loss resulting from [plaintiff's] being deprived of an opportunity to make an advantageous disposition of the estate," may be recovered as special damages, when pleaded as it is here.

Another point made by the appellant is, in effect, that the plaintiff might have avoided the damages by giving the statutory bond under the provisions of the Code of Civil Procedure. But we do not think this position requires discussion.

The judgment and order appealed from are affirmed.

We concur: GRAY, P. J.; ALLEN, J.

STATE v. BERGFELDT.

(Supreme Court of Washington. Dec. 28, 1905.)

1. SUNDAY—VIOLATION OF SUNDAY LAW—INFORMATION.

An information charging that the accused on the 10th day of April, 1904, unlawfully carried on the business of barbering on Sunday, sufficiently shows that the acts complained of were committed on Sunday, since the court will take judicial notice that the date named was Sunday.

2. STATUTES—TITLE.

Laws 1903, p. 68, c. 55, prohibiting the carrying on of the business of barbering on Sunday, is not unconstitutional for insufficiency of its title.

3. SAME—SETTING FORTH AMENDED STATUTE.

Laws 1903, p. 68, c. 55, prohibiting the carrying on of the business of barbering on Sunday, amending Ballinger's Ann. Codes & St. § 7251, is not unconstitutional for failure to set forth at full length the act as amended.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 209.]

4. CONSTITUTIONAL LAW — PROHIBITING BARBERING ON SUNDAY.

Laws 1903, p. 68, c. 55, prohibiting the carrying on of the business of barbering on Sunday, is not unconstitutional as a violation of Const. art. 1, § 12, providing that no law shall be passed granting any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, on the same terms, shall not equally belong to all citizens and corporations, nor as a violation of section 1 of the fourteenth amendment to the Constitution of the United States.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 611.]

Rudkin, J., dissenting.

Appeal from Superior Court, Pierce County; W. H. Snell, Judge.

Alfred Bergfeldt was convicted of carrying on the business of barbering on Sunday, and appeals. Affirmed.

James F. O'Brien, for appellant. Charles O. Bates and Walter M. Harvey, for the State. Cutts & Dorey, amici curiæ.

PER CURIAM. The defendant was informed against for the crime of carrying on the business of barbering on Sunday, in violation of the act of March 7, 1903 (Laws 1903, p. 68, c. 55). A demurrer interposed to the information was overruled. Thereafter the case was submitted to the court on agreed statement of facts. The agreed statement admitted facts constituting a violation of the act, and set forth by way of defense that the defendant is a Seventh Day Adventist and conscientiously observes the seventh day of the week, commonly called Saturday, and performs no labor of any kind on that day; that he believes the right is guaranteed him to work six days of the week, and to refrain from work on the seventh; that he further believes that it is impossible for him to make a living in his business without keeping his place of business open six days of the week. The court adjudged the defendant guilty, and from the

judgment and sentence pronounced against him this appeal was taken.

The only ground of demurrer, aside from the question of the validity of the statute, is that it does not sufficiently appear from the information that the acts complained of were committed on Sunday. The information recites that the appellant is accused of the crime of carrying on the business of barbering on Sunday, and charges that on the 10th day of April, 1904, the appellant unlawfully carried on the business of barbering on Sunday. While the information does not charge in direct terms that the 10th day of April, 1904, was Sunday, yet the court will take judicial notice of that fact, and this, coupled with the further allegation that the appellant carried on the business of barbering on Sunday, on that day, shows with sufficient certainty that the acts complained of were committed on Sunday. The first objection urged against the validity of the statute under which the information was filed is that the act is amendatory of section 7251, Ballinger's Ann. Codes & St., and that the object of the act is not set forth in the title, and the act as amended is not set forth at full length, as required by our Constitution. This question was decided adversely to the appellant in *Re Dietrick*, 32 Wash. 471, 78 Pac. 506.

The next contention is that the act violates section 12 of article 1 of the state Constitution, which provides that "no law shall be passed granting any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens and corporations," and also section 1 of the fourteenth article of amendment to the Constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." It is further contended that the act is unconstitutional as to those who conscientiously believe in the observance of the seventh day of the week. The power of the Legislature to enact a general law prohibiting all labor on Sunday, excepting works of charity or necessity, is now conceded on every hand. It is likewise contended that such regulations are civil in character, and apply to all persons within the state—to those who believe in the observance of the first day of the week, or the seventh day of the week, as a religious duty, and to those who believe in no religious observance whatever. These propositions are so well settled that it requires no citation of authorities to sustain them. 27 Am. & Eng. Enc. of Law (2d Ed.) 390, 391. There is, however, a sharp conflict of authority as to the power of the Legislature to enact a law prohibiting the carrying on of a particular occupation such

as barbering on Sunday. Such laws have been sustained by the courts of New York, Michigan, and Oregon. *People v. Havnor*, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707; *People v. Bellet*, 99 Mich. 151, 57 N. W. 1094, 22 L. R. A. 696, 41 Am. St. Rep. 589; *Ex parte Northrup*, 41 Or. 489, 69 Pac. 445. On the other hand, their validity has been denied in Illinois, California, and Missouri. *Eden v. People*, 161 Ill. 296, 43 N. E. 1108, 32 L. R. A. 659, 52 Am. St. Rep. 365; *Ex parte Jentzsch*, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664; *State v. Granneman*, 132 Mo. 326, 33 S. W. 784.

The arguments in favor of and against the validity of such statutes are fully set forth in the decisions referred to, and will not be repeated here. *Petit v. Minnesota*, 177 U. S. 164, 20 Sup. Ct. 666, 44 L. Ed. 716, is also cited in support of such laws. The law of Minnesota involved in that case prohibited all Sunday labor, excepting works of necessity or charity, and provided that Sunday barbering should not be deemed a work of necessity or charity. The Supreme Court of the United States held, first, that the proviso took nothing from the statute, as barbering was not a work of necessity or charity; and, second, that the classification was not so palpably arbitrary as to bring the law in conflict with the Constitution of the United States. The question has been twice before this court, first, in the case of *Tacoma v. Krech*, 15 Wash. 296, 46 Pac. 255, 34 L. R. A. 68, where an ordinance prohibiting barbers from pursuing their ordinary calling on Sunday was declared unconstitutional, following the cases above cited from Illinois, California, and Missouri; and, second, in *State v. Nichols*, 28 Wash. 628, 69 Pac. 372, a prosecution for the violation of the Sunday closing law, found in section 7251, Ballinger's Ann. Codes & St. In the case last cited the case of *Tacoma v. Krech* was declared overruled. It was contended in argument before this court that *State v. Nichols* was based on a different statute, and that the point decided in *Tacoma v. Krech* was not involved. However that may be, a majority of the court is now of opinion that the act in question is constitutional, and that *Tacoma v. Krech* was properly overruled.

This leads to an affirmance of the judgment.

RUDKIN, J., does not concur in this conclusion. He thinks the act in question, without right and without reason, denies to an inconsiderable portion of our population the right to pursue their ordinary calling on Sunday, while that privilege or immunity is enjoyed by every other laborer and artisan in the state, and that while, in a technical sense, the act applies to all persons within the state, yet in its practical operation it affects barbers alone and denies to them that equality before the law which our Constitutions were established to maintain. He does not consider these views in conflict with *Petit v. Minnesota*, supra, as no such discrimination appeared there.

DOUGLAS v. BADGER STATE MINE.

(Supreme Court of Washington. Dec. 28, 1905.)

1. APPEAL — BOND — CONDITIONS — SUFFICIENCY.

A bond in the sum of \$200, conditioned both as an appeal and supersedeas bond, will be considered merely as an appeal bond, in the absence of a showing of its having been used, or attempted to be used, as a stay bond.

2. JUDGMENT — DEFAULT — APPLICATION TO SET ASIDE — DISCRETION OF COURT — ABUSE.

2 Ballinger's Ann. Codes & St. § 4953, authorizes the court on terms to relieve a party from a judgment taken against him by mistake or excusable neglect. Section 4957 provides that the court shall disregard any error or defect in a proceeding not affecting the substantial rights of the adverse party. Section 5091 empowers the court in its discretion to set aside a default. A defendant moved to make the complaint more specific. His attorney filed a brief. The judge on returning the following day overruled the motion, but the attorney, not being informed thereof, failed to plead over within 10 days. Plaintiff, 11 days after the ruling, moved for a default, notice of which was served on defendant's attorney two days later, and he prepared an affidavit of meritorious defense and showing excusable neglect, and also tendered an answer and served the same the following day. Defendant's attorney, residing about 200 miles from the place of trial, relied on plaintiff's attorney notifying him on the court's action on the motion to make the complaint more specific. Held, that the court in sustaining the motion for default abused its discretion.

Fullerton, Rudkin, and Dunbar, JJ., dissenting.

Appeal from Superior Court, Chelan County; R. S. Steiner, Judge.

Action by Thomas Douglas against the Badger State Mine. From a judgment refusing to vacate a default judgment, defendant appeals. Reversed.

Smith & Cole, for appellant. Frank Reeves and Reeves & Reeves, for respondent.

ROOT, J. At the threshold of this case we are confronted with a motion to dismiss the appeal, for the reason that the undertaking is conditioned as both an appeal and supersedeas bond, while in the sum of only \$200. The appeal sought to be taken was from a judgment and decree foreclosing a laborer's lien in the sum of \$1,475, with \$300 attorney fees and costs, upon certain mining claims of appellant. The trial court was not asked to, and did not, fix the amount of any supersedeas. Appellant maintains that the bond was not intended as a stay bond, but that a printed form was used containing the supersedeas clause which was unnoticed at the time. It is not claimed by respondent that the undertaking was ever used or sought to be used as a supersedeas bond. In fact, it was stated in the briefs and orally at the argument, and not denied, that after the giving of the bond respondent's attorneys wrote to appellant's attorneys, threatening to have execution issue unless a supersedeas bond should be given. A copy of said letter appears in an affidavit on file herein, and is undenied. This would seem to show that both

parties treated the instrument as an appeal bond only. But it is suggested that this court must look solely to the instrument itself and not consider extrinsic matters. How about examining the trial court's order fixing a stay bond? Without conceding ourselves to be thus restricted, let us see what this bond reveals when scrutinized.

We find two of its parts inconsistent with each other. The penalty is stated in the sum of only \$200, the lowest possible sum sufficient for any bond on appeal—a sum inadequate for any other than a mere appeal bond. Then, turning to another portion of the bond, we find words commonly found in an appeal and supersedeas bond. Consequently, one part indicates an intention that it should be merely an appeal bond. The other part indicates that it was intended for both an appeal and supersedeas. When a written instrument has two portions inconsistent with each other, what is the duty of a court? It is the province of the court to examine the entire instrument, and, from a consideration of all its parts, give a construction that shall effectuate the evident intention of the makers of the instrument. Where one item of an instrument is absolutely inconsistent with another, it is evident that one or the other of said items was placed, or left, in such instrument inadvertently. It is not to be presumed that parties would intentionally incorporate in a document two irreconcilable expressions. The writing is to express the intention of the makers. It is inconceivable and unthinkable that the maker of a written instrument should intend two things, one of which is diametrically opposed to the other; or that he endeavored to express two purposes, the existence of one of which would necessarily destroy the other. As the sum of \$200 could in no manner and under no circumstances constitute the penalty of an appeal and supersedeas bond, we must find that it was incorporated inadvertently, if we believe appellant intended the bond to be both an appeal and supersedeas. On the other hand, if we believe appellant to have intended merely an appeal bond, then we must conclude that the supersedeas words were placed or left in the bond by mistake or oversight. In preparing a bond on appeal, into which error would an attorney be most likely to fall, that of writing the penalty only \$200 when he intended it to be \$3,300 or more, sufficient to constitute both appeal and supersedeas, or in leaving in the supersedeas words when only an appeal was intended? It seems to us that the leaving in of the unnecessary supersedeas clause might be a very natural oversight; but that any attorney would write or leave in a bond the words or figures "\$200," when he meant \$3,100 or some larger sum, would be a very unusual mistake. Then the mention of the amount of the judgment shows plainly that there was no lack of intention to write in the amount of the bond as \$200. In fact, there

is nothing to show that the writing of the amount as \$200 was unintentional, or an inadvertence. It is perfectly evident that appellant intended the penalty to be, and to be written therein as, \$200. This being true, it follows that it could not have intended the supersedeas words, the effect of which, if given any, would be to squarely contradict the significance of the language expressing the penalty as \$200. If the penalty were any sum in excess of \$200, a different question would be presented. But, in this case, the fact of the bond expressing the minimum penalty fixed by the statute, in the absence of any showing of its having been used, or attempted to be used, as a stay bond, precludes the idea that it was ever intended for any purpose other than that of an appeal bond. Respondent cites several decisions of this court in support of his motion. But in all of those cases the bonds were clearly intended as both appeal and supersedeas bonds; and in some, if not all, they actually performed the functions of stay bonds before being challenged here. In the first of said cases (*Pierce v. Willeby*, 20 Wash. 129, 54 Pac. 999) the trial court, upon application of appellant, fixed the amount of the supersedeas bond in the sum of \$200. The appellant then executed an undertaking in the form of an appeal and supersedeas bond, making the penalty, however, only \$200. A stay was actually obtained under said bond. The appellant having used it as a stay bond to supersede the judgment, this court held it to be merely a supersedeas bond, and insufficient to effect an appeal. In the case at bar no intention, attempt, or purpose to make or use a supersedeas bond appears. The contrary is affirmatively shown. This case is clearly distinguishable from all those cited. The motion to dismiss the appeal is denied.

Appellant, defendant below, is a corporation having its principal office at Seattle, King county, Wash. This action was commenced in the superior court in and for Chelan county. Appellant's attorneys reside and have their offices in Seattle. The office of respondent's attorneys is in Wenatchee, Chelan county. To the complaint appellant interposed a motion to make more definite and certain. This motion was noticed to be heard, before the superior court in Chelan county, on the 5th day of December, 1904. The judge of that court presides over the superior courts of four counties, and his time is consequently divided among said counties. Not knowing whether or not the judge would be at Wenatchee on the said 5th day of December, appellant's attorneys did not go over to Wenatchee, but prepared and sent to the court a written argument upon the motion. As a matter of fact the judge was not in Wenatchee on said 5th day of December, but arrived the next day and proceeded to consider the motion, and denied the same. Appellant's attorneys, not being informed of the court's ruling upon

their motion, failed to plead over within 10 days. On December 17th, 11 days after the court's said ruling, respondent moved for an order of default against appellant for not pleading over. Notice of this was received by appellant's attorneys on December 19th, and they forthwith prepared an affidavit of meritorious defense and tending to show excusable neglect, and also tendered an answer. These were served and filed December 20, 1904. Respondent moved to strike these, and his motion was set for hearing January 9, 1905; but the judge again being away, the motion was not heard until January 16, 1905, at which time the answer was ordered stricken and the default entered. Findings, conclusions, and decree were signed January 20, 1905. On January 23d, appellant filed and served a petition to vacate the judgment and for a new trial. This petition was denied, and the decree confirmed on March 1, 1905. From said judgment and decree this appeal is prosecuted.

Appellant's attorneys contend that they relied upon respondent's attorneys to notify them of the court's ruling upon the motion to make more definite. They urge that, owing to the long distance of the place of trial (some 200 miles) from their home, and the uncertainty of the judge being there, it was unnecessary for them to be personally present; that they had faith in said motion and expected in any event that respondent's attorneys would notify them of the court's ruling when it should be made. They maintain that their neglect, under all of the circumstances, was only such as is contemplated and covered by the statutory provisions permitting relief from "inadvertence" and "excusable neglect." Respondent contends that it was appellant's duty to be represented or to have arrangements made whereby it would have been promptly notified of the court's ruling. Conceding this to be correct, did the omission of appellant's attorneys constitute neglect that was inexcusable? That was the question presented to the trial court and now presented for our consideration. Appellant's attorneys say that they expected respondent's attorneys to notify them when the court should come and pass on the motion; that they expected this as an act of courtesy such as ordinarily obtains among practitioners. Respondent contends that his attorneys were required by no statute, rule of court, or law to notify appellant's attorneys. This is perhaps true; but if attorneys recognize no obligations toward brother attorneys except such as are imposed by statute, rule of court, or law, what becomes of that professional courtesy which has been cherished and observed by the profession from time immemorial? If an attorney extends to another nothing but what that other may demand as a strict matter of law and right, there is no courtesy about it; it is but the mere performance of a legal

duty. Those engaged in the active practice of the law must encounter many difficulties and annoyances at the best; and were it not for the generous acts of courtesy and kindly consideration that commonly characterize the dealings of attorneys with one another, the drudgery would often become well nigh intolerable. In the case at bar, the motion of appellant was not merely for delay. It presented a substantial question. It is a serious question whether or not the ruling of the trial court was correct in denying the same. But we are not called upon to pass upon this. We merely mention it to show that it was manifestly interposed in good faith. Had respondent's attorneys notified appellant's attorneys of the court's ruling and thereby given them a chance to plead further, it would certainly have been a courteous and commendable action on their part and in accord with the common practice obtaining among attorneys. Now, because appellant's attorneys relied upon them as attorneys who would practice such courtesies, we do not think they should be humiliated and their client mulcted because of their misplaced confidence and reliance.

Now, let us go a step further. A motion for default was made within a few days. To this appellant responded with an affidavit of excuse and merits. It also tendered an answer which set forth a perfect and complete defense to respondent's complaint. All of this was done promptly and evidenced a good-faith intention to defend. When this was done, respondent, instead of withdrawing his motion for default, insisted upon it, thereby indulging in a practice which, we are glad to say, obtains only to a very limited extent in this state. The action of the trial court in sustaining the motion for default under these circumstances was not only an abuse of discretion, but was violative of both the letter and the spirit of our Code which requires that all rules of practice shall, so far as practicable and where a different course is not arbitrarily prescribed by statute or established rule of decision, be construed and applied so as to accomplish substantial justice. 2 Ballinger's Ann. Codes & St. §§ 4953, 4957, 5091. A portion of said section 4953 says that the court "may, upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." By the imposition of costs and reasonable terms upon appellant, respondent and his attorneys could have been fully compensated for any expenses, delay, and inconvenience occasioned them by appellant's neglect to timely plead over. This should have been the course pursued by the trial court. A portion of said section 4957 reads as follows: "The court shall, in every stage of an action, disregard any error or defect in pleading or proceeding which shall not affect the sub-

stantial rights of the adverse party." Here was a defendant with an answer presenting a just and meritorious defense; but, because its attorneys had been guilty of slight neglect, its defense is excluded. The statutory provision regarding "excusable neglect" was enacted for some purpose. That attorneys are not infallible, but subject to the same shortcomings that characterize humanity in general, is recognized by the law, and should be by the courts. If judges who are asked to deal drastically with the interests of litigants whose attorneys make slight mistakes would indulge in a little retrospection, they would probably recall experiences in their own practice that would help to clarify their vision, encourage commendable forbearance, and suggest a course better calculated to subserve the ends of justice and right. The function of a court is to adjudicate the differences existing between litigants and mete out that which is right and lawful so far as such a consummation may be approximated under the forms of law. They are not institutions where the rights of suitors are to be determined by the prowess, skill, or sharp practice of attorneys on the one side or by the inconsequential errors, omissions, and oversights of the opposite counsel. Technicalities, forms, and rules must not be permitted to defeat the highest purpose of courts—the dealing out of substantial justice; unless, in a given case, an arbitrary statute or established rule of decision positively so requires. *Westland Pub. Co. v. Royal*, 36 Wash. 390, 408, 78 Pac. 1096; *Bloomington v. Well*, 29 Wash. 611, 621-623, 70 Pac. 94. Our observations herein are not intended as a censure of respondent's attorneys, who, owing to their standing, we are inclined to believe were actuated in their course herein by hasty and ill considered counsel rather than by any deliberate purpose to ignore the ethics of the profession. But we have spoken freely for the reason that we do not wish the bar of this state to feel that there is any disposition on the part of this court to sanction the lowering of the high standard of professional ethics which has always been recognized and maintained by said bar. The traditions, ideals, and proprieties of the profession require nothing less at our hands.

The judgment of the honorable superior court is reversed, and the cause remanded, with instructions to permit appellant to file its answer, and for further proceedings according to law. In lieu of the imposition of terms by the trial court, it is ordered that appellant do not recover costs on this appeal.

MOUNT, C. J., and HADLEY and CROW, JJ., concur.

FULLERTON, J. (dissenting). I concur in that part of the foregoing opinion which holds the bond sufficient to sustain the appeal. I do not do so, however, on the ground

that this bond can be distinguished from others that this court had held insufficient, but because I believe the cases announcing the doctrine that a bond conditioned both as an appeal and supersedeas bond, but sufficient in amount only as an appeal bond, is not good as either, are wrong in principle and should be overruled. In my judgment, a bond sufficient in condition and amount as an appeal bond is good as an appeal bond regardless of any conditions looking to the stay of the judgment it may contain. Notwithstanding the statute says they may be included in one instrument, the appeal bond and stay bond are inherently distinct. The appeal bond must be given in any event. It is made necessary by statute in order to perfect the appeal. The appeal cannot be heard without it. But the stay bond may be given, or not, as the appellant chooses. If he wishes to prevent execution of the judgment pending the appeal, he may do so by giving a stay bond as provided by statute. But his rights on the appeal are in nowise affected by his failure so to do. Every question open to him will be heard and adjudged whether he gives it or does not give it. Moreover, these bonds may be given in separate instruments. The sureties need not be the same on each. And when separately given the one is not affected by the other. Indeed, no court, so far as I have been able to ascertain, has ever held that an appeal bond sufficient in itself to perfect the appeal, and good if standing alone, is rendered nugatory by the filing of an insufficient stay bond. Why then should the appeal bond be affected by the stay bond when both are included in the same instrument? I confess my utter inability to find any reason for the distinction, and, finding none, I believe the holdings of the court to the effect that there is a distinction are wrong.

I must, however, disagree with the opinion on the merits of the case. I find nothing in the record which warrants this court in censuring either the trial judge or counsel for the respondent. The trial court, in adjudging that the showing made by the appellant was insufficient to authorize it to set aside the judgment it had theretofore rendered, acted upon a matter within its discretion which this court can set aside only for manifest abuse. It is not enough for us to say that if we had been personally present and the question had been submitted to us we would have decided it differently, but we must be able to say that the decision is so far wrong that a reasonable mind, acting without prejudice, and having in view the just rights of all of the parties, would not have decided it that way. The record in my judgment does not enable us to do this. Personally, I cannot even hold that it ought to have been decided differently.

In my opinion, therefore, the motion to dismiss should be overruled, and the judgment affirmed.

RUDKIN, J. (dissenting). In *Pierce v. Willeby*, 20 Wash. 129, 54 Pac. 999, decided more than seven years ago, this court held that a bond on appeal conditioned as both a cost and a supersedeas bond, which was not sufficient for both purposes, was not sufficient for any purpose, and dismissed the appeal. In that case the trial court fixed the amount of the supersedeas in the sum of \$200, and a bond in that amount conditioned both as a cost and a supersedeas bond was filed. Such a bond was declared insufficient, and I am unable to distinguish that case from the case at bar. An appeal bond comes before this court without issues and without proofs. We must ascertain the intention of the parties, and determine the character of the instrument from what appears within the four corners of the bond. The appeal bond before us is clearly both a cost and supersedeas bond, and complies with all the requirements of the statute governing such bonds, except as to the amount. The argument of the majority, based on the amount of the bond, would apply with equal force in the case of *Pierce v. Willeby*. The latter case has been followed in numberless cases since the decision was rendered, and it should be followed now or overruled. I do not feel called upon to approve or criticize the ruling in that case. It relates exclusively to a question of practice, and, so long as the rule established is uniform, it is as easy to comply with the statute as there construed as with any other construction this court might now adopt. However, if the court desires to overrule *Pierce v. Willeby* and the long line of cases following it, I will interpose no objection; but they should not be followed in one case and distinguished away in the next.

I also dissent from what is said on the merits. The majority concede that the appellant was in default, and that the only excuse for such default was the failure of counsel for respondent to notify counsel for appellant of the ruling of the court on a motion to make the complaint more definite and certain. The majority further concede that counsel for respondent were under no legal obligation to give such notice. The trial court held that this was not a case of excusable neglect, and denied an application to open the default and for leave to answer. Applications of this kind are addressed to the sound discretion of the trial court, and I am not prepared to say that an abuse of discretion is shown here. Professional courtesy, undefined and unregulated by law, is a very uncertain guide, and cannot safely be adopted as a rule of practice in the courts. In the broad sense in which that term is discussed in the majority opinion, it belongs in the domain of morals rather than of law.

I think the appeal should be dismissed, or the judgment affirmed.

DUNBAR, J., concurs in what is said by **RUDKIN, J.**

DOUGLAS v. LA RICA CONSOLIDATED.
(Supreme Court of Washington. Dec. 28, 1905.)

Appeal from Superior Court, Chelan County; R. S. Steiner, Judge.

Action by Thomas Douglas against the La Rica Consolidated. From a judgment refusing to vacate a default judgment, defendant appeals. Reversed.

Smith & Cole, for appellant. Frank Reeves and Reeves & Reeves, for respondent.

PER CURIAM. The facts in this case are substantially the same as those in *Douglas v. Badger State Mine* (just decided) 83 Pac. 178, and controlled by the same principles. Upon the authority of that case, the judgment of the trial court in this cause is reversed.

RAPP et al. v. STRATTON.
(Supreme Court of Washington. Dec. 28, 1905.)

1. **MUNICIPAL CORPORATIONS—STREETS—VACATION.**

Hill's Ann. Codes & St. § 752, provides that a party who desires to vacate a street in an incorporated town may petition the trustees, and the same proceedings shall be had before the trustees or other corporate body as are authorized to be had before the board of county commissioners in towns not incorporated. Section 749 provides, in relation to proceedings for the vacation of streets in towns not incorporated, for a petition to the county commissioners, which shall be filed with the county auditor, and notice of which shall be given for 20 days by posting such notice in three public places. *Held*, that records of a city council, reciting the reception of a petition for the vacation of an alley, its reference to the committee on streets, the favorable report of the committee, and the granting of the petition, do not show a vacation of the alley.

2. **ADVERSE POSSESSION—MUNICIPAL PROPERTY.**

One cannot acquire title by adverse possession to property, such as an alley, held by a municipality in its governmental capacity for public purposes.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 49.]

Appeal from Superior Court, Spokane County; O. V. Linn, Judge.

Action by Charles G. Rapp and others against Lorine B. Stratton. From a judgment for plaintiffs, defendant appeals. Affirmed.

Hamblen, Lund & Gilbert, for appellant. Joseph B. Lindsley, for respondents.

DUNBAR, J. Plaintiffs brought this action, alleging ownership of property in block 20 of Stratton's addition to Spokane, that an alley extends north and south through the center of said block on which the property of plaintiffs abuts, and that defendant is wrongfully and unlawfully, and with intent to deprive said plaintiffs of the use of said alley, attempting to appropriate and use the same as her own private property, and has placed barriers and obstructions across

the same, etc., and asking that she be perpetually enjoined. An answer was filed, alleging, in substance, that the alley in question was vacated by the city council of Spokane on the 25th day of April, 1888, and further setting up the right of defendant to the alley by adverse possession for over 10 years. The reply denied both these allegations, and upon these issues the cause went to trial and terminated with a judgment in favor of the plaintiffs; and an injunction was issued restraining the defendant from interfering with the public use of the alley. From this judgment this appeal was prosecuted.

There are but two questions to be determined in this case: (1) Was the alley vacated? and (2) if it was not, has the defendant obtained title to the same by adverse possession? The appellant had been the owner of the lots now owned by the respondents for several years prior to her conveyance of them to respondents' grantors. In her deed to the respondents' grantors they were described as being in accordance with the records of the plat on file, and the recorded plat showed the existence of the alley in question. The only evidence of the vacation of these lots is two entries in the records of the city council. The first appears under date of March 21, 1888, in the following recital: "A petition from the Centenary Church, asking the vacation of the alley in block 20, Stratton's addition, was received and referred to the committee on streets and alleys." And on page 186 of the record the following is found: "The committee on streets and alleys reported favorably on the petition to vacate an alley in block 20, Stratton's addition, which, on motion of Mr. Waters, was granted." That is all there is in the records of the council proceedings on the subject of the vacation of this alley.

The law governing the vacation of streets and alleys at the time of the alleged vacation of this alley was section 752, 1 Hill's Ann. Codes & St., which is as follows: "In cases where any person interested in an incorporated town in this state may desire to vacate any street, alley, lot, or common, or any part thereof, it shall be lawful for such person to petition the trustees in like manner as persons interested in towns not incorporated are authorized to petition the board of county commissioners; and the same proceedings shall be had thereon before such trustees, or other body corporate having jurisdiction, as are authorized to be had before the board of county commissioners; and such trustees or other corporate body may determine on such application, under the same restrictions and limitations as are contained in the foregoing provisions." And section 749, as follows: "Any person or body corporate interested in any town in this state not incorporated, who may desire to vacate any lot, street, alley, common, or

any part thereof, in any such town, it shall be lawful for any such person or corporation to petition the board of county commissioners for the proper county, setting forth the particular circumstances of the case, and giving a distinct description of the property to be vacated, which petition shall be filed with the county auditor twenty days previous to the sitting of said court, and notice of the pendency of said petition shall be given for the same space of time, by written or printed notices set up in three of the most public places in said town, containing a description of the property to be vacated."

It does not appear from the record affirmatively, or even by implication, that the law in relation to notice was complied with, or that anything was done beyond accepting the report of the committee. This was mere preliminary action, and from it alone the court is not authorized in presuming that the prescribed notice was given, or that an ordinance was passed finally vacating the alley. Streets and alleys are of too much importance to the public to be obliterated by a showing of this kind. As tending to show the view taken by the appellant on this proposition: Some time before the commencement of this action she petitioned the city council for the vacation of this alley, which petition, upon consideration by the city council, was rejected. Under the rule announced in *Unzelman v. City of Snohomish* (Wash.) 82 Pac. 911, the appellant would be estopped from now claiming that the street had been vacated at a prior time. In any event, so far as the question of title by adverse possession is concerned, this court held, in *West Seattle v. West Seattle Land, etc., Co.*, 38 Wash. 359, 80 Pac. 549, that a party could not acquire title by adverse possession to property held by a municipality in its governmental capacity for public purposes. The property upon which the appellant is seeking to obtain title by adverse possession is confessedly held by the city as a trustee for the public, and not as property of the municipality.

There being no error in the case, the judgment is affirmed.

MOUNT, C. J., and HADLEY, FULLERTON, RUDKIN, CROW, and ROOT, JJ., concur.

SHORT v. CITY OF SPOKANE.

(Supreme Court of Washington. Dec. 28, 1905.)

1. MUNICIPAL CORPORATIONS — TORTS — NOTICE OF CLAIM.

Under Spokane City Charter, art. 14, § 220, requiring claims for personal injuries sustained by reason of negligence of the city to be presented to the city council within one month after the injuries, and further requiring notice of an injury caused by the existence of snow or ice on a street or sidewalk to be filed with the city clerk within three days after the injury,

one who was injured by reason of a broken plank in a sidewalk need not file his claim with the city clerk within three days after the injury, although there were a few inches of snow on the sidewalk at the time of the injury, where such snow did not cause the injury.

2. SAME—DUTIES OF MUNICIPALITY—INSPECTION OF SIDEWALKS.

A city is bound to inspect and supervise sidewalks, and its duty is not fulfilled by taking merely such notice of the condition of the walks as would be taken by any person walking over the same.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1654.]

3. SAME—NOTICE OF DEFECT.

A city is chargeable with notice of a dangerous opening, hole, or defect in a public sidewalk or street, although actual knowledge thereof is not brought home to it or to any official, where the defect has existed for a sufficient length of time that the city by exercising ordinary care might have learned of its condition.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1648.]

4. SAME—DUTY OF CITY—SAFETY OF SIDEWALK.

A city is bound to keep sidewalks in reasonably safe condition for travel throughout the entire year, and if the walks are in such shape that they are safe in the summer, but dangerous during the winter, the city is guilty of negligence if it has notice of the defects.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1612, 1616.]

5. SAME—DUTY TOWARD INFIRM PERSONS.

The sidewalks of a city are not constructed and maintained for the sole use of the healthy, but for the use of the infirm as well, and they may be lawfully traveled by every citizen, without regard to age, sex, or physical condition, and the city is chargeable with knowledge that people of different bodily conditions travel its streets, and that among these are the diseased and the lame, whose infirmity may greatly aggravate a bodily injury, and may retard or prevent a cure.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1675.]

6. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—REMOVEDNESS AS CAUSE.

Where an injury to plaintiff is proximately caused by defendant's negligence, plaintiff may recover, even though he may himself have been guilty of negligence, if his negligence was only a remote cause or a mere condition of the accident.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 112, 113.]

Appeal from Superior Court, Spokane County; George W. Belt, Judge.

Action by B. K. Short against the city of Spokane. From an order granting a new trial, defendant appeals. Affirmed.

F. M. Dudley and Charles P. Lund, for appellant. J. M. Geraghty and Alex M. Winston, for respondent.

DUNBAR, J. This action was brought by plaintiff to recover damages for alleged personal injuries on account of an alleged defective condition of a sidewalk in the city of Spokane. The complaint contained the ordinary allegations of negligence on the part of the city. Damages were asked in the

sum of \$5,000. The defendant denied the material allegations of the complaint, and pleaded contributory negligence on the part of the plaintiff, and that the claim of plaintiff was not filed within the time required by the city charter. By replication the affirmative defenses were denied. The case went to trial before a jury, resulting in a verdict for defendant. The plaintiff filed a motion for a new trial, which was granted by the court. From this order the defendant has appealed.

The errors alleged are that the court erred in refusing to sustain defendant's motion for a nonsuit at the close of plaintiff's case, in refusing to sustain defendant's motion made at the close of the case to direct a verdict for defendant, in setting aside the verdict of the jury for defendant, and in granting a new trial. This judgment would probably have to be affirmed in any event, for the reason that it does not appear from the record, nor indeed from the briefs of the respective parties, upon what ground the new trial was granted. It might have been because the court had concluded that error was committed in giving or refusing to give instructions, or it might have been because the court concluded that the verdict was not justified by the weight of the testimony. But, in view of the possibility of a new trial, we think it advisable to pass upon some of the errors which are claimed by the respondent to have been committed by the court in the giving and refusing to give instructions, and upon the contention of the appellant that, in any event the new trial should not have been granted, for the reason that the defendant's motion for a nonsuit, at the close of the plaintiff's case, and at the close of the whole case, should have been granted by the court. If this contention is true, then the alleged errors in regard to the instructions would be immaterial. But, from an examination of the testimony, we are satisfied that the motion for a nonsuit was properly denied. Section 220 of article 14 of the charter of the city of Spokane, among other things, provides that "all claims for personal injuries or for injuries to property, alleged to have been sustained by reason of the negligence of the city or any officer, agent, servant, or employé thereof, must be presented to the city council within one month after any such injuries shall have been received in the manner hereinafter in this section provided: provided, however, that in addition to the filing of the claim as hereinabove provided, where such injuries are alleged to have been caused by the existence of snow or ice on a street, highway, sidewalk, bridge, or crosswalk, notice of such injury, in writing, signed by the person injured, or the owner of the property injured, or by someone on his or her behalf, must be filed with the city clerk within three days after said injury shall have been sustained." From an investigation of the complaint in

this case, we fail to perceive that there is any allegation that the injury was caused by the existence of snow or ice, but the mention of snow and ice in the complaint was incidental, the gist of the negligence alleged being that a plank in the sidewalk was broken in two, a portion of said plank falling through to the ground, and the remaining end of the plank, for several feet from the break, was sunk below the boards at the sides of it; that there was no support for the broken end of the plank, and said plank would bend easily under slight pressure; that by reason of such condition, said plank and walk were dangerous and defective, which condition had existed for a long time prior to the date of the injury to this plaintiff, and was known, and by reasonable care should have been known, to said city and the officials thereof, but the said city negligently failed to fix said walk and plank; and that, while passing along said walk, the plaintiff stepped upon said broken plank and fell, whereby the injury occurred—describing the injury. Neither can it be maintained from the proof that the snow or ice (there being a couple of inches of snow on the sidewalk) was the cause of the injury; it was simply a condition of the accident, but the broken plank was the primary and essential cause contributing to the accident. This is shown by the testimony of the plaintiff and his witnesses who testified on that subject. We have omitted to mention that this claim was not filed with the city council within the 3 days required by the proviso in the ordinance quoted above, but was filed within 30 days from the time the accident occurred; and from the pleadings and testimony, we conclude that the plaintiff was not estopped from prosecuting his case by not filing his claim within the 3 days.

The court gave the following instruction, which is also claimed as error by the respondent: "In the absence of actual notice, municipalities are liable only for such defects in sidewalks as are apparent or suggested by appearance or disclosed by a test in the nature of the ordinary use of such walks." If the court meant by this language that no higher duty rested upon the guardians of the city than to take such notice of the condition of the walks as would be taken by any person walking over the same, the instruction was too limited, for it leaves out of account the duty of inspection and supervision with which the officers of the municipality are charged. The court did instruct lucidly in relation to the care generally which the city should exercise, but seems to have defined in the instruction which we have quoted its duty in the absence of actual notice, which might have been misleading to the jury. The respondent proposed on that question the following instruction, which the court refused to give: "You are instructed that a city is charge-

able with notice of a dangerous opening, hole, or defect in a public sidewalk or street, although actual knowledge may not have been brought home to it or any official of it, if the evidence shows that such a state has existed for sufficient length of time so that the city, by exercising ordinary care might have learned of its condition, and not to know such fact would be negligence on the part of the city." This is a correct and clear statement of the law applicable to the case being tried, and should have been given. He also proposed this further instruction: "This duty to keep a sidewalk in such repair that it is reasonably safe for ordinary travel extends throughout the entire year and during weather conditions such as are customary, and can reasonably be expected. If the walk should be in such shape that it would be safe in the summer during good weather, but would be dangerous during stormy weather in the winter, if the city had notice of such defects it would be guilty of negligence in allowing such walks to remain defective during the bad weather." It would seem that, under the circumstances of this case, this instruction was pertinent and unobjectionable.

The respondent also asked the court to give the following instruction, which the court refused to give: "The duty of caring and of abstaining from the unlawful injury of another applies to the sick, the weak, the infirm, as fully as to the strong and healthy; and when the duty is violated the measure of damages is for the injury done, even though the injury might not have resulted but for the peculiar physical condition of the person injured, or may have been augmented thereby. The proximate cause of an injury is the efficient cause. The public streets and sidewalks in a city are not constructed and maintained for the sole use of the healthy and robust people, but for the use of the infirm, the sick and decrepit as well. They may be lawfully traveled by every citizen, without regard to age, sex, or physical condition. If the city negligently permit such streets and sidewalks to remain out of repair, and any person (who is himself free from negligence) is injured, the city is liable for the injury. The city is chargeable with the knowledge that people of different bodily conditions travel its streets, and that among these are the weak, the decrepit and those with organic predisposition to disease. The city is chargeable with knowledge that all classes of persons, including both the healthy, and diseased, and lame, constantly travel its streets and sidewalks, and that such disease or lameness might greatly aggravate a bodily injury. Hence the city has reasonable ground to expect that if one of that class, who are diseased or lame, is injured by reason of a defect in the sidewalk or street, the disease or lameness might develop, and retard or prevent a cure." This instruction should have been given, under the rule an-

nounced in *Jordan v. Seattle*, 30 Wash. 298, 70 Pac. 743.

The court also refused the following instruction asked by the respondent: "You are instructed that if you find that the defendant was guilty of negligence, which negligence was the proximate cause of the injury, the plaintiff will be entitled to recover, even though plaintiff may have been guilty of negligence, if the negligence of the plaintiff was only a remote cause, or a mere condition of the accident." This instruction was approved in *Redford v. Spokane Street Ry. Co.*, 15 Wash. 419, 46 Pac. 650.

The judgment is affirmed.

MOUNT, C. J., and HADLEY, RUDKIN, ROOT, and CROW, JJ., concur.

FULLERTON, J. I concur in the result, but do not wish to be understood as concurring in the holding that it was error to refuse to give the requested instructions. The plaintiff is not appealing, and whether or not the court erred in refusing to give his requested instructions, is not here for review.

(41 Wash. 220)

SHANNON et al. v. CITY OF TACOMA.

(Supreme Court of Washington. Dec. 28, 1905.)

1. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS—CONTRIBUTORY NEGLIGENCE.

While the fact that a person travels along a sidewalk known by him to be defective and dangerous does not of itself convict him of contributory negligence, yet it may always be shown in support of a plea of contributory negligence, and may of itself establish such negligence as a matter of law, where the attempt to use the sidewalk plainly and unequivocally amounts to a want of ordinary care and prudence.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1677, 1679, 1683, 1755.]

2. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where answers to immaterial questions are not prejudicial to appellants, but reflect upon respondent, if on any one, error in permitting the questions to be answered is not ground for reversal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4153-4155.]

3. SAME—EXCLUSION OF EVIDENCE.

Where, in an action against a city for injuries caused by a defective sidewalk, the existence of the defect and its size and character were shown by the undisputed testimony of all the witnesses who testified on the subject, the exclusion of a piece of board taken from the sidewalk, showing the condition of the walk and the size of the hole into which plaintiff stepped, was not ground for reversal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4194, 4196.]

4. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS — INJURIES TO PEDESTRIAN — PROXIMATE CAUSE.

In an action against a city for injuries caused by a defective sidewalk, it is not sufficient to show that plaintiff was injured while travelling along the walk, and that the walk

was defective, but it must be shown by a preponderance of evidence that the defect caused the injury.

5. NEW TRIAL — GROUNDS — NEWLY DISCOVERED EVIDENCE.

Newly discovered evidence, which is merely cumulative on a part of the case which was abundantly proven and as to which there was in fact no controversy, is not ground for new trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 218-220.]

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by Helen E. Shannon and another against the city of Tacoma. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Govnor Teats, for appellants. O. G. Ellis, J. J. Anderson, and R. E. Evans, for respondent.

FULLERTON, J. The appellant Helen E. Shannon, while walking along a sidewalk in the city of Tacoma, received an injury to her foot, and this action was brought to recover therefor. In their complaint the appellants allege that the respondent city negligently allowed the walk where the injury occurred to become worn out and decayed and otherwise out of repair, and that there was at the time of the accident a hole therein some eight inches wide and three feet long; that the appellant Helen E. Shannon, while walking along the same in the nighttime, stepped into the hole, caught her foot therein, and strained and tore away the ligaments of the foot and leg, leaving her permanently crippled and maimed. It was further alleged that the defective condition of the walk was known to the city authorities long prior to the injury, and that they negligently failed to repair the same. Issue was taken on the allegations of the complaint, and a trial had which resulted in a verdict and judgment for the city.

The first error assigned is predicated on the cross-examination of the witness Ada Shannon. It was shown in her examination in chief that she was the daughter of the plaintiffs and accompanied her mother at the time of the accident. The following appears in her cross-examination: "Q. You had gone along this sidewalk before this night? A. Yes, sir. Q. And knew something of the condition of the sidewalk? Mr. Teats: Objected to as immaterial. The Court: The objection overruled. Mr. Teats: Plaintiff notes an exception. Q. You knew something of the condition of that sidewalk, didn't you? A. Yes, sir. Q. As you told Mr. Teats, you knew it was in a bad condition? A. Yes, sir. Q. How did you happen to go along that way that night? A. I don't know for any certain reason, only that is a little— Mr. Teats: That is objected to as absolutely immaterial. [After argument.] The Court: The objection overruled. Mr. Teats: Plaintiff notes an exception. Q. I will ask you how

you happened to take that street that night? A. We didn't decide any certain way we would go, but I knew the sidewalks on Anderson and Seventh both were poorer than on Pine street. Q. But you often went that way? A. No; up Oak, to the bicycle path. Q. That was the way you and your family went? A. Yes, sir. Q. As a matter of fact didn't you usually take the route you did that night? A. I did, when alone. Q. Didn't you take that with your mother? A. I don't think so. Q. Didn't you ever go? A. We didn't go there very often, and I don't think so. Q. Why would you and your mother select that route if you thought it was worse? Mr. Teats: That is objected to as immaterial. Mr. Ellis: I want to test the witness' memory and accuracy. Mr. Teats: She stated that she went that way going to school. The Court: The objection overruled. Mr. Teats: Plaintiff notes an exception. Q. It was just as near across that way as the other way to Mrs. Mather's? A. Yes, sir."

It is contended that this was error because it permitted counsel to examine upon an immaterial matter prejudicial to the appellants. It is argued that a person has the right to travel upon any of the open sidewalks of a municipality, and that a person so doing cannot be guilty of contributory negligence, even though the walk be defective or dangerous, and the person traveling upon it knows it to be so. Such, however, is not the rule. While the fact that a person travels along a sidewalk known by him to be defective and dangerous does not of itself convict him of contributory negligence in every case where injury occurs, yet it is always some evidence of such negligence, and may be shown to the jury in support of a plea of contributory negligence. Where the danger was slight and trivial, the probative effect of the fact is likewise slight, but the proof increases as the dangers increase, and, when it reaches the stage where an attempt to pass over the way would of itself plainly and unequivocally amount to the want of ordinary care and prudence, contributory negligence is established as a matter of law. But generally the presumption arising from the fact is not conclusive. It is open to question whether the incurring of the probable and possible hazard of using the way is consistent with the exercise of ordinary care and prudence. In such cases the question becomes a mixed one of law and fact, and is for the determination of the jury under proper instructions. But it is not the rule that one may use a way which he knows to be dangerous with impunity; he must use care commensurate with the danger, and unless he does so he is guilty of contributory negligence and cannot recover for an injury suffered because of the dangerous condition of the way, no matter how negligent the authorities whose duty it was to repair it may have been. There is nothing in the case of *Jordan v.*

Seattle, 30 Wash. 298, 70 Pac. 743, that is contrary to this rule. It was not there said, nor was it intended to be said, that contributory negligence could not be established by showing that the injured plaintiff had used a defective or dangerous way without the exercise of ordinary care. It may be that the questions objected to were immaterial because there was no showing or offer to show that the witness had imparted her knowledge of the defect in the walk to her mother, prior to the time of the injury, but this does not require a reversal of the case. The answers to the questions were not prejudicial to the appellants. If they reflected upon either party, it was upon the respondent, and error without prejudice is not a ground for reversal.

With reference to the witness Teats the following appears in the record: "Mr. Teats: On agreement of counsel that he will not enforce the rule, that he will not prevent me from addressing the jury, I would like to be sworn to identify Identification B. I don't like to do this, but it seems I am the only witness on the point. Govnor Teats, a witness on behalf of plaintiffs, being first duly sworn, testifies as follows: About—Mr. Ellis: Just a moment. Counsel has taken the stand for the purpose of identifying this piece of board marked Identification B. Now, counsel, of course, will proceed to make his statement without questions, and we insist, if he does, the first thing he does is to qualify by stating positively that he knows exactly where the accident occurred, before he is allowed to make any statement whatever. The Court: I will hear whatever the witness has to state, and, if he states anything objectionable, you can interpose your objection at the time. By Mr. Teats: I live at South Oaks and South Fourteenth. I think about a week after the accident I was called upon by — I went to call on Mrs. Shannon at her request, and she informed me where she was injured. I am acquainted with the sidewalk, and have been for ten years, between South Seventh and Sixth avenue. Upon her information I went to the place— Mr. Ellis: Now, your honor, we object to this on the ground that counsel has not shown that he knows where the injury occurred, and therefore is not competent to identify the place. It is a self-serving declaration through an attorney, and clearly inadmissible on any theory. If such evidence could be admitted there would be no limit. A client could state facts in a general way to counsel; counsel could take the stand and swear from those facts and create any state of facts; there must be a limit drawn somewhere. The Court: There is force in counsel's contention, the court recognizes. At the same time I am inclined to the view that, in a matter of this kind, probably it is a question for the jury rather than the court. Mr. Ellis (after further argument): We object on

the further ground that the witness' testimony would necessarily be hearsay, as attempting to show where the injury occurred by hearsay. The Court: The objection overruled, on both grounds. Mr. Ellis: Defendant notes an exception. By Mr. Teats: I proceeded on the east side of Pine street from South Seventh towards Sixth avenue, and about 100 feet toward Sixth avenue from South Seventh I found a hole in the sidewalk on the left hand side going, on the street side and in the bottom of that hole I found Identification B— Mr. Ellis: I move to strike, on the further ground that witness has stated in the opening of his statement that this was a week—about a week—after the accident is alleged to have occurred, and the evidence would be incompetent as to showing the condition of the walk, or tending to show the condition of the walk, when the accident occurred. The Court: Your objection may be sustained on that ground. The condition of the walk at some comparatively long period of time after the happening of the alleged accident would not be competent. Mr. Teats: This is a week after, and is not for the purpose of showing the condition of the walk, but for the purpose of how and where I found this Identification B. Mr. Ellis: That is exactly what we are objecting to. The Court: I think, such a period of time having elapsed, it would be very unsafe to admit testimony as to what was found. A week after the accident the court or jury would have no means to know what occurred. Mr. Ellis: We move to strike out all of counsel's testimony. The Court: I will sustain the motion. Mr. Teats: Plaintiff excepts to the striking of the testimony. Mr. Teats: I found no other hole of any dimension—Mr. Ellis: We object to further testimony as to the condition of this sidewalk, on the ground stated. The Court: The objection sustained. Mr. Teats: Plaintiff notes an exception. Mr. Ellis: We move to strike the last statement of witness. The Court: The motion sustained, and exception allowed."

Counsel now argues that this was error because the piece of board was competent evidence for two reasons: First, it showed the rotten condition of the walk; and, second, the size of the hole into which the injured appellant stepped. But it will be observed that when objection was made to the statements of the witness counsel disclaimed distinctly that the evidence was for the purpose of showing the condition of the walk, and the purpose expressed excluded the other reason. It would seem that he could not complain now of the court's ruling unless the evidence was admissible for the purpose he sought to introduce it. He said its purpose was to show how and where Identification B was found. But plainly it was an immaterial question how and where Identification B was found, unless he intended to offer it in evidence, and of this he gave no

intimation, either by offering it, or stating that it was his purpose to so offer it. But if we accept the theory of the appellants, the court's ruling would not be fatal to the judgment. That there was a hole in the sidewalk at or near the place where the appellant received the injury, and that it was of the size and character described in the complaint, was testified to by all the witnesses who were asked concerning the condition of the walk. All of them testified also that the boards in the walk were more or less decayed. In fact, on neither of these questions was there any dispute in the evidence. This rejected evidence could therefore have been but accumulative of an undisputed fact, and for the court to limit the amount of evidence upon an undisputed question is never a ground for a reversal.

Many exceptions were taken to the instructions given the jury and assigned as error in this court, but we have found it unnecessary to notice them separately. The charge as a whole was a clear exposition of the law when applied to the issues in the case and the facts before the jury, and we have repeatedly held this to be sufficient, even though it may contain expressions which would state the law too broadly or incorrectly if standing alone or read apart from the context in which such expressions are found.

Error is assigned on the ruling of the court denying the motion for a new trial. The questions raised by the motion not heretofore considered are: Misconduct of a juror, that the verdict of the jury is not supported by the evidence, and newly discovered evidence. The specific charge against the juror is that while the injured appellant was testifying the juror read from a pamphlet which he took from his pocket, paying no attention to her testimony whatever, and that, when a certain other witness for the appellants was testifying, the juror rolled the pamphlet into the form of a tube through which he looked at the witness. The affidavits making these charges are specifically denied by the accused juror, and his denial is supported by the jurors sitting next to him and behind him to the effect that they saw no such conduct on the part of their fellow juror. Passing over the question whether the acts charged against the juror would be cause for reversal if admitted or satisfactorily proven, we cannot think the evidence submitted justifies the conclusion that the juror was willfully guilty of the acts charged. If the question were reduced to one of veracity between the parties, we would hesitate before concluding that the weight of the proofs was against the juror, but the question is not reduced to this. There was room for an honest mistake on the part of the persons making the charges, and we prefer to believe that they were honestly mistaken, rather than that perjury was committed by one side or the other.

On the second question, we think the ver-

dict not contrary to the evidence. There was little or no evidence to support the allegation that the defect in the walk caused the injury, and the jury were justified in finding against the appellants on this ground. It is not enough to show that a person received an injury while traveling along a walk and that the walk was defective. It must be shown by a preponderance of the evidence that the defect caused the injury before a recovery can be had.

The newly discovered evidence went only to the condition of the walk. It was to the effect that the walk had been long out of repair, and that a hole of the size and dimensions described in the complaint existed in the walk prior to the time of the injury. But, as we have stated before, the jury could not have found against the appellants on this branch of the case. There was no dispute, as we read the record, of the fact that the walk was out of repair, and that a hole existed therein prior to the time of the accident. But there was room for the contention that the proofs failed to show that the defective walk or the hole in the walk caused the accident, and additional evidence on the first question could in no way aid the want of proof on the latter. Conceding, therefore, that the appellants have made a showing sufficient to excuse their failure to procure the additional evidence at the trial, it can avail them nothing, since the new proofs do not go to that part of the case where proof was wanting.

As we find no substantial error in the record, the judgment must stand affirmed, and it is so ordered.

MOUNT, C. J., and HADLEY, RUDKIN, CROW, ROOT, and DUNBAR, JJ., concur.

BANCROFT v. GODWIN et al.

(Supreme Court of Washington. Dec. 28, 1905.)

1. LANDLORD AND TENANT — DAMAGES TO TENANT'S GOODS AND RIGHTS—LIABILITY OF LANDLORD.

A landlord, who undertakes the remodeling of a leased building, must accomplish it so as not to damage his tenant's goods or interfere with his enjoyment of the tenancy, and is liable for the damages resulting to the tenant in consequence of not properly supervising the work done by subcontractors.

2. TRIAL—VERDICT—DISREGARD OF INSTRUCTIONS.

Where a landlord was liable for the damages sustained by his tenant in consequence of his failure to properly supervise the work done by a contractor or subcontractor in remodeling the leased building, a verdict for the tenant would not be set aside because contrary to an erroneous charge that the landlord was not liable if the damage was done by a contractor or subcontractor, or their respective servants.

3. NEGLIGENCE—OMISSIONS OF INDEPENDENT CONTRACTOR.

Where the damage sustained by a tenant during the remodeling of the leased building was occasioned by the negligence of a subcontractor, doing the work without the super-

vision of the original contractor, the subcontractor, and not the original contractor, was liable therefor.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 68.]

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Elizabeth Chapin Bancroft against John W. Godwin and others. From a judgment for plaintiff, defendants appeal. Affirmed as to defendant John W. Godwin; reversed as to defendants Ryan & Co.

Allen, Allen & Stratton and Gill, Hoyt & Frye, for appellants. G. F. Bogue, for respondent.

ROOT, J. Respondent commenced this action to recover damages against the appellants jointly on account of an injury to a stock of goods, caused by leakage of water upon the same while contained in a building which she had leased for store purposes from appellant Godwin, and which building, at the time of the injury complained of, was being remodeled. Appellant Godwin interposed an answer, denying all the material allegations of the complaint tending to charge him with liability. The appellants Ryan & Co. interposed an answer containing some denials and setting forth an affirmative defense to the effect that the actual work of remodeling this building was being done by one McDonald, who was an independent subcontractor. Upon the trial the jury returned a verdict in favor of respondent, as against all the defendants, in the sum of \$500. Motions for a new trial were interposed by Godwin and by Ryan & Co., respectively, and each also moved for a judgment in his favor non obstante verdicto. All of these motions were denied, and judgment entered in accordance with the verdict. From this all of the defendants appealed. Numerous errors are assigned upon rulings of the court touching the introduction of testimony; but an examination of these rulings convinces us that no substantial or reversible error was committed.

Among other instructions the court gave the jury the following: "In this connection I charge you that T. Ryan & Co. were not the servants and employees of said Godwin." And, further: "If you find that the damage was not done by any of Godwin's negligence, or the servants of Godwin, but was done by T. Ryan & Co., his agents or servants, or by any other subcontractor, then you must find in favor of Godwin, as I have instructed." It is contended by appellant Godwin that under this instruction no verdict should have been rendered as against him, and that said instruction was binding and conclusive, even though it should be deemed incorrect as a proposition of law. As a matter of law, in the light of the facts in this case, this instruction was erroneous. The proposition therein contained would be sound if Godwin's liability depended merely upon the

question of negligence and was purely a matter of tort. It is alleged in the complaint and shown by the evidence that the remodeling of this building was done in such a careless and unskillful manner that during a rainstorm the water found its way through the roof and ceiling, and caused the plastering to be moistened and to fall upon respondent's goods, to their serious damage. Godwin had entered into a contract with Ryan & Co. to do the work of remodeling this building. Ryan & Co. had sublet or transferred the contract to McDonald, who had sole charge of the manner in which the work was done; neither Godwin nor Ryan & Co. participating therein. Hence no tort on the part of Godwin occasioned the injury complained of.

But it must be remembered that the relation of landlord and tenant existed between Godwin and respondent. The former had leased these premises to the latter as a store building, and by virtue of said lease actually or by implication guaranteed that he would neither do nor permit to be done anything which would render said premises unfitted for such purpose or disturb the substantial enjoyment by his tenant thereof, as contemplated by said lease. When he undertook to remodel said building, it was incumbent upon him to see that said modification was accomplished in such a manner as not to damage the goods of his tenant or in any way seriously interfere with the beneficial enjoyment of the tenancy created by said lease. Having, however, caused this remodeling to be undertaken, and not having supervised it so as to avoid impairing his tenant's property and substantial rights, he became liable in damages for the injury thereby wrought. *Wusthoff v. Schwartz*, 32 Wash. 337, 73 Pac. 407. The rule, contended for by appellant Godwin, that the verdict of a jury which is contrary to an erroneous instruction of the court should be set aside, we cannot apply in this case. There are doubtless some cases where this is a proper and salutary rule. But we do not deem it such where the facts are as this record reveals. We do not think the former decisions of this court are such as to establish this as a rule applicable in all cases of erroneous instructions followed by verdicts inconsistent therewith. The verdict of the jury, so far as it affects Godwin, will not be disturbed. For the reasons already suggested, the motion of defendant Godwin for a judgment notwithstanding the verdict was properly denied.

The motion for judgment in favor of Ryan & Co. non obstante veredicto should have been granted. No relationship of landlord and tenant existed between respondent and Ryan & Co. There were no contractual relations whatever between them. If respondent had any cause of action against Ryan & Co., it was in tort arising by reason of the careless and negligent manner in

which the work was being done. But it was alleged and established by the proof that Ryan & Co. neither did this work nor had any supervision, control, or management thereof. Any negligence or carelessness was not theirs, but entirely that of their subcontractor McDonald. As the latter did the work in his own manner and without the direction, control, or supervision of the original contractor, he became and was an independent contractor, and was directly responsible for his acts and omissions, and incapable of charging the original contractor with any negligence committed in the carrying out of the contract.

The judgment of the honorable superior court, in so far as it affects the appellant Godwin, is affirmed. In so far as it affects the defendants Ryan & Co., it is reversed and remanded, with instructions to dismiss the action as to said appellants.

MOUNT, C. J., and CROW, HADLEY, and RUDKIN, JJ., concur.

DUNBAR, J. I concur in the result, but wish to emphasize my disapproval of the rule contended for by the appellant that the verdict should be set aside because it does not accord with the instructions, conceding the instructions to be erroneous. The object of a lawsuit is to do justice to litigants, and when it is so manifest to an appellate court that justice has been done, and it appears conclusively that errors of law have been errors without prejudice, it will not defeat the ends of justice by reversing a case which has been rightly decided.

KEYSTONE MILLING CO. et al. v. EQUITY MINING CO.

(Supreme Court of Oregon. Jan. 23, 1906.)

MINES AND MINERALS—LOCATION—BOUNDARIES—EVIDENCE.

In a suit to quiet title to a mining claim, evidence held to sustain a decree fixing the boundaries of the claim.

Appeal from Circuit Court, Grant County; Robert Eakin, Judge.

Suit by the Keystone Mining & Milling Company and another against the Equity Copper & Gold Mining Company. From a judgment in favor of defendant, plaintiff Keystone Mining & Milling Company appeals. Affirmed.

This is a suit to enjoin an alleged trespass on real property. The plaintiff the Keystone Mining & Milling Company, a corporation, is the owner of a quartz mining claim in Grant county, known as the "Keystone," and its coplaintiff, the Keystone Mining Company, a corporation, is in possession thereof, pursuant to a contract to purchase the premises. The defendant, the Equity Copper & Gold Mining Company, a corporation, is the owner of quartz mining claims called the

"Colorado" and the "Oregon." It is alleged in the complaint that the defendant, pretending to develop its claims, willfully trespassed upon plaintiff's lode, taking therefrom and converting to its own use large quantities of valuable gold-bearing ore, to plaintiffs' damage in the sum of \$20,000, thereby destroying the substance of the mine, and to prevent further injury to the property an injunction is prayed. The answer denies the material allegations of the complaint and avers facts tending to show the defendant's title to its claim. The right to extract ore from the tunnels which the defendant has run is asserted by adverse possession and also by estoppel. The reply put in issue the allegations of new matter in the answer, and, the cause having been referred, the court found from the testimony taken that the boundaries of the Colorado claim do not conflict with those of the Keystone; that the southern boundary of the Oregon claim overlaps the northern boundary of the Keystone, not more than 150 feet, but that the defendant had done no work on the Oregon claim within the limits of the Keystone; and that plaintiffs were not entitled to an injunction or to damages. A decree having been rendered according to such findings, but establishing the boundaries of the defendant's claim, the Keystone Mining & Milling Company appeals.

N. C. Richards, for appellant. John L. Rand and Errett Hicks, for respondent.

MOORE, J. (after stating the facts). The question to be considered is, where were the boundaries of the Keystone claim originally located? The transcript shows that in 1881 W. F. Settlemeir located the Wide West quartz mining claim, A. E. Starr the Keystone, and W. B. Carpenter the Green Mountain. These claims, as evidenced by the notices of location, which were duly recorded, were each 1,500 feet in length and 300 feet in width on each side of a lode, and extended in the order named southwesterly, and were treated by the locators, who were partners in the enterprise, as an entity known as the "Keystone Mines." The location notices contained separate statements as follows: The Wide West: "Running from the Keystone quartz claim northerly. Location on the hillside on the left-hand side of the Left-Hand Fork of Dixie Creek." The Keystone: "Running from this notice southerly. This location is on the hill on the left-hand side of the Left-Hand Fork of Dixie Creek, running southerly toward what is known as 'Henry Gulch.'" The Green Mountain: "Said claim runs in a southerly direction from the Henry gulch south of the Keystone quartz ledge." The plaintiffs introduced in evidence maps showing that the group of mines is situated in sections 2 and 11, in township 12 S. of range 33 E. of the Willamette meridian. There is represented on

one of these maps ravines marked "Comer Gulch" and south thereof "Henry Gulch," which are nearly parallel, extending south-easterly and terminating at a stream noted as "Left or South Fork of Dixie Creek"; such creek having been named "left" contrary to geographical rule by looking up stream. While the group of mines was so owned by the partners, Starr, on January 27, 1885, located westerly thereof another quartz mining claim called the "Colorado"; the notice stating that it extended southerly from Comer gulch. Settlemeir having parted with his estate in the Keystone Mines, his successors in interest and Starr and Carpenter on July 5, 1886, executed to J. Frank Watson a deed to the Keystone, the Wide West, and the Green Mountain claims; the conveyance stating that the Wide West and the Green Mountain claims were northerly and southerly extensions, respectively, of the Keystone. The Keystone Mining & Milling Company having been incorporated, Watson, on July 12, 1886, executed to it a deed to the mining claims which he purchased. This corporation operated the mines about four years, when it abandoned the Wide West and Green Mountain claims, whereupon the former was attempted to be relocated, June 24, 1891, by W. W. Jones, C. R. Johnson, and W. B. Woodruff, who placed the southern boundary thereof at Comer gulch calling the claim the "Little Denver." An amended location of the last-named claim was made by the same persons, November 9, 1891, in which the courses and distances from the point of discovery are given; the notice specifying that the claim was situate "on the north side of Comer gulch, near Main Dixie creek." Isham Laurance, having secured the title to the Little Denver, relocated that claim, September 9, 1898, calling it the "Oregon." Having secured the estate of A. E. Starr and of others in the Colorado claim, he executed a deed thereof and also of the Oregon claim, November 7, 1902, to the Equity Copper & Gold Mining Company, which commenced running tunnels, expending about \$23,000 for labor, when it discovered a valuable deposit of gold-bearing ore. The Keystone Mining & Milling Company, on August 24, 1903, entered into a contract with the Geiser-Hendryx Investment Company, a corporation, whereby it stipulated to sell and convey to the latter the Keystone quartz mining claim for the sum of \$20,000, payable in 18 months, giving possession of the premises.

A. Philbrick, a mining engineer, at the request of the Geiser-Hendryx Investment Company, surveyed what he considered to be the Keystone quartz mining claim, placing the north boundary thereof about 150 feet north of Comer gulch, and on August 22, 1903, Watson, as president of the Keystone Mining & Milling Company, subscribed the latter's name to an amended location notice of that

claim, corresponding to Philbrick's survey thereof. Watson thereafter, concluding that such survey was incorrect, employed A. B. Browne, a mining engineer, who surveyed what he considered to be the Keystone claim, placing the north boundary thereof about 800 feet north of Comer gulch, thereby finding an excess of 228.7 feet on the south end of the claim. The Keystone Mining & Milling Company, on December 22, 1903, made an amended location of the Keystone claim, according to Browne's survey, and the Geiser-Hendryx Investment Company, on February 9, 1904, located the excess found by Browne, which was called the "Keystone Fraction." The corporation last mentioned assigned all its interest in the contract for the purchase of the mine to the Keystone Mining Company. If the northern boundary of the Keystone claim is the line located by Browne, the west boundary thereof overlaps the northeast corner of the Colorado claim about 200 feet; the southwest corner of the Keystone Fraction claim being about on the line of the Colorado claim. If, however, the northern boundary of the Keystone claim coincides with the line surveyed by Philbrick and as found by the trial court, though it overlaps the southern boundary of the Oregon claim, the western boundary of the Keystone claim does not interfere with the eastern boundary of the Colorado claim, and, as no work has been done by the defendant on the Oregon claim within the boundaries of the Keystone claim, the plaintiffs have sustained no damage and are not entitled to an injunction. The relocation of the northern boundary of the Keystone claim as originally indicated by the locator is necessarily decisive of the issue involved.

J. Frank Watson, as plaintiff's witness, testified that, when he was negotiating for the purchase of the group of mines, A. E. Starr, one of the locators, pointed out to him what purported to be the boundary common to the Keystone and to the Wide West claims, calling his attention to a stump near an open cut to which a board was nailed, having thereon location notices of such claims, which stump stood about 600 or 700 feet north of Comer gulch, and saying that the point indicated was at the discovery shaft of the Keystone claim. Watson further testified that at that time he made a topographical sketch of the several claims, which, having been introduced in evidence, has indicated thereon the boundary common to the Wide West and to the Keystone claims located at a winze marked "30 feet deep," which was dug near the summit of a hill; the outline showing a deep depression intended to denote Comer gulch as being situate about the middle of the Keystone claim. The witnesses Justin Henry, Robert C. Reed, Richard Hall, W. F. Settlemeir, the locator of the Wide West, and W. B. Carpenter, the locator of the Green Mountain claim, severally testified that the location notice of the Keystone claim

was posted at the point indicated by Watson. The foregoing is a summary of the testimony given by plaintiffs' witnesses tending to show that the north boundary of the Keystone claim was located about 800 feet north of Comer gulch.

Isham Laurance testified that Starr pointed out to him the Keystone claim as lying south of Comer gulch, and J. W. Mack testified that he saw posted on a tree south of Comer gulch the Keystone location notice, in speaking of which he said: "That was the first quartz notice I ever saw." A blue print of the several claims, offered in evidence by the defendant has indicated thereon a point denominated "Mack Notice," which, according to scale, is about 175 feet south of Comer gulch. Samson Roy testified that Starr pointed out to him the northeast corner of the Keystone claim, which was about 270 or 300 feet north of Comer gulch, and W. E. Gifford testified that he was employed as a miner by Starr, who showed him the north boundary of the Keystone claim, which was evidenced by a stump standing about 3 or 4 rods north of such gulch. The testimony last mentioned constitutes all the direct evidence tending to show that the north boundary of the Keystone claim was located near Comer gulch, and, although the greater number of witnesses place such line about 800 feet north of the gulch, we think the testimony given by defendant's witnesses, when considered in connection with certain facts to be mentioned, preponderates, and that the finding and decree of the trial court on that issue are correct.

The witness J. W. Mack, who is a surveyor, testified that Starr employed him to ascertain the legal subdivisions of public land upon which he had built a house, saying to the witness that, as there was no proper place on the Keystone claim to erect a dwelling, he had built across the gulch and wanted a description of the premises, so he could make a location thereof and save his home. Mack further testified that Starr took him to a quarter post standing just above the mouth of the gulch, and thence to the section corner one-half mile west, and, returning to the quarter post, he found by sighting through to the other point that the house was not on the Keystone claim, whereupon the witness gave Starr a description of the land which he desired. Justin Henry testified that Starr took up a piece of land on Comer gulch. W. F. Settlemeir testified that he thought it was Starr's intention to take a land claim, so that his house, which had not been moved, might be thereon. Isham Laurance testified that Starr's house was built on vacant ground, and that, when the mining claim was sold to Watson, Starr received \$500 more than either of his partners, which sum was paid him for his house. M. Howell also testified that Starr built his house individually, and that he was paid \$500 for the dwelling. A. B. Browne, who surveyed the Keystone claim

for plaintiffs, testified that his attention was called to a building on the north side of Comer gulch, which was pointed out to him as Starr's house. One of the maps which this witness prepared, and which was received in evidence, has delineated thereon a square marked "Starr House." Measuring from the west line of such square west to the boundary of the Keystone claim as located by Browne, according to the scale of his map, the distance is about 60 feet. That Starr's house was built west of the side line of the Keystone claim, as originally located, has been established, we think, beyond a doubt. As Browne's survey places this building within the limits of the Keystone claim, it is evident that the western boundary thereof has been "floated" to the west since it was originally located. This result was secured by adopting the stump identified by plaintiff's witnesses as the north center end of the Keystone claim, the west boundary of which is not parallel with the east boundary of the Colorado claim.

The Wide West and the Green Mountain claims were intended by the original locators thereof to be the northerly and southerly extensions, respectively, of the Keystone claim. An examination of the location notice of the Green Mountain claim will show that it contains the following statement: "Said claim runs in a southerly direction from Henry gulch and south of the Keystone quartz ledge." Henry gulch is about 2,200 feet south of Comer gulch, as indicated by the scale adopted by Browne in making his map. Construing the notice of the Green Mountain claim according to the fair import of the words used in the clause quoted, we think there can be no doubt that it was the intention of the locator of that claim to make Henry gulch the northern boundary thereof. The distance from Comer gulch to Henry gulch being about 2,200 feet seems to substantiate J. W. Mack's testimony as to his having seen the location notice of the Keystone claim so far south of Comer gulch, and to corroborate the testimony of Isham Laurance to the effect that, when Starr showed him the Keystone mine, he took this witness south of that ravine. The distance mentioned would also seem to explain the description in the location notice of the Green Mountain claim on the assumption that the Keystone claim extended to Henry gulch, though the notice of the latter claim is only as follows: "This location is on the hill on the Left-Hand Fork of Dixie Creek, running southerly toward what is known as 'Henry Gulch.'" The short space intervening between these gulches would further appear to elucidate the description last given, by assuming that, if the north boundary of the Keystone claim was on the line indicated by the stump referred to as the initial point, Starr's notice of location would probably have stated that his claim extended across Comer gulch; the testimony disclosing that such ravine is deeper, but not so broad, as Henry gulch.

W. F. Settlemeir, the locator of the Wide West claim, after an absence of about 20 years visited the territory originally included in that claim in company with F. D. Stanley, Samson Roy, D. R. Roberts, and W. J. Hughes, who severally testified that he took them to a stump near an open cut north of Comer gulch, and said that the Wide West claim originally extended north and south from that point about 700 and 800 feet, respectively; that Settlemeir further said that his son-in-law, W. J. Galbreath, located a claim as a northern extension of the Wide West claim, but, not having made any discovery of valuable mineral ore therein, he dug a hole in his claim and put therein some quartz which he took from the Wide West claim; that Settlemeir, going about 700 feet north from such open cut, came to a hole partially filled, and Roberts, digging therein, found some quartz which Settlemeir said had been brought from the Wide West claim. Two of the witnesses say that, measuring from such hole, it was found to be 60 feet south of the north boundary of the Oregon claim. Settlemeir admits making the statements so imputed to him, but, explaining them, he testified that, after showing such witnesses what he supposed to be the boundaries of the Wide West claim, he was informed by his son-in-law and also by W. B. Carpenter that the open cut to which he went was in the Keystone claim, and that, his memory having been refreshed by such information, he was satisfied that he erred in what he at first considered to be the boundaries of the Wide West claim. Settlemeir further testified that he came to the hole referred to sooner than he expected to find it. W. J. Galbreath testified that, going about 1,500 feet north of the open cut, he dug a hole about 20 inches deep, and, not discovering any ore, Starr thereafter informed him that he had taken some quartz and put it into such hole, so that the witness could make a location when he had time to find the ledge.

Mr. Settlemeir is 70 years old, and he had not been at the Keystone claim for about 20 years, until he visited it just prior to the trial herein, in company with the officers, agents, and employes of the defendant company. His age and the time that had elapsed since he saw the property explains, in our opinion, why he so readily acquiesced in the suggestion of others in respect to the boundaries of the Keystone claim. We do not doubt the sincerity of his ultimate belief in respect to the issue involved, for an examination of his testimony clearly shows a desire to tell the whole truth; but we nevertheless believe that the discovery of the quartz in the hole which he claimed his son-in-law dug conclusively shows that his prior opinion as to the north boundary of the Wide West claim was correct. That A. E. Starr, the locator of the Keystone claim, showed Wat-

son a stump near a winze which he claimed was on the boundary common to that claim and to the Wide West, there can be no doubt, as is evidenced by the topographical sketch made by Watson at the time he purchased the property. It will be remembered that Starr pointed out to various persons, who appeared as witnesses at the trial, different points as corners and north center ends of the Keystone claim. The variant points so indicated by him cannot all be correct, and, this being so, we think the location notice of the Green Mountain claim, fixing the north boundary thereof at Henry gulch; the building of Starr's house off the Keystone claim as originally located; and the discovery of the quartz in the hole pointed out by Settlemeir—give preponderance to the testimony produced by the defendant and irresistibly lead to the conclusion that the Keystone claim did not originally extend so far north as Starr claimed to Watson and to others who appeared as plaintiffs' witnesses.

In our opinion the testimony of J. W. Mack, to the effect that he saw the location notice of the Keystone claim posted on a tree standing south of Comer gulch is entitled to credit, because he says such notice was the first he had ever seen of a quartz mining claim. Such notice, being the first of its kind Mack had ever seen, would in all probability attract his attention, and thus impress upon his memory, not only the form thereof, but the particular place of its location as well. This notice is attempted to be explained by several of plaintiffs' witnesses, who testify that an old water right notice was posted in Comer gulch. We do not think the explanation contradicts Mack's statement, for the point to which he referred is several feet south of the gulch, where the testimony shows the surface of the ground to be very precipitous, in which place it would seem unreasonable to think that a water right notice would be posted, but rather in the ravine, as testified to by some of plaintiffs' witnesses, thus showing that more than one notice was posted in that vicinity.

We believe that a fair consideration of all the testimony introduced at the trial, when construed in connection with the circumstances adverted to, fairly shows that the north boundary of the Keystone claim never originally extended north of Comer gulch; but, the trial court having established such boundary on a line about 150 feet north thereof and no complaint having been made by the defendant, we conclude to leave the boundary as thus determined. The boundaries of the Colorado claim, in which the mining complained of has been done by the defendant, are hereby established as surveyed by F. D. Stanley, to wit: Beginning at a stake at the southwest corner of the claim, from which the northwest corner of section 11 in township 12 S. of range 33 E. bears N.

87° 1' W. 1,521.59 feet; thence N. 39° 11' E. 1,475.09 feet, to a stake; thence S. 63° 47' E. 600 feet, to a stake; thence S. 39° 10' W. 1,500 feet, to a stake; and thence westerly to the place of beginning.

It follows, from these considerations, that the decree of the court below is affirmed.

GRIMBERG v. COLUMBIA PACKERS' ASS'N.

(Supreme Court of Oregon. Nov. 27, 1905.)

1. SHIPPING — CHARTERS — NATURE OF CONTRACT—PRESUMPTIONS.

It is presumed that a charter party is a contract of affreightment, unless its terms show a clear intention to make a demise to the charterer.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 149.]

2. SAME—CONSTRUCTION OF CONTRACT.

A charter party must be construed as other contracts, and, when the true intentment of the parties is ascertained, it must prevail.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 142.]

3. SAME—CHARTERER AS OWNER FOR VOYAGE.

Where a charter party transfers to the charterer the entire command, possession, and control of the vessel, the charterer is owner for the service stipulated for; but where a charter party is merely an agreement for the use of the vessel, the general owner at the same time retaining command, possession, and control over her navigation, the charterer is a contractor for the specific service, and the responsibilities of the owner are not changed.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 149, 150.]

4. SAME — MEANING OF "FREIGHTING" IN CHARTER.

The word "freighting" in a charter party, whereby the owner of a vessel agrees on the "freighting" and chartering thereof to the charterer for one voyage, means a loading with goods for transportation, and does not indicate a demise of the vessel to the charterer.

5. SAME — MEANING OF "CHARTERING" IN CHARTER.

The word "chartering," in a charter party whereby the owner of a vessel agrees on the freighting and "chartering" thereof to the charterer for one voyage, does not necessarily mean a letting of the vessel by way of demise, but is equally consistent with the idea of a contract of affreightment.

6. SAME—STIPULATIONS—CONSTRUCTION.

A charter party binding the owner to keep the vessel during the voyage well fitted, tackled, etc., giving the charterer the sole use of the vessel, except the private apartments of the master in the cabin, and providing that no goods shall be laden on board, except for the charterer, gives the owner an oversight over the vessel during the voyage, and binds him to engage in freighting her, and is inconsistent with a demise of her to the charterer.

7. SAME.

A provision in a charter party, whereby the charterer covenants to charter and hire a vessel and to pay for the charter, including the captain's salary, during the voyage, a specified sum on the acceptance of the vessel and a specified sum per month until the vessel is discharged of her cargo, is not inconsistent with a contract of affreightment only, where the provision is contained in a covenant on the part of the char-

terer, and the owner has not on his part employed any words operative as a demise.

8. SAME.

A charter party contained no technical words of demise, nor was the vessel let to hire. The charterer covenanted to "charter and hire." The owner provided the master. The charterer engaged the crew and bound himself to pay all port charges and labor bills and provisions during the voyage, and to "deliver" the vessel in port of destination to the owner, and agreed to employ the vessel only in lawful trade. The master's wages were included in monthly payments to be made for the charter. The first payment was to be made on the day of the "acceptance" of the vessel by the charterer. The owner agreed to place the vessel at a wharf selected by the charterer, at which time, the vessel being safely moored, the charter should "commence," and if the vessel was not so delivered the charterer might cancel the charter. *Held* that, though the words "charter and hire" and "acceptance" and "deliver" indicated a demise, they were not inconsistent with a contract of affreightment merely, and in view of the absence of words of demise and the presumption against a demise the charter party must be construed as one of affreightment only.

Appeal from Circuit Court, Clatsop County; Thomas A. McBride, Judge.

Action by Charlotte Grimberg, administratrix of Emanuel Grimberg, deceased, against the Columbia Packers' Association. From a judgment for defendant, plaintiff appeals. Affirmed.

Plaintiff sues to recover damages for the death of Emanuel Grimberg, alleged to have been caused through the negligence of the defendant. It is alleged that Grimberg was in the employ of the defendant in the capacity of a sailor on the vessel *St. Nicholas*, under charter from George W. Hume & Co., of San Francisco, who, being ordered aloft, obeyed, but that, while in the rigging of the vessel, and using a becket on the mizzen topgallant yard, it gave way, whereby he was precipitated to the deck of the vessel, sustaining injuries from which he died. The alleged carelessness consists in allowing the becket to become unsafe and insecure. The accident is alleged to have happened on the ship's homeward voyage from Nushagak Harbor, Alaska, to the port of Astoria, Ore. When plaintiff concluded her evidence at the trial, the defendant moved for a nonsuit, which being granted, the defendant had judgment, and plaintiff appeals.

George Noland, for appellant. G. C. Fulton, for respondent.

WOLVERTON, C. J. (after stating the facts). From the allegations in the complaint the accident must be deemed to have happened upon the high seas, for the vessel was on her homeward voyage from her port of destination in Alaska to her port of final discharge in Oregon. The theory of plaintiff is that defendant was the owner of the vessel *pro hac vice* for the voyage, and, therefore, being in possession and command, was responsible for the accident and liable in damages for the injury sustained. The de-

fendant combats the proposition, and contends that the liability is with Hume & Co., the general owners of the vessel. It is practically conceded by appellant's counsel that, unless the defendant was the lessee of the vessel *St. Nicholas*, under a demise from the owner, it is not liable for the damages sustained. Whether, therefore, the charter party between Hume & Co. and the defendant, touching the navigation of the vessel, constitutes a demise thereof, or is a mere contract of affreightment, is at the outset a material, if not the vital, question for our consideration.

The charter party was made and concluded in San Francisco between George W. Hume & Co. of the first part and the Columbia River Packers' Association of the second part. The following is an abstract of the provisions of the charter party, material for our purposes, *viz.*: That the party of the first part "does covenant and agree on the freighting and chartering of the said vessel unto" the second party "for one voyage from the port of San Francisco, California, with option via Astoria, Oregon, to Nushagak Harbor, Bristol Bay, Alaska, and thence to Astoria or Puget Sound, final port of destination," and "does engage that the said vessel, in and during the said voyage, shall be kept tight, staunch, well fitted, tackled, and provided with every requisite necessary for such a voyage. That the whole of such vessel, excepting the private apartments of the master in the cabin, and his navigation room, and necessary room on the ship for sails and necessary extra tackle, shall be at the sole use and disposal of the" second party "during the voyage aforesaid; and that no goods or merchandise whatever shall be laden on board otherwise than for said party of the second part or its agent without its consent." That the second party "does covenant and agree * * * to charter and hire said vessel as aforesaid," and to pay "for the charter of said vessel, including the captain's salary, during the voyage aforesaid" \$1,500 "on the day of acceptance of said vessel alongside of the wharf in San Francisco, and thereafter fifteen hundred dollars monthly in advance and *pro rata* for fractional part of a month, until said vessel is discharged of all her cargo in Astoria, Oregon, or Puget Sound, the final port of destination. It is further agreed" that the second party "shall pay all wages of crew (excepting captain) and all port charges and labor bills from the date this charter party commences, and to furnish all necessary provisions, fuel, water, and lights during the whole of said voyage, and at the termination of this charter to deliver the said vessel in port of Astoria or Puget Sound to the" first party "in as good condition (reasonable wear and tear excepted) as she is at the commencement of this charter, dangers of the sea and navigation, and acts of God and the elements, and fire excepted"

and that it will "employ said vessel only in lawful trade, and no goods or merchandise shall be laden on board thereof for the purpose of unlawful trading." That the first party "will place the aforesaid vessel, with swept hold ready for cargo * * * alongside of such safe wharf in San Francisco as the party of the second part may direct, * * * at which time, said vessel being safely moored, said charter shall commence," but that, if "said ship shall not be delivered to the party of the second part in the manner and at the time designated, then the party of the second part may at its option cancel this charter"; and that, "in case the said vessel be lost or wrecked," the second party shall pay to the first party "the freight under this charter up to the day the said vessel is lost or wrecked, and in case the said vessel shall return to this, or any other port, unable to complete the said voyage, this charter shall cease and terminate." The second party further agrees that "on the delivery of said vessel at the termination of the charter she shall be clear and free of any liens for services performed to or on board the same, and for materials furnished. Payments for services or materials are by this charter party required to be made by the party of the second part. That she shall be free from all or any claims or demands or liens for breach of passengers or carrying contract, unless the damages caused shall be by reason of the unseaworthiness of the vessel, but not otherwise," and that the second party shall "at all times have enough men aboard to properly care for ship and her safety." That the first party "shall furnish and supply said ship with sufficient tackle, gear, and falls to handle cargo, and necessary lines for moorings."

The question presented arises almost wholly upon a construction of the charter party. For there are but few extraneous facts that shed any light upon the subject, which is whether the agreement constituted a demise of the vessel to the defendant or was merely a contract of affreightment; the general owners retaining the control, management, and navigation thereof. It is well to observe at the outset that the presumption primarily is against a demise, and the contract is to be construed as one for an affreightment, unless the terms show a clear intentment to the contrary. Say the learned authors of the American and English Encyclopedia of Law (2d Ed.) vol. 7, p. 167: "The presumption is that the ownership of the vessel, even during the period covered by the charter party, continues in the general owner; and, unless the intention to transfer the possession and ownership to the charterer is unequivocally manifested by the contract, a charter party will not be treated as a lease or demise of the ship, but will be treated as a contract of affreightment." So, in *Reed v. United States*, 11 Wall. 591, 601, 20 L. Ed. 220, Mr. Justice Clifford says: "Courts of

justice are not inclined to regard the contract as a demise of the ship, if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer, but where the vessel herself is demised or let to hire, and the general owner parts with the possession, command, and navigation of the ship, the hirer becomes the owner during the term of the contract, and, if need be he may appoint the master and ship the mariners, and he becomes responsible for their acts." The burden, therefore, lies with the plaintiff to overcome this presumption.

About the only extraneous evidence, important to the inquiry, is that the decedent was employed by the defendant at Astoria, Ore., in the capacity of a sailor on the voyage, and others were so employed by defendant for a like service; that they shipped on the vessel at Astoria; that there were three mates in the service of the ship; and that the second mate directed the deceased to go aloft, which order being obeyed, he met with the mishap in question, causing his death. Aside from the bearing this evidence may have as showing what was done in pursuance of the charter party, the instrument itself must be construed as other contracts, and, when the true intentment of the parties is ascertained, it must prevail. We should keep in mind, however, the presumption applicable, so that the doubt, if one exists, may be resolved in favor of a contract of affreightment, rather than a demise of the vessel. See, further, *Adams v. Homeyer*, 100 Am. Dec. 391, and *Certain Logs of Mahogany*, 2 Sumn. 589, Fed. Cas. No. 2,559. The general rule of construction relating to the charter party is that if the vessel, the subject of the agreement, be let so that there is a transfer or relinquishment to the charterer of the entire command, possession, and subsequent control, he will be treated as owner for the time being; that is, for the voyage or particular service stipulated for. However, if the charter party is but an agreement or covenant for the use of the vessel or some designated part thereof, the general owner at the same time retaining command, possession, and control over its navigation, the charterer must be regarded as a contractor only for a designated or specific service, which does not alter the duties and responsibilities of the owner. In the one case the charter party operates as a lease or demise of the vessel, whereby the lessee assumes the duties and liabilities in a large measure, at least, of the owner; while in the other the agreement is for a special service to be rendered by the owner of the vessel. *Reed v. United States*, supra. "All the cases agree," says Mr. Justice Field, in *Leary v. United States*, 14 Wall. 607, 611, 20 L. Ed. 756, "that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as

special owner for the voyage or other service mentioned." "But," says Mr. Justice Story, in *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch, 38, 48, 3 L. Ed. 481, "where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter party is considered as a mere affreightment, sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership." See, also, *United States v. Shea*, 152 U. S. 179, 14 Sup. Ct. 519, 38 L. Ed. 408, and *Emery v. Hersey*, 16 Am. Dec. 268. So that the distinguishing feature between a demise of the ship, whereby the legal responsibilities of ownership are transferred to and assumed by the charterer, and an agreement, for affreightment, is clear, and the main difficulty lies in determining what the parties intended by the charter party, considering the language in which it is clothed.

The first clause of the charter party consists exclusively of words of covenant, and not of demise. They are that the first party "does covenant and agree on the freighting and chartering of the said vessel unto" the second party "for one voyage." "Freighting" signifies a loading with goods or other commodities for transportation (Web. Dic.), and "chartering" does not necessarily mean a letting of the ship by way of demise, and is equally as consistent with the idea of a contract for affreightment. *Ross v. Charleston M. & S. Transportation Co.*, 42 S. C. 447, 20 S. E. 285. Following this are engagements of the first party in two clauses—the first to the effect "that the said vessel, in and during the voyage, shall be kept tight, staunch, well fitted, tackled," etc.; and the second that "the whole of such vessel, excepting the private apartments of the master in the cabin," etc., "shall be at the sole use and disposal of the" second party during the voyage, and that no goods "shall be laden on board otherwise than for said" second party. These contain cogent and forcible expressions indicating that an affreightment only was intended, and not a demise. They imply, first, that the owners shall have an oversight of the ship to see that it be kept in proper condition during the voyage, and, second, that they should engage in freighting the vessel, consistent with the previous clause, agreeing that no goods should be laden thereon except such as the charterer should designate. The engagements are simply what they purport to be, covenants on the part of the owners, and are inconsistent and incompatible with the idea of a demise. *Leary v. United States*, supra.

We come, now, to the next clause, which consists of stipulations on the part of the defendant. It reads, in effect, that the second party "does covenant and agree to charter and hire said vessel," and "to pay

for the charter of said vessel, including the captain's salary, during the voyage" \$1,500 on the day of acceptance of the vessel, and \$1,500 per month, until "said vessel is discharged of all her cargo." The clause runs in covenant and agreement by its direct terms; that is to say, it is a covenant to charter and hire, and to pay the stipulated sum of \$1,500 per month for the charter. The use of the term "hire," like the word "charter," is not inconsistent with the idea of a covenant or agreement only for freighting accommodations aboard ship. Says Mr. Justice Bliss, in *Adams v. Homeyer*, supra: "Nor can anything be inferred from the repeated use of the term 'hire,' for the word may as well apply to the price for service of a lease." But, in the connection in which the word is used in the present instance, the inference would be rather against the signification of a leasing, for it is contained in a covenant on the part of the charterer, while the owners have not on their part employed any terms which are ordinarily considered operative words in a lease or demise. But these clauses, considered simply in their relations one to another, are not controlling, but may yet be dominated and their true intentment governed by subsequent conditions of the charter party. In *Marcardier v. Chesapeake Ins. Co.*, supra, the charter party contained this language: "Granted and to freight let, * * * the said brig, excepting and reserving her cabin for the use of the master." And by the first clause in the case of *Clarkson v. Edes*, 4 Cow. 470, the owner agreed "to freight and to let" to the charterer the whole of the ship, and yet it was held in each of those cases, considering all the terms of the charter party, that the ownership and possession was retained by the general owner. Here were positive terms used, strongly indicative of an intentment that the ship should pass to the charterer under a demise.

The first payment in the present charter party was to be made on "the day of the acceptance" of the vessel by the charterer. The word "acceptance" has a significance that we will discuss presently. By succeeding clauses it was agreed that the charterer should pay all wages of the crew, excepting the captain, all port charges and labor bills, and furnish all necessary provisions, fuel, etc., during the whole of the voyage, and should at the termination of the charter deliver the vessel in port of destination to the owner in as good condition as when chartered, reasonable deterioration for usage excepted, and that it should "employ" the vessel only in lawful trade. These clauses certainly militate strongly against the idea of a contract of affreightment, for the charterer has taken upon himself the entire expense of the voyage, except the wages of the captain, which are provided for in the consideration for the charter of the vessel. In other words, the captain's wages were included in the monthly payments to be made

for the charter. Who were to furnish the crew we are not advised. By all reasonable intendment the owners were to furnish the captain or master, for why should they provide for the payment of his wages along with the consideration for the charter of the vessel? If the charterer was to provide such master, it would be a matter of indifference with the owners respecting the payment of such wages, except that they would probably have required a stipulation on the part of the charterer, as they have with reference to the wages of the crew, that such wages should be discharged, so that they would not become a lien upon the ship. From evidence aliunde we know that the decedent and others were employed by defendant to ship as sailors for the voyage. But there were mates aboard who undoubtedly participated in the navigation of the ship, and we are unadvised as to who furnished or employed them, the owners or the charterer. Their wages were to be paid by the charterer. The provisions touching the expense of the voyage are certainly largely inimical to the idea of a contract of an affreightment only. *Drinkwater v. Freight and Cargo of the Brig Spartan, 1 Ware, *149, Fed. Cas. No. 4,085; First National Bank of Marquette v. Stewart, 26 Mich. 84.* So it would seem, as to the agreement on the part of the charterer, that it should employ the vessel only in lawful trade. The word "employ" indicates a purpose of control and management. Yet the defendant might reasonably have made such a covenant without taking a demise of the vessel. The covenant or agreement is perhaps common to most charter parties. By a subsequent clause the owners agreed to place the vessel, ready for cargo, alongside of such wharf in San Francisco as the charterer might direct, at which time, the vessel being safely moored, the charter should "commence," but that, if the ship should not be "delivered" in the manner designated, then that the charterers might at their option cancel the charter. Then later in the agreement the charterer stipulates that "on the delivery of said vessel at the termination of the charter she shall be free and clear of any liens," etc. The use of the terms "acceptance" and "delivery" with relation to the ship would seem almost conclusively to indicate an intendment that the command and possession were surrendered to the charterers, to be by them delivered back to the owners at the termination of the voyage, and would evidence a demise, and yet not a single technical term of demise, and no other term of such significance that could not as well be used in draughting a contract of affreightment, is employed in the charter party between the parties. The mere circumstance that such terms were not employed is in itself significant. There are some other provisions of minor moment, namely, that the charterer shall, in case the vessel is disabled for service or lost, pay

"freight" to the time of such disablement or loss only, the charter terminating by the event; that the charterer shall at all times have men on board sufficient properly to care for the ship and her safety, and that the owners shall supply the ship with tackle, etc., to handle cargo, and necessary lines for mooring. These are not inconsistent, either with a demise of the vessel or a contract of affreightment, and may as well be employed in the one case as in the other. We will recur, therefore, to a further consideration of the preceding conditions touching the acceptance and delivery and redelivery of the vessel.

In the case of *Adams v. Homeyer, supra*, there arose very much such a conflict of inconsistent clauses in the charter party as here, and the court gave them most careful and intelligent consideration, resulting in the conclusion that the charter party did not effectuate a demise of the vessel. There is a significant distinction in one respect only. In that case the owners agreed and claimed the right to provide the captain "to command and run the steamer, and to furnish a man to take charge of and manage the barges, both of whom were to be paid by the plaintiffs." While the owners here do in fact provide the captain or master, and pay his wages, nothing is said regarding his command or control of the vessel. Beyond this the charterer was to insure the steamer for the benefit of the owners, and pay them "for the use and hire" of the boat and barges a stipulated sum every 15 days, "until the charter was terminated by the delivery of said steamer and all of the said barges to the owners," or until otherwise terminated. In case of loss or disablement of the boat, it was further agreed that he might deliver the barges to the owners, "pay up the hire of said steamers and barges to the date of such delivery," and be discharged from liability or loss and "for further hire"; that upon failure on the part of the charterer to pay expenses or liabilities of steamer or barges, or to keep the former insured, or to "pay the hire," his rights were to be forfeited; that the owners might terminate the charter and "resume possession of the steamer and barges"; and that in case of loss of the steamer the charterer should "be discharged from all liability to deliver said steamer as aforesaid." After speaking of the effect of other clauses of the charter party, all supporting the presumption of ownership in the general owners, the court say: "What, then, must the parties have intended by the language used by them in relation to the surrender of possession at the termination of the contract? Clearly and only that, at the time and on the occasion referred to, the contract should end; that the owners should then have the independent use and control, absolved from any obligation to run and carry exclusively for the charterer. This meaning renders the whole instrument,

and the action of the parties under it, consistent and harmonious; while the one contended for would require that Capelle, who never was in actual possession, should yield possession to the owners, who had all along, by their officers, though for Capelle's use, been running the boat and barges." A little later the court continues: "The general owner may let his ship with a master and crew of his own choosing, and, if there is evidence of intention to part with the possession, it is held to be a demise. But a covenant that he shall have the right to appoint the master to control and navigate clearly indicates an intention not to trust the property in the hands of others, but to control it by his own agents for the use of the charterer."

Now, as previously observed, the parties have employed no technical words of grant or demise, nor was the vessel, in terms, let to hire. The charterer covenanted and agreed to "charter and hire," but we look in vain for any letting to "hire" on the part of the owners, nor was there any express declaration that the charterer was to take the vessel into its own possession. The owners provided the master and presumably the mates, while the charterer engaged to employ the crew. The natural deduction would be that the owners retained command and possession and the consequent navigation of the vessel through the master and mates. So that here are conditions altogether incompatible with any idea of a demise whatever, and, while the term "hire" might be consistent with a demise, it is not inconsistent with a contract of affreightment. The clause with reference to the charterer's payment of the wages of the crew, etc., is, however, consistent with a demise, yet it is not controlling. So, with the stipulations concerning acceptance, delivery, and redelivery, considering the other conditions of the charter party. These terms are more readily reconcilable with the idea of their employment with reference to the commencement and termination of the charter party than that they portend a transfer of the possession, control, and management of the ship from one party to the other.

These considerations, taken in connection with the legal presumption that obtains in favor of the continuance of ownership of the ship in the general owners, and against any transfer thereof for the voyage, impel us to the conclusion that the contract is one of affreightment only, and does not constitute a demise. The presumption alluded to is said to be so strong that, if the end sought to be effected by the charter party can conveniently be accomplished without a transfer of the vessel to the charterers, the law is not disposed to regard the contract as a demise; and this, even if there be express words of grant in the formal parts of the instrument. *Hagar v. Clark*, 78 N.

Y. 45. No such words whatever are found in the present charter party.

Such being our conclusion, it is conceded that the defendant is not liable for the injury resulting to the decedent, and the judgment of the circuit court will therefore be affirmed.

CHRIST v. WICHITA GAS, ELECTRIC LIGHT & POWER CO.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where, in a personal injury action, contributory negligence becomes material, and its existence depends upon a conclusion of fact as to which one of two courses of action the plaintiff, in the exercise of ordinary care for his own protection, should have pursued, and the evidence is such that different minds might differ as to the proper conclusion, the question is for the jury, and not for the court.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 296, 298, 333-346.]

2. TRIAL—DEMURRER TO EVIDENCE.

In such case, on demurrer to plaintiff's evidence, if the existence of such negligence determines the plaintiff's right of action and depends upon which of the two conclusions is adopted, it is error to sustain the demurrer.

3. MASTER AND SERVANT—FELLOW SERVANT—VICE PRINCIPAL.

A foreman under whom workmen are employed is a fellow servant with the workmen, when engaged in accomplishing with them the common task or object; but when discharging or assuming to discharge the duties toward the workmen which the law imposes on the principal he is a vice principal.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 422-448.]

(Syllabus by the Court.)

Error from District Court, Sedgwick County; D. M. Dale, Judge.

Action by E. J. Christ against the Wichita Gas, Electric Light & Power Company. Judgment for defendant, and plaintiff brings error. Reversed.

The plaintiff in error brought this action, as plaintiff, in the district court of Sedgwick county to recover damages for personal injuries alleged to have been received through the negligence of the defendant, its superintendent, and foreman, while the plaintiff, under the direction of the alleged foreman, was cutting a broken wire from a pole in defendant's light line. A jury was impaneled to try the case, and the plaintiff introduced his evidence, upon the conclusion of which the defendant filed a demurrer thereto. The demurrer was sustained, and judgment was rendered against the plaintiff. To reverse this ruling and judgment plaintiff brings the case here.

Adams & Adams, for plaintiff in error. Houston & Brooks, for defendant in error.

SMITH, J. (after stating the facts). The plaintiff makes nine assignments of error, which may be fully stated in one—that the

court erred in sustaining the demurrer to plaintiff's evidence. If this ruling was not erroneous the overruling of the motion for a new trial and the judgment against the plaintiff was right. So we have only to consider the one question—was the demurrer properly sustained?

The negligence alleged is (1) in maintaining a rotten pole which absorbed water and thus became a good conductor of electricity; and (2) the failure to shut off the electric current before the plaintiff was directed to cut and attempted to cut the wire. The defenses alleged were (1) that the injury occurred through the contributory negligence of the plaintiff; and (2) if from any other cause, through the contributory negligence of a fellow servant.

It was admitted that the defendant's light plant was in charge of one Ward as superintendent. There was evidence that he was also the engineer at the power house, and employed the men; that plaintiff had worked for defendant some years before Ward became superintendent, but was not so working at the time Ward assumed said position; that Ward re-employed plaintiff, and was informed by plaintiff that he did not work among the wires when the current was on; that some time after plaintiff commenced work under Ward's employment, Ward said to plaintiff: "Mr. Evans is here. He is the foreman on your line. You will look to him for your orders and instructions from now on." That from this time Evans, the plaintiff, and sometimes a third man did the line work. That on the day of the accident, the plaintiff and Evans were called from their work, by a signal, to the power house, and were informed by Ward that a wire was down a short distance away. They drove immediately to the point indicated, saw a loose wire, and got out of the conveyance. Plaintiff proceeded to put on his "climbers" and requested Evans to telephone to the power house to have the current turned off, then climbed the pole a little distance, and sitting on a mail box attached thereto, awaited the return of Evans. A crowd of people had assembled, but soon Evans reappeared, and called to the plaintiff, and said, "All right, go ahead." Thereupon the plaintiff, without stopping to investigate or to observe the condition of the wire, as to whether it was "alive" or "dead," immediately ascended the pole, with his back to the wire, and grappled the wire with his pliers to cut it loose from the pole and instantly received a great shock of electricity. He was thus rendered unable to release his hold on the wire, and was severely burned—was hung there till the current was shut off. That there was 1,000 voltage on the circuit and that 800 voltage will kill—is fatal. The evidence also shows that it was very dangerous to attempt to cut a wire under the circumstances shown when the current was on. There is some evidence that the plaintiff

could by looking have told that the wire was alive at the time he started to climb from the mail box, but it was shown to depend on whether the end of the wire was in a wet or dry place, which is not proven, and whether or not people stood between him and the end of the wire.

It is contended that the evidence of plaintiff unquestionably showed as a question of fact that the plaintiff was guilty of contributory negligence, that it required no weighing of the evidence to come to this conclusion; or, the facts being admitted as shown by the evidence most strongly in favor of the plaintiff, that, as a proposition of law, there was contributory negligence on the part of plaintiff. We hold neither of these positions is tenable. "Whether negligence is shown is ordinarily a question for the jury; but when the facts are undisputed or are definitely found by the jury, and only one conclusion can be drawn therefrom; it becomes a question for the court. *U. P. Ry. Co. v. Lippard*, 5 Kan. App. 484, 47 Pac. 625; *Dewald v. K. C., Ft. S. & G. Rd. Co.*, 44 Kan. 586, 24 Pac. 1101. By the demurrer to the evidence of plaintiff such evidence is admitted as true, but it does not follow that only one conclusion can be drawn therefrom. It still remains to determine, from all the facts and circumstances disclosed by this evidence, whether the plaintiff, in the exercise of ordinary care for his own safety, was bound to determine for himself if the current was cut off or whether he had a right to assume this when his foreman shouted to him—"All right, go ahead." Different minds might form different conclusions as to what this evidence proves as opposing counsel have well illustrated in their briefs. The conclusion is for the jury, not for the court.

Again, it is urged that the evidence shows Evans to have been a fellow servant, and, if his negligence was the proximate cause of the injury, the plaintiff is not responsible. We cannot agree with this contention. On the contrary we think the evidence, viewed in its most favorable light to the plaintiff, shows Evans to have been acting as a vice principal when he shouted to plaintiff, "All right, go ahead." The rule requiring a master to furnish his servant a reasonably safe place to work has no ironbound limitations as to whether the place be a permanent or a temporary one. If the master sends a servant to work in a place of danger, however temporary, and the danger arises from acts or omissions of other servants against which the servant has no means of protecting himself, it is the duty of the master to provide such warnings or to take such other steps as may be reasonably necessary to safeguard the servant so employed, and if another servant of higher or lower degree is delegated by the master to such safeguarding he is performing the functions of the master; and, if guilty of negligence, the master is

responsible. *Brick Co. v. Shanks*, 69 Kan. 306, 78 Pac. 856. In this case Ward, who was vice principal, in conducting the entire business of the defendant in running the plant, sent Evans, the foreman of the line, and the plaintiff, a lineman, to repair a broken wire, which Ward knew, or in the exercise of reasonable care, should have known, was a "live" wire. Ward was also bound to know that it was very dangerous to adjust a live wire, and that the safety of the lineman required the shutting off of the current. The plaintiff exercised the usual means to have the current shut off, which probably should have been done without suggestion from him. The foreman, aiding in the performance of the duty of the master in effect, told plaintiff that the current had been cut off, and ordered him to go ahead. If, as the jury had a right to find, the plaintiff was justified in relying on this assurance without investigating the truthfulness of it, then the proximate cause of the injury was the negligence of Ward or Evans, or both, as vice principals. We are not assuming that a foreman is necessarily a vice principal as to the men employed under him. He is a fellow servant when laboring to accomplish the common object or purpose of the laborers. He is a vice principal when performing the duties, or aiding to perform the duties, which, by law, devolve upon the master. *Brick Co. v. Shanks*, supra; *H. & St. J. Rd. Co. v. Fox*, 31 Kan. 586, 8 Pac. 320; *Mining Co. v. Robinson*, 67 Kan. 510, 78 Pac. 102; *Atchison & E. Bridge Co. v. Miller* (Kan.) 80 Pac. 18.

The judgment of the court below is reversed, and the case is remanded, with instructions to grant a new trial. All the Justices concurring.

LOVE v. LOVE et al.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. APPEAL—REVIEW—FINDINGS—CONCLUSIVENESS.

Findings of fact by a trial court are as conclusive on appeal as the verdict of a jury.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3955-3969.]

2. DEEDS—DESCRIPTION OF PARTIES—EFFECT.

The word "administrator," in a deed conveying lands to an administrator and describing him as such, is simply descriptive, and of no greater significance.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 292.]

3. PAYMENT—EVIDENCE—SUFFICIENCY.

Where for more than 10 years after a ward might have sued his guardian to recover moneys received by him he failed to do so, and there was no proof to show nonpayment, the inference was that payment had been made.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payment, § 178.]

Error from District Court, Johnson County; W. H. Sheldon, Judge.

Action by James Love against Annie M.

Love and others. From a judgment in favor of defendants, plaintiff brings error. Affirmed.

E. B. Gill, J. W. Parker, and J. P. Hindman, for plaintiff in error. H. L. Burgess, I. O. Pickering, and Jno. T. Little, for defendants in error.

PER CURIAM. This is an action to enforce a resultant trust. It is alleged in the petition that Alexander Love, father of the plaintiff, used large sums of money belonging to the estate of his deceased wife, the mother of the plaintiff, and purchased valuable lands therewith, taking conveyances therefor in his own name, enjoyed the rents and profits thereof for many years, and then exchanged a part of them for other lands to the defendant Mitchell, who took the same with notice, and conveyed the remainder, without consideration, to his second wife, the defendant Annie M. Love. The plaintiff asks that all these conveyances by his father be canceled; that he and his insane brother, the other children having disclaimed, be declared the owners of one-half the lands originally purchased by his father; and that an accounting be had for rents and profits.

This suit was originally commenced by all of the children of said Alexander Love and his said deceased wife, five in number. Three of them afterwards disclaimed any interest in the suit, and one of them was adjudged insane, and his guardian, Charles C. Hoge, was made a defendant, which left James Love the sole surviving plaintiff. Pending the suit, Alexander Love died testate, and his widow, Annie M. Love, was appointed executrix of his will, and was afterwards made a party defendant. The defendants deny that Alexander Love received any money from the estate of his deceased wife, and allege that the lands were bought by Alexander Love with his own money. The court upon the trial filed the findings of fact and conclusions of law separately, which are very full and of great length, embracing many facts, which in our view cannot be considered, and therefore we refrain from giving them here. It was shown and the court found that Agnes Love, the deceased wife of Alexander Love, at the time of her death had no estate whatever, and Alexander Love at that time was involved largely, having failed in business some time prior thereto and was in debt about \$20,000. That afterwards he was engaged in business, out of which he made about \$40,000, and that the lands in controversy were bought with money so acquired. These findings show that these lands were not bought with money taken from the estate of the plaintiff's deceased mother, and therefore there was no resultant trust as alleged in the petition.

Counsel insist, however, that these findings are not sustained by the evidence, and ought

to be set aside as contrary to the evidence. To avoid the long-established rule applicable to such cases, that the findings of fact by a trial court, like the verdict of a jury, are final in this court, it is urged that in this case the evidence is all in writing, and can be considered by this court as well as by the trial court, and the rule above mentioned is intended to apply only in cases where the findings are made from the oral evidence of witnesses. An examination of the record, however, shows that on the trial 12 witnesses were examined orally, one of whom, Annie M. Love, was one of the most important as to these particular facts. She was well acquainted with Agnes Love, deceased, and with her family, was a member of the family of Alexander Love before, at the time, and since her death, and was in a position to know more about the financial condition of the plaintiff's mother at the time of her death than any other witness, except Alexander Love, deceased, whose deposition was read upon the trial. The reason, therefore, for the rule which bars this court from a re-examination of the evidence applies here with especial force.

Alexander Love, more than four years after her death was appointed administrator of his deceased wife's estate in the state of Pennsylvania, and executed a bond as such for \$3,000. It does not appear that he ever received anything from her estate, or did anything further as such administrator. The conveyances received by him for the lands in controversy were ordinary deeds of general warranty, wherein the land appeared to be conveyed to "Alexander Love, administrator," "his heirs and assigns," and the word administrator, as used in said deeds, is simply descriptive of the person, and are not entitled to any greater significance. As to a part of these lands, an action of ejectment was brought by one Fritz against Alexander Love to recover the same, and he filed an answer therein claiming that said land was held in trust by him for his children, naming them; the plaintiff then amended his petition making said children defendants, to which all the defendants answered by filing a general denial, and on trial the plaintiff was defeated. Alexander Love had himself appointed guardian of his minor children by his first wife, and, through proceedings in the probate court, sold a part of said real estate as the property of said children. By reason of these acts and statements of Alexander Love, it is urged that he was conclusively bound and estopped from showing otherwise upon the trial of this case. These acts unexplained were probably sufficient to make a prima facie case in favor of the plaintiff, but they were all satisfactorily explained to the district court by the fact that Alexander Love bought all of these lands with his own money. We think the evidence was properly received, and was sufficient to sustain the findings of the court.

It is claimed that Alexander Love received, as guardian, upon the sale of the lands hereinbefore mentioned, \$218.75, which belongs to the plaintiff, and has never been paid; it was received more than 10 years before this suit was commenced, during all of which time the plaintiff might have sued therefor, but did not. If any reason appears in the record for this long delay, it lies in the fact that no proof was offered to show nonpayment, and the inference is that payment was duly paid.

We have carefully examined the entire record, and find no material error.

The judgment is affirmed.

SHAY v. BEVIS ROCK SALT CO.

(Supreme Court of Kansas. Nov. 11, 1905.)

HOMESTEAD—LEASE—VALIDITY—ESTOPPEL.

A lease giving the right to mine and take salt from a tract of land occupied as a homestead was executed by the owner; but his wife did not join in its execution, and, when informed of it, questioned his right to lease the land without her consent. No protest or objection, however, was made to the lessee, although a large amount of money was expended in making improvements and in operating the mine under the lease. She was frequently at and near the mine, and in contact with those operating it, and knew that much money was being invested to carry on the work in pursuance of the lease. Later she and her husband abandoned the homestead, after which, and for a number of years, the lessee continued to operate the mine and to make substantial improvements with the knowledge of both the lessor and his wife, but neither objected nor questioned the validity of the lease, and the attitude of both was that of assent and acquiescence in the validity of the lease. Held, that they and their grantee, who had notice of the transactions, are equitably estopped to assert that the lease is invalid.

(Syllabus by the Court.)

Error from District Court, Rice County: J. W. Brinckerhoff, Judge.

Action by John J. Shay against the Bevis Rock Salt Company. Judgment for defendant, and plaintiff brings error. Affirmed.

C. F. Foley and John D. Milliken, for plaintiff in error. Samuel Jones, for defendant in error.

JOHNSTON, C. J. The point in dispute herein is the validity of a lease executed on December 11, 1889, by David Ahlberg to the Lyons Rock Salt Company, giving the exclusive right to take salt from a tract of land which constituted a rural homestead. Mrs. Ahlberg, who occupied the land with her husband, did not sign the lease, and, when told of it, about the time of its execution, remarked that it was wrong to sign things without her consent. The salt company acquired the right to mine salt under adjoining lands, and in May, 1890, began operations by sinking a shaft within 200 feet of the Ahlberg land, and to a depth of more than 1,000 feet. Buildings were erected, and machinery and mining appliances installed,

which cost \$130,000; but none of them were placed on the Ahlberg land, nor was the surface in any way occupied or disturbed by the salt company. The plant was installed, and the shipping of salt began in 1891, and, the money for the plant having been furnished by Bevis, the property was ultimately transferred to the Bevis Rock Salt Company. During the sinking of the shaft and the erection of the buildings and other improvements, Mrs. Ahlberg was frequently at and near the plant, observed the purposes and progress of the operations, and knew that the expenditures were made for the mining of salt under the homestead, and in pursuance of the contract with her husband. Except the remark made when she first learned of the lease, she never remonstrated or complained to any one connected with the operation of the mine, although some of the workmen boarded at her house. She did not even suggest to her husband that the work should be stopped because she had not signed the lease or given her consent to it. In the spring of 1893 the Ahlbergs removed from the homestead, and established a residence in the city of Lyons, where they remained until the fall of 1895, and during their residence in the city Ahlberg exercised the privileges of an elector there, and otherwise manifested an intentional change of residence and an abandonment of the rural homestead. They returned to the farm in the fall of 1895, and lived there until 1902, when they moved back to the city, and they were not occupying the farm when it was sold to the plaintiff, John J. Shay. After the abandonment of the homestead by the Ahlbergs the salt company continued to operate the mine, and expended \$25,000 additional in improvements, and the company was in the possession of and actively operating the mine when Shay acquired the land.

One of the defenses of the salt company was that the Ahlbergs and their grantees were estopped from asserting that the lease is invalid, or that the mining rights had not been effectually transferred to the salt company, and this defense the court sustained. It is conceded that the lease was not signed by Mrs. Ahlberg, and that her consent was not given when the lease was executed; and plaintiff insists that it was void when it was made, and the conveyance to him gave him everything on the surface and under it. The defendant contends that as the surface of the land was not disturbed, not its occupation as a homestead impaired, the joint consent of the wife was not essential to its validity. We find it unnecessary to determine that question, but, assuming that the lease carried such an interest in the homestead as required the joint consent of husband and wife, the court correctly applied the doctrine of equitable estoppel as against the claim of Shay. Assuming that consent was necessary, it was not essential that it

should be in writing, and, as she could have given an oral consent, the lease was not necessarily bad on its face. *Pilcher v. Railroad Co.*, 38 Kan. 516, 16 Pac. 945, 5 Am. St. Rep. 770; *Dudley v. Shaw*, 44 Kan. 683, 24 Pac. 1124; *Durand v. Higgins*, 67 Kan. 110, 72 Pac. 507. The salt company proceeded on the theory that the lease was valid, and made a large outlay in the belief that the Ahlberg lease, as well as others likewise executed, gave it mining rights under the lands. Mrs. Ahlberg knew of the existence of the lease, that it purported to give the right to mine for salt under her husband's land, and knew that a large amount of money was being invested for the purpose of mining salt under the land in pursuance of the lease. She lived within a short distance of the mine and in view of the work, visited and passed the plant, was in contact with those engaged in the work, but she and her husband remained silent as to any defect in the lease, and allowed the salt company to believe that both were assenting to the lease and were recognizing the rights which the lease undertook to transfer. They did not protest or speak when they should have spoken, and neither they nor their grantee should now be heard to speak or complain. It has already been determined that equitable estoppel may be invoked to defeat the operation of the homestead law, and parties may, by their conduct and acquiescence, be estopped from asserting that a transfer, insufficient in the first instance, is not finally sufficient and valid. The doctrine was applied in *McAlpine v. Powell*, 44 Kan. 411, 24 Pac. 353, where an owner of land occupied as a homestead undertook to convey it in exchange for another home, and it was finally claimed that the deed of conveyance was invalid because the wife did not in fact sign it. She, however, knew of the exchange, acted in accordance with the terms of exchange, expressed satisfaction with it, and occupied and enjoyed the benefits of the land received in the exchange; and it was held that she was equitably estopped from claiming the homestead. In *Sellers v. Crossan*, 52 Kan. 570, 35 Pac. 205, an owner of a homestead and her husband executed a deed purporting to convey a complete title. They subsequently made the claim that the deed was in fact a mortgage given to secure the payment of borrowed money. Their grantee, however, executed a mortgage on the tract, and as those claiming the homestead, and who still held the possession of the land, had not signed that mortgage, it was claimed that it was ineffectual. It was shown that after they had executed the deed they had disavowed ownership of the land, and had acted so as to induce the belief that they had neither title nor homestead interest in it; and it was held that they were estopped to claim any. *Sellers v. Gay*, 53 Kan. 354, 36 Pac. 744, was

based largely on the facts of the last-cited case, and the same rule of estoppel was applied as against a claim of homestead. In *Adams v. Gilbert*, 67 Kan. 273, 72 Pac. 769, 100 Am. St. Rep. 456, the principal of equitable estoppel was again invoked and applied where a husband, having an insane wife, signed a deed to a homestead. Later he surrendered the possession to one holding under his deed and put the grantee in possession. Extensive improvements were made and much money expended by the grantee with the full knowledge of the grantor, and it was there held that these facts embraced all the necessary elements of equitable estoppel and the court denied the claim of the grantor to the property. See, also, *Johnson v. Samuelson*, 69 Kan. 263, 76 Pac. 867; *Spafford v. Warren*, 47 Iowa, 47; *Brown v. Coon*, 36 Ill. 243, 85 Am. Dec. 402.

In this case, as in *Adams v. Gilbert*, supra, there was an abandonment of the homestead. If we put aside the elements of estoppel which existed prior to the abandonment, that which occurred subsequently was certainly sufficient to estop both of the Ahlbergs. Although Ahlberg owned the property for nine years after surrendering the homestead right in the land, the attitude of himself and his wife was that of assent to the right claimed under the lease, and it was such as to induce the belief of the salt company that the mining right was unquestioned and valid. During that time the mine was operated, improvements made, and a large amount of money invested by the salt company. Each of them knew of these operations and expenditures, and each knew that they were carried on and made in pursuance of the lease, and on the faith of a valid transfer, but neither protested nor raised a single objection. Both had complete information; both acquiesced in the possession and claim of right by the salt company; both acted as if a good transfer had been made—and it would be inequitable now to allow them to repudiate their recognition and to assert that the transfer was invalid. It would operate as a fraud on the salt company to permit them to deny what they had led that company to believe, and upon which it had acted. Shay is in no better position than his grantors. The lease was on record, and the lessees were in the open possession of the mine. By inquiry he would have learned all the circumstances, including those which showed that the company had acquired a mining right in the land, and one which was as binding upon him as it had been upon the Ahlbergs.

There is nothing substantial in the objections to the admission of testimony, nor in the claim that the findings of the court were not supported by the testimony.

Judgment affirmed. All the Justices concurring.

(72 Kan. 140)

WITHERS v. LOVE.

(Supreme Court of Kansas. Nov. 11, 1905.)

HOMESTEAD—ABANDONMENT—WHAT CONSTITUTES.

A homestead, occupied by the husband and children while the wife is insane and confined in an asylum, is not abandoned by the husband's sentence and confinement for a term of years in the penitentiary and the removal of the minor children from the homestead; and upon the pardon and return of the husband no act or conduct of his can be held to constitute an abandonment or alienation of the homestead during the lifetime of the wife and while she continues insane, nor will such acts or conduct estop him from recovering the homestead in an action begun while the wife is living. So long as the wife is living, nothing the husband alone can do or suffer to be done will estop either of them from claiming the homestead. The case of *Adams v. Gilbert*, 72 Pac. 769, 67 Kan. 273, 100 Am. St. Rep. 456, cited and distinguished.

Johnston, C. J., dissenting.

(Syllabus by the Court.)

Error from District Court, Bourbon County; W. L. Simons, Judge.

Action in ejectment by J. B. Withers against Charles Love for the recovery of a farm of 160 acres in Bourbon county, and for rents and profits. Defendant had judgment below, and plaintiff brings error. Reversed.

The petition was in the ordinary form under the statute. The answer of defendant pleaded all his defenses in detail, and the reply was in substance a general denial. From the pleadings and evidence the facts about which there was little, if any, dispute are as follows: John B. Withers moved upon the land in 1864. The patent was issued to him in 1870, and he occupied the land with his family as a homestead continuously until 1879. At that time his family consisted of his wife and seven children. In May, 1879, his wife, Mary E. Withers, was adjudged insane by the probate court of Bourbon county, and was removed to the insane asylum, where she remained until her death, which occurred in 1904. After the wife's insanity plaintiff continued to occupy the land, with his children, as a homestead until September, 1892. On the 14th day of September, 1892, he was convicted of murder in the second degree, and on September 19, 1892, was sentenced by the district court of Bourbon county to the State Penitentiary for a term of 12 years. This sentence was commuted afterward to three years, and he was restored to the rights of citizenship. April 9, 1895, he was released from the penitentiary and returned to Bourbon county, where some of his children were still living. At the time of his trial and sentence two of his children (minors) were living on the land, and with them he was occupying it as a homestead. On September 19, 1892, the day he was sentenced to prison, he executed and acknowledged a power of attorney to L. H. Mylius, appointing him his lawful attorney to collect all money due him from any source, to rent his farm (the land

in controversy), to fill out his pension vouchers and draw his pension, with power to sell any and all his property, real and personal, and out of the sales to pay his just debts. This power of attorney was recorded on the same day. Mylius and John B. Withers were brothers-in-law; the wife of Mylius being a sister of plaintiff. On the same day that he executed the power of attorney to Mylius he resigned the guardianship of his insane wife, and the probate court of Bourbon county at the same time appointed Mylius as her guardian. Mylius immediately took charge of plaintiff's property, rented the land, disposed of some of the household goods, and placed the minor children, both girls, aged 15 and 17 years, with relatives who lived near the home. On September 27, 1892, Mylius filed a petition in the probate court of Bourbon county for leave to sell the interest of the insane wife in the land in dispute, describing it as "her homestead interest as the wife of John B. Withers," and alleging that the sale would be for her benefit, because the farm was liable to go to waste and would not rent for as much as could be procured from its value placed at interest. On October 15, 1892, the petition was allowed, and the sale of the wife's interest ordered; the same being referred to in the order as "an undivided one-half interest." The proceedings in the probate court were continued from time to time until January, 1894; Mylius, the guardian, reporting that he had been unable to find a purchaser. On January 18, 1894, Mylius sold the land in controversy to Sam Alsop, executing to him, as attorney in fact for John B. Withers, what purported to be a warranty deed for the undivided one-half of the land, for the consideration of \$1,250. Of this \$1,000 was paid to him in cash, and a note and mortgage for \$250 was executed to him, covering the farm; the note and mortgage being payable to John B. Withers, or his attorney in fact, L. H. Mylius. At the same time Mylius, as guardian of the insane wife, executed to Alsop a guardian's deed for the other undivided one-half of the land; the consideration being \$1,250. He took back a note for this sum and a mortgage on the farm, payable to himself as guardian. The probate court had approved the sale and ordered the guardian to convey the undivided one-half interest in the land to Alsop, and after the conveyance approved and confirmed the deed. The deeds and mortgages were recorded, and Alsop took possession of the land. John B. Withers was visited occasionally while in prison by Mylius, but, beyond being informed in a general way that the farm had been sold, knew little about the transactions until his release and return in April, 1895. At that time Mylius made a settlement with him, and accounted for attorney's fees and other obligations paid out of the \$1,000 received from the sale of the half of the land, and the account was satisfactory to Withers.

He accepted from Mylius without question the balance in his hands, which amounted to \$172.90, and Mylius turned over to him the \$250 mortgage, which represented the remainder of the consideration received for his half of the land. Afterward, when this \$250 mortgage became due, he employed an attorney to collect it for him. At the time of the settlement Withers was told by Mylius that he held the mortgage of \$1,250 for the balance of the purchase price of the farm, but that before he could pay that there would have to be an order of the probate court. Withers understood that this mortgage would not be due for some time but believed he would receive it when it became due. He was not informed that two deeds had been made, or that the supposed interest of his wife in the land had been sold separately. He first learned upon the trial the fact that separate deeds had been executed. He never demanded the money on this mortgage, but did consult at various times different attorneys about it, and was informed each time that he never could get the money. After his return from prison, and while he was in the neighborhood, on March 4, 1896, Alsop and wife sold and conveyed the land to Charles Love by warranty deed; the consideration being \$2,500, the same that Alsop had paid. This deed was recorded, and Love went into possession under it. Love and Alsop were partners, however, in the cattle business, and kept their cattle on the place in much the same way as before the transfer. Some improvements were made by Alsop and Love on the land, but, beyond seeding it down to tame grass, they amounted to very little.

Charles Love is defendant in this action. He also is a brother-in-law of plaintiff; the insane wife being his sister. All the parties were related in one way or another; Sam Alsop being married to a niece of Love and Mrs. Withers. They all resided in the neighborhood, and all were familiar with the facts and circumstances surrounding this remarkable case. This action was not begun until January 28, 1903. At that time the wife of John B. Withers, the plaintiff, was still alive and insane. She died in the asylum on March 17, 1904, after the second trial of this case in the court below. The first trial was the usual formal trial in ejectment. The second was upon the merits, and the judgment in favor of defendant was set aside by the court, and a new trial granted. The \$1,250 note and mortgage given to Mylius, as guardian of the insane wife, was paid to him, with interest, by Charles Love, the defendant, who assumed its payment when he purchased the land, and the guardian kept the proceeds of this mortgage at interest, and reported regularly to the probate court in reference thereto, until the death of Mrs. Withers, after the action was begun. At her death her son, J. E. Withers, was appointed administrator of her estate, and Mylius, as guardian, paid this money, amounting to

\$1,495, to him, and the administrator still holds it. In the amended answer defendant pleads (1) the three-year statute of limitations as to rents and profits; (2) that Mylius contracted to sell the entire farm to Alsop, and, as attorney in fact and guardian, was legally bound and intended to execute a single deed conveying all the land, said deed to be a joint deed, but that, through mistake, Mylius executed two deeds, as described in the answer, and prayed that the deeds should be corrected, and that Withers be required to execute a good and sufficient deed to the land. Upon the trial plaintiff proved his title and occupancy as a homestead, the value of the rents and profits; that he had been sentenced to the penitentiary, his sentence commuted, his rights as a citizen restored; and that he had been released from the penitentiary. Defendant, in support of his title, introduced the power of attorney from Withers to Mylius; the deed from Mylius, attorney in fact, to Alsop, of the undivided one-half of the real estate; the proceedings in the probate court of the appointment of Mylius as guardian of the insane wife; the petition to sell her interest, and all the proceedings in reference to the sale, the guardian's deed, and confirmation; and the deed from Alsop to Love. The court afterward, on motion, struck out all the evidence in reference to the power of attorney and deed by the attorney in fact, and the guardian's deed and proceedings in the probate court in regard to it, and rendered judgment for the defendant.

W. P. Dillard, W. W. Padgett, and R. B. Campbell, for plaintiff in error. W. R. Bidle and Hubert Lardner, for defendant in error.

PORTER, J. (after stating the facts). Counsel, in addition to able oral arguments, have favored the court with well-prepared briefs, which discuss every feature of the case, with ample citations of authorities. The case presents some difficult questions. The facts in many respects are remarkable. A review of the evidence leaves no suspicion of bad faith upon the part of those who participated in the transactions, or of any attempt to gain an advantage over plaintiff by reason of the misfortunes which fell upon his household, culminating in September, 1892, when, with the mother of his children hopelessly insane, he was sentenced to the penitentiary for a term of years, and his children dispersed from the home the family had occupied so long. On the contrary, it appears that all the brother-in-law Mylius did was undertaken with the purpose of conserving the interests of plaintiff and his family. He cared for the minor children, sold the personal property, purchased necessities for the insane wife, paid the debts of plaintiff, and upon his return rendered a satisfactory account of his stewardship. While the petition to sell the supposed interest of the wife in the land

was filed in the probate court within a few days after plaintiff was taken to prison, there was no undue haste in the proceedings to sell, and the sale made to Alsop was not completed until 1894, and brought the fair value of the land.

Plaintiff's preliminary contentions are, that the power of attorney from plaintiff to Mylius was void, and all proceedings under it, including the deed as attorney in fact to Alsop, were void; that the alleged guardian's deed, by which Mylius attempted to convey to Alsop the undivided one-half of the land as the interest of the wife, was void; that the court below, after striking out of the evidence the power of attorney, the deed made as attorney in fact, and the guardian's deed to Alsop, committed error in refusing to strike out the deed from Alsop to Love, because, with the former conveyances stricken out, Alsop had nothing to convey. Error also is urged because the court refused to strike out all of the testimony of Alsop and Mylius in reference to conversations about the sale by Mylius to Alsop. The claim is made that if the sentence and incarceration of Withers in the penitentiary, and the wife's insanity, rendered the deeds void, it left Mylius without authority, as agent of Withers or of the wife, to bind them in any respect.

The main contentions of plaintiff here, as below, are: (1) That the land was the homestead of plaintiff and his family, consisting of plaintiff, his wife and children; that it never ceased to be their homestead while the wife lived; that the leaving of the homestead by plaintiff and wife did not constitute an abandonment, because it was involuntary, occasioned by the sentence to and confinement in the penitentiary of plaintiff and the insanity of the wife; that the sentence of plaintiff suspended all his civil rights, so that his acts were void; and that during his confinement in the penitentiary he could not abandon the homestead. (2) That plaintiff was not estopped by his acts and conduct from claiming the land. (3) That, if the court should hold that the homestead is not involved because it was abandoned, still plaintiff should have recovered an undivided one-half of the land, as the doctrine of equitable estoppel would not apply to the part attempted to be conveyed by the guardian's deed, because plaintiff never received the consideration paid for that portion, notwithstanding he might be held to have ratified the unauthorized act of Mylius in reference to the part conveyed as attorney in fact, for which he did accept the consideration. Defendant vigorously maintains on the contrary: (1) That the land was not a homestead; that the petition of plaintiff nowhere claims that it was a homestead; that as a matter of fact it was abandoned as a homestead when the children of plaintiff left it, after his sentence to the penitentiary, and the furniture was removed from it; that, if not abandoned by his act and the removal of

the children, it was abandoned by his acts upon his return from the penitentiary, because at that time his youngest children were of age, and his family consisted of himself and wife; that she did not live with him, and he did not support her; that she was insane, and, if she were asked whether she desired to occupy or abandon the property, she could not answer; that the act of occupancy must be that of a sane mind. (2) That every act of Mylius, as agent of plaintiff, was ratified by plaintiff with full knowledge of all the facts, after his disabilities had been removed and he had returned from the penitentiary, and, however void the power of attorney may have been, all that was done under it became valid and binding by the subsequent ratification. (3) That plaintiff is prevented from recovering the land, or any part of it, by equitable estoppel. (4) That the power of attorney was valid in law, and authorized Mylius to convey; that, while a person under sentence for a term of years cannot enter into executory contracts and call in aid the courts to enforce them, he may make a valid transfer of his property by will or deed. We have stated here somewhat in detail the contentions of the parties as set forth in their briefs, but many of them it will not be necessary to discuss. The trial court held that the sentence to the penitentiary of Withers for a term of years, and his incarceration and confinement therein, suspended all his civil rights, and that the power of attorney from Withers to Mylius, and the deed from Mylius, as attorney in fact for Withers, to Alsop, of the undivided one-half of the land, were void. The court also held that the guardian's deed from Mylius, as guardian of the insane wife, to Alsop, of the other undivided one-half of the land, was void.

Plaintiff in error makes no complaint of the rulings of the court in those respects. He is satisfied they were correct. While counsel for defendant in error argues at some length the question of the effect to be given to the provision of Gen. St. 1901, §§ 2301, by which the civil rights of a person sentenced to confinement and hard labor for a term of years are suspended, it is not necessary for us to consider that question, for the reason that no cross-petition in error is presented, and whether the court's ruling was right or wrong upon the validity of the power of attorney and the deed made in pursuance of it is not before us. For the same reasons it must be assumed that the correctness of the ruling upon the guardian's deed, and the proceedings taken in the probate court, is not open to discussion. These rulings of the court were made in excluding the testimony in reference to the power of attorney and the deeds. The court found generally for defendant, and, aside from some minor errors alleged in reference to certain oral testimony and the admission of the deed from Alsop to Love, the main error relied upon is that the judgment

should have been for plaintiff upon the law and the evidence.

Stripped of the unsubstantial matters, the questions involved, and the ones upon which the judgment must stand or fall, are narrowed down to these: (1) Was this a homestead? (2) Conceding that it was, is plaintiff estopped by his acts and conduct from claiming it? That the land in controversy was originally the homestead of plaintiff and his family is not disputed. The insanity of the wife in 1879, and her confinement in the asylum, did not change its character as a homestead, for plaintiff continued to occupy it with his children. It was then the homestead upon the day he was sentenced. When did it cease to be the homestead? His civil rights were suspended during his sentence and confinement. It is not necessary here to decide the effect of such suspension upon his power to convey or incumber his property, but merely the question whether his involuntary absence, under the sentence and confinement, amounted to abandonment, assuming that plaintiff by his own act might abandon the homestead during the insanity of the wife and her enforced absence in the asylum, a point we shall consider hereafter. His voluntary absence would not constitute an abandonment while the homestead continued to be occupied by the family, and his involuntary absence, under sentence and confinement in prison, should not be given that effect, and the beneficent object of the homestead law defeated upon grounds which so apparently were never contemplated by the framers of the Constitution. It was said, in *Osborne v. Schoonmaker*, 47 Kan. 667, 670, 28 Pac. 711, 712, that "A person may be absent from his homestead without abandoning it as such. * * * It depends upon the character of his absence." See, also, *Hixon v. George*, 18 Kan. 253. It was not abandoned, therefore, by his absence and confinement. The claim of counsel that the leaving of the home by the minor children and the removal of the furniture constituted an abandonment has no force or weight. The mother was insane, the father in the penitentiary, and the fact that under the enforced circumstances the home was unsuitable for their continued occupancy could not constitute an abandonment, if, as we have said, his absence under such circumstances was not sufficient. *Shirack v. Shirack*, 44 Kan. 653, 24 Pac. 1107. It is urged that after his release and the removal of his disabilities he returned to the neighborhood, and not only made no attempt to occupy the homestead, but with full knowledge of all the facts ratified the sale of the land, and by these acts and conduct, and the lapse of years which intervened before this action was begun, he is estopped from claiming it as a homestead. This brings us to the main question in the case. With the wife alive and insane, could the husband, by these acts, which it is claimed amounted to an equitable

estoppel, alienate the homestead or abandon it?

The construction given by this court to the homestead law in the early case of *Morris v. Ward*, 5 Kan. 241, 244, has been uniformly followed. There it was said: "There are at least two views which may be taken of these laws. One is that the occupying of a piece of land as a homestead merely suspends the operation of any liens, alienations, or incumbrances concerning it during the time that it is so occupied as a homestead. * * * We do not adopt this construction of our homestead laws. We do not believe that the framers of the Constitution intended to found the homestead of the family upon such a precarious foundation, or to protect it by such slight and fragile safeguards. The homestead was not intended for the play or sport of capricious husbands, merely, nor can it be made liable for his weaknesses or misfortunes. It was not established for the benefit of the husband alone, but for the benefit of the family and of society, to protect the family from destitution, and society from the danger of her citizens becoming paupers. The other view of the homestead laws, and the one which we adopt, is that no incumbrance or lien or interest can ever attach to or affect the homestead, except the ones specifically mentioned in the Constitution." In *Locke v. Redmond*, 6 Kan. App. 76, 49 Pac. 670, affirmed in 59 Kan. 773, 52 Pac. 97, the wife was insane, and the husband, as guardian for her, borrowed \$800, giving a mortgage on the homestead. After her restoration the wife contested the mortgage. The court held the mortgage void. In *Helm v. Helm*, 11 Kan. 25, 27, where the wife was compelled to sign a deed for the conveyance of the homestead by threats of her husband, and brought the action to have the deed declared void, this court said: "Our homestead provision is peculiar. The homestead cannot be alienated without the joint consent of the husband and wife. The wife's interest is an existing one. The occupation and enjoyment of the estate is secured to her against any act of her husband, or of creditors, without her consent. If her husband abandons her, that use remains to her and the family. With or without her husband, the law has set this property apart as her home." *Chambers v. Cox*, 23 Kan. 393, was a case where the wife never had been a resident of the state, and had been abandoned by the husband without cause. The husband conveyed the homestead by his deed, and took back a mortgage for the purchase price. The action was to foreclose the mortgage. The defense was failure of title because the wife had not joined in the deed. The court held that no title passed by the separate deed of the husband, notwithstanding the wife never had lived in the state. Justice Brewer, speaking for the court, said: "The separate deed of a married man to the homestead is void. It does not divest him of title, nor estop him

from recovering the land. The question is not, who will inherit from him? but, has his title been divested? And the Constitution says that his title to the homestead shall not pass unless his wife joins in the deed. While the Legislature may regulate the matter of inheritance, it cannot avoid or limit the constitutional provision for the protection of homesteads. The Constitution forbids the alienation without the joint consent of husband and wife. It does not add, 'providing they are living together and occupying the homestead,' nor 'providing that both are residents of the state'; but the prohibition against separate alienation is absolute, when the relation of husband and wife exists. Whether any exception to this absolute prohibition were wise, it is not for us to inquire. The Legislature has not attempted to make any, even if it had the power, but has repeated in the statute the very terms of the constitutional prohibition. Comp. Laws 1879, p. 437, § 1 [section 3016, Gen. St. 1901]. Neither is the presence of both husband and wife essential to the existence of a homestead. Though one may have abandoned the other, yet either may have the children to care for, and be the head of a family and occupy a homestead." In *Ott v. Sprague*, 27 Kan. 620, a case where the wife had left her husband and the homestead and brought action against him for alimony, he conveyed the homestead by a separate deed. The deed was held void, and a subsequent separate deed by the wife, made after the land ceased to be a homestead, was held to convey no title, and that it did not make valid the original deed of the husband. The following language, taken from *Morris v. Ward*, supra, is repeated in *Coughlin v. Coughlin*, 26 Kan. 116, 117: "No alienation of the homestead by the husband alone, in whatever way it may be effected, is of any validity. Nothing that he alone can do or suffer to be done can cast the slightest cloud upon the title to the homestead. It remains absolutely free from all liens and incumbrances, except those mentioned in the Constitution." See, also, *Howell, Jewett & Co. v. McCrie*, 36 Kan. 636, 14 Pac. 257, 59 Am. Rep. 584; *Wallace v. Insurance Co.*, 54 Kan. 442, 38 Pac. 489, 26 L. R. A. 806, 45 Am. St. Rep. 288; *Pilcher v. A. T. & S. F. R. Co.*, 38 Kan. 516, 16 Pac. 945, 5 Am. St. Rep. 770.

It thus appears that almost every phase of attempted alienation of the homestead has been passed upon, and the provision of the Constitution and the term "joint consent" have been construed with strictness and in favor of the homestead. This court has, however, recognized in a number of cases the doctrine, announced in *Sellers v. Crossan*, 52 Kan. 570, 33 Pac. 205, that the acts of those claiming a homestead may be such as to operate as an abandonment or to estop them from claiming it. In that case the husband and wife had joined in a conveyance at the homestead, absolute upon

its face and duly recorded, and afterward, as against innocent mortgagees, set up the claim that the deed was an equitable mortgage. The court held that their acts and conduct estopped them. In *McAlpine v. Powell*, 44 Kan. 411, 24 Pac. 353, equitable estoppel was held to constitute a defense to a claim of a homestead, but it is to be noted that in that case no homestead rights were actually involved, and the court, in the opinion, expressly find that the wife had abandoned the Wyandotte homestead for 12 years and taken up a new one in Woodson county, and that the facts in the case took it out of the strict rules governing the alienation of a homestead.

The main reliance of defendant is the recent case of *Adams v. Gilbert*, 67 Kan. 273, 72 Pac. 769, 100 Am. St. Rep. 456. That case may be said to mark the extreme limit to which the court has gone in holding that the operation of the homestead law may be defeated by equitable estoppel. The facts in that case are these: Adams owned and occupied the land, with his family, as a homestead. His wife had been adjudged insane, and was confined in an asylum. On October 20, 1893, he conveyed by warranty deed to one Foster, and the guardian of the insane wife joined in the deed. The deed was made to avoid creditors; the husband supposing that the homestead was not exempt. No consideration passed. On the same day Foster executed a mortgage for \$2,000 to Davis, a brother-in-law of Adams; Davis having no real interest. The note was turned over to Adams, who secured \$700 upon it. The property was worth \$800. Foster conveyed to one Kelley without consideration, and Kelley conveyed to one Doran, who paid off the \$700 mortgage. Doran took possession and expended \$2,000 in improvements, and in 1898 sold to Gilbert, who made other valuable improvements. Adams abandoned the property in 1895. Mrs. Adams continued insane until her death, January 1, 1899. September 20, 1899, Adams brought ejectment. The court held that the deed to Foster was ineffectual at the time of its execution as a muniment of title, the property conveyed being a homestead, and the deed lacking the joint consent of husband and wife, and said (page 275 of 67 Kan., page 769 of 72 Pac. [100 Am. St. Rep. 456]): "While the marriage relationship continued, and the property was occupied as a homestead, no act of the husband could be efficient to ratify or confirm such deed. The husband might, but his actions, words, or silence when he should have spoken, confirm a deed to the homestead, executed by himself alone, or estop himself from denying its validity, so as to make it convey title after its homestead character has ceased, or after the death of the wife." The facts in that case differ materially from those here. Adams received the full consideration for the property, and stood by, silent when he should

have spoken, and permitted more than \$2,000 in valuable improvements to be expended upon the property; and these acts should, in equity, have estopped him from claiming the property, unless the constitutional provision for the protection of the homestead prevented the estoppel because his wife was living. Then the death of his wife occurred, and the homestead character of the property ceased instantly. He had abandoned it already so far as he might do so. The wife's death completed the abandonment, and nine months after her death he brought the action. In the opinion the court said (page 277 of 67 Kan., page 770 of 72 Pac. [100 Am. St. Rep. 456]): "In any event, after the death of his wife, the homestead character of the property ceased. At that time Adams was as fully informed as to the facts and the law as he was when this action was brought. He certainly might, even by his silence and inactivity, in time confirm and make efficient his former deed. We are not in a position to say the delay of about nine months was not sufficient for that purpose." While the decision is based in part upon the acts amounting to equitable estoppel, it really turns upon the fact that the wife's death occurred and completed the abandonment of the homestead; and nine months elapsed after her death before suit was brought, during which time the husband had full knowledge of the imperfections in the deed. Some expressions may be found in the opinion which apparently go so far as to suggest that the act of abandonment may have been complete by his acts prior to her death and while she was insane, but these are not necessary to the decision, and are not controlling.

Counsel for defendant also cite the case of *Shields, Guardian, v. Aultman, Miller & Co.*, 20 Tex. Civ. App. 345, 50 S. W. 219, in which the Supreme Court of Texas held that, where the wife became hopelessly insane, the husband had power to convey the homestead separately, because by the wife's insanity she lost the power to consent. We quote from the opinion (page 349 of 20 Tex. Civ. App., page 221 of 50 S. W.): "Her power of choice and discretion passed away with the departure of her reason. She was no longer an intelligent partner of the community, equally loving and sharing the interests and responsibilities of the family. She was a pitiable, mindless, helpless charge, and, for all practical purposes, *civilitur mortuus*. It is not the consent of a crazy woman that the law contemplates as essential to the alienation of the homestead, it is the consent of the wife whose faculties of reason and discretion have not been dethroned." The opinion comments upon the admitted fact that the wife was hopelessly insane, and counsel here urge that the evidence in this case is to the effect that Mrs. Withers was hopelessly insane, that she was, as to the homestead, *civilitur mortuus*, and that the reasoning of

the Texas court is sound. This reasoning, however plausible, does not appeal to us, or furnish what appears to be solid grounds for breaking away from the well-established principle adhered to since the earlier decisions by this court.

It is difficult to see how effect can be given to the constitutional provision requiring the joint consent of husband and wife, and at the same time hold that, while the wife is insane, the husband can either separately convey, or by acts or conduct estop the wife from her right to claim, the homestead, or estop himself from claiming it in his own right while she is living. The acts of estoppel must be such as will estop both. *Law v. Butler*, 44 Minn. 482, 47 N. W. 53, 9 L. R. A. 856. The same question was raised in *Panton v. Manley*, 4 Ill. App. 210, but left undecided. There the wife was insane and confined in an asylum. The husband executed a mortgage upon the homestead, and upon foreclosure attempted to abandon it under an agreement with the mortgagee. A statute then provided that neither the husband nor wife could remove the other from the homestead without the consent of the other, unless the owner of the property should in good faith provide a homestead suitable to the condition in life of the family. The court said: "It would seem that if the conveyance is to be helped out, according to the provisions of the statute, by abandonment of possession in case the husband has not abandoned the wife, then, on principle, the wife's consent to such abandonment should be obtained." Upon the evidence the court held that no abandonment was proven, while it suggests the question whether the husband, under such circumstances, can abandon the homestead, leaves it undetermined. As was said in *Morris v. Ward and Coughlin v. Coughlin*, supra: "Nothing that he alone can do or suffer to be done can cast the slightest cloud upon the title to the homestead." All that was done, which it is claimed amounts to equitable estoppel, were his acts alone. We, therefore, hold that nothing which he did or suffered to be done while she was alive cast any cloud upon the title to the homestead, or could estop either the wife or husband from claiming this land as the homestead during her lifetime. After her death his acts might have been such as to estop him from setting up the claim of a homestead, but the fact that Mrs. Withers was still alive and insane when this action was brought is the controlling circumstance which prevents the principles of equitable estoppel from defeating his right to the land as a homestead.

The facts here relied upon to support the principle of equitable estoppel as against plaintiff are not so strong as in the cases cited. It is true, Withers, upon his return, settled with Mylius, and, so far as he had power to do so, ratified and confirmed the acts of his attorney and agent in reference to

the sale of part of the land. He accepted without question the proceeds of the sale to that extent. The only other facts which are relied upon are his knowledge that the other half of the purchase price was represented by a mortgage which he permitted the maker to pay to Mylius without protest, and the fact that he was silent when he should have spoken, and permitted defendant Love to purchase from the first grantee. But the evidence shows no intentional misleading of Love, and that he was not misled in fact by plaintiff's silence. All the parties were equally cognizant of the facts with reference to the wife's insanity. Love was her brother, and knew all that Withers knew, and perhaps understood even better than Withers the facts in reference to the separate deeds. There is a claim that valuable improvements were made while Withers stood by, but the evidence shows that these were slight, and that the possession of the land by Love was no different from the possession of his grantor, Alsop. They were partners, and continued to keep partnership cattle upon the land. Plaintiff, besides, was not a business man, nor nearly so familiar with business matters as Alsop and Love. He tried vainly to discover why it was that he could not secure the other half of the proceeds of the sale, and clearly never knew his rights, as claimed now, until a short time prior to the beginning of this action. The strongest point against him, aside from the acceptance of half the purchase money, is the lapse of time which intervened after his return and before the action was begun. During this lapse of time the situation of the parties remained practically the same. It is insisted that, because Love paid the balance of the purchase price to the guardian, he is in the same situation as though he had paid it to Withers, because Withers knew of and ratified the payment. It was never paid to any agent of Withers, even assuming that Mylius was his agent, for Mylius held it in another capacity and refused to pay it to him. There is nothing in the contention that Withers should have instituted some proceedings to recover this money. It never belonged to him in law or equity. It was paid for the supposed interest of Mrs. Withers in the land, when in law and fact she had no such interest, and Withers could not have established his right to it. The proceedings in the probate court for the sale of her supposed interest were void ab initio.

Plaintiff, therefore, was entitled to judgment for recovery of the land, and for rents and profits, and the cause must be reversed for further proceedings. While it has been said that "it is not within the equitable power of courts in this state to declare any indebtedness a lien on a homestead" (*Jenkins v. Simmons*, 37 Kan. 496, 15 Pac. 522), plaintiff, in open court here and in his brief, offers to do equity, and to consent that defendant be given a lien upon the land for the \$1,250

which he received from Mylius, as purchase money for the conveyance of half the land, under the power of attorney, and to this offer plaintiff must be held.

The judgment, therefore, is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

GREENE, BURCH, MASON, SMITH, and GRAVES, JJ., concur.

JOHNSTON, C. J. (dissenting). Withers sold the land about 13 years ago, and received the agreed consideration. Nine years have passed since his return from the penitentiary, and he has stood by and seen the land transferred and improved without claiming it or making any protest until this action was brought. In various ways he has recognized the validity of the transfer and the title of his grantee. None of his family has occupied the land for the past 13 years, and the youngest child reached majority about 10 years ago. No one is claiming a homestead interest in the land, except himself. In my view, the facts, which are quite fully stated in the prevailing opinion, bring the case within the authority of *McAlpine v. Powell*, 44 Kan. 411, 24 Pac. 353; *Sellers v. Crossan*, 52 Kan. 570; 35 Pac. 205; *Sellers v. Gay*, 53 Kan. 354, 36 Pac. 744; *Adams v. Gilbert*, 67 Kan. 275, 72 Pac. 769, 100 Am. St. Rep. 456. Under the rule of these cases, Withers is equitably estopped to assert that the title which he undertook to convey is invalid, and he is equally estopped to claim the land as against Love, whose rights in it he has long assented to and recognized. *Shay v. Bevis Rock Salt Co.* (just decided) 83 Pac. 202.

EVERETT v. WILSON.

(Supreme Court of Colorado. Nov. 6, 1905.)

1. JUDGMENT—DEFAULT—JURISDICTION.

Where the court had jurisdiction of the subject-matter of an action, and the record recited that defendant appeared by counsel and moved to dismiss the cause and that his default was entered for failure to plead as required by rule, the court had *prima facie* jurisdiction to enter judgment.

2. WRIT OF ERROR — BILL OF EXCEPTIONS — NECESSITY.

A motion to dismiss the action and quash the attachment and levy therein, based on affidavits and files and records in the case, is not within *Mills' Ann. Code*, § 387, declaring that decisions on motions based on the pleadings, etc., shall be taken as a part of the record without being made such by bill of exceptions, and is not a part of the record, unless embodied in a bill of exceptions.

3. SAME.

The validity of an order requiring defendant to plead cannot be assailed, in the absence of a bill of exceptions containing impeaching evidence, where the record proper does not contradict it.

4. SAME.

A ruling on a motion to quash a writ of attachment and the certificate of levy cannot be reviewed, in the absence of a bill of exceptions.

5. APPEARANCE—GENERAL APPEARANCE.

A defendant, who, separately or in conjunction with a motion going only to the jurisdiction of the court over his person, invokes the power of the court on the merits or moves to dismiss, appears generally.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appearance, § 47.]

6. SAME.

A defendant, who not only asks for the dissolution of the attachment and quashing of the writ because of defective service of process on him, but asks for the dismissal of the cause, appears generally; for the court, by virtue of the express provisions of *Mills' Ann. Code*, § 44, acquired jurisdiction by the filing of the complaint, and the cause could not be dismissed because of the want of jurisdiction of defendant's person.

Error to Rio Grande County Court; Alden Bassett, Judge.

Action by William D. Wilson against Sylvester T. Everett. Judgment for plaintiff, and defendant brings error. Affirmed.

O. D. Bryan and W. E. Cox, for plaintiff in error. C. H. Pierce, Wilson & Rickards, and W. C. Bowen, for defendant in error.

CAMPBELL, J. Action for work and labor done and expenditures made by plaintiff at the request of defendant. The defendant is a nonresident of the state, and summons was ordered served by publication. In aid of the action, a writ of attachment was sued out and a levy made upon defendant's real estate, situate in Colorado. Defendant filed a motion to dismiss the cause, set aside the attachment, and quash the levy, which was denied, and he was required to answer. This he did not do. His default for failure to comply with this rule was entered, and a trial was had, evidence heard, findings made for plaintiff, the attachment sustained, and judgment rendered against defendant for the amount claimed. To the judgment the defendant prosecutes this writ of error.

The errors relied upon for reversal are that the trial court was wrong (1) in passing upon defendant's motion to quash the attachment and certificate of levy thereof, in the absence of defendant's attorney and without any proper notice to him; (2) in prematurely entering defendant's default; (3) in overruling defendant's motion to quash, and rendering judgment in plaintiff's favor and sustaining the attachment.

1. In the record is an order of the court, leading up to the final judgment, in which is recited the fact that defendant, by his counsel, filed a motion to dismiss the cause and dissolve the writ of attachment and its levy. And the further recital is made therein that the defendant appeared not, though duly notified of the hearing, and the court thereupon proceeded to hear the motion and overruled the same, and as a part of the same order required defendant to plead further within a certain time. Afterwards there is another order, and as part of the final judgment, that the defendant having failed to appear and

plead, as theretofore required by the order already referred to, and, the time thus limited having expired without any such appearance or plea, the defendant's default therefor was duly entered, and upon the application of the attorney for the plaintiff the court proceeded to trial and heard evidence, and upon consideration thereof found the issues for plaintiff and rendered final judgment for him, as already stated. These orders, therefore, reciting that the defendant appeared by counsel and that his default was entered for failure to plead as required by rule, *prima facie* show that the court had jurisdiction of the person of the defendant, secured by a general appearance, and that the default was properly entered. As the complaint discloses that there was jurisdiction of the subject-matter, it follows that the judgment must stand, unless it is impeached by something else in the record which we are privileged to notice.

2. No bill of exceptions was preserved or filed. The objection urged in argument that the trial court, without due notice to defendant's counsel, heard and determined his motion to dismiss the action and quash the attachment and the levy, cannot be considered in the absence of a bill of exceptions. This motion was not, in fact, based upon, nor did it affect, any pleading in the cause. While there was a reference in the motion to pleadings, the only pleading filed is the complaint, and the disposition of the motion in no wise depended upon it. To sustain the motion, reliance was had upon affidavits and certain files and records in the case. The motion does not come within section 387, Mills' Ann. Code, and is not part of the record proper. It can become such only by being embodied in a bill of exceptions, and rulings thereon and consideration of affidavits in its support are available on appeal, and can be preserved for this purpose only by bill. *Wike et al. v. Campbell*, 5 Colo. 126; *Rowe v. People*, 26 Colo. 542, 59 Pac. 57.

3. Another objection urged is that the court entered the default of defendant before the time for answer expired. The rightfulness of this depends upon the validity of the order requiring him to plead. This order is valid, in the absence of an affirmative contrary showing. The record proper does not contradict it, and there is no bill that contains impeaching evidence.

4. Another objection was that the court erred in overruling defendant's motion to quash the writ of attachment and the certificate of levy. This motion not being based on, or affecting, the pleadings, objections and exceptions to rulings upon it must be preserved by bill, and the same observations apply to this as to the objection first considered. In short, the foregoing objections are not properly before us, because no bill of exceptions was preserved.

5. The general objection that the court did not have jurisdiction over the person of the defendant, hence no power to proceed to judgment, because no service of process, either personal service or service by publication, was had, is not good as against the recitals in the record that defendant by his attorney appeared in the action, unless such recital is false. This appearance, however, the defendant says, as shown by other recitals in the motion, was a special appearance only, limited to the single object for which the motion was filed, viz., to dissolve the writ of attachment and quash the certificate of its levy. He contends, therefore, that the trial court was wrong in construing the filing of this motion as constituting a general appearance. The presumption is that any appearance is general. 2 Enc. Pl. & Pr. 632. Merely because a defendant says he enters a special appearance does not make it such. That must be determined, in part at least, by the object he has in view. A special appearance is one made for the purpose of urging jurisdictional objections. 2 Enc. Pl. & Pr. 620; 3 Cyc. 511. If a defendant separately or in conjunction with a motion going only to the jurisdiction invokes the power of the court on the merits, or moves to dismiss the action, or asks relief which presupposes that jurisdiction has attached, this constitutes a general appearance. 3 Cyc. 508; 2 Enc. Pl. & Pr. 626; *Bucklin v. Strickler*, 32 Neb. 602, 49 N. W. 371; *Wood et al. v. Young*, 88 Iowa, 102; *Belknap v. Charlton*, 25 Or. 41, 34 Pac. 758. The defendant's motion here asked for relief, which is inconsistent with his avowed object to test the jurisdiction of the court over his person, and which could be granted only after jurisdiction was obtained. Not only did he ask to have the attachment dissolved and the writ and the levy quashed because of defective service, but he went further and asked to have the cause itself dismissed. It would not be proper to dismiss the cause, even though jurisdiction of defendant's person was lacking. The action was instituted and jurisdiction of the court acquired by the filing of the complaint. Mills' Ann. Code, § 44. If the attempted service of process, whether summons or writ of attachment, was ineffective, additional process might issue, and valid service be secured. The defendant's evidence to overcome the record recital of an appearance is the motion to dismiss. If, in the absence of a bill of exceptions, we are not permitted to inspect the motion, the recital must stand; and, if we do examine it, we are constrained to agree with the trial court in construing, as a general appearance, the appearance which the defendant made when he filed it. The judgment must be affirmed.

Affirmed.

GABBERT, C. J., and STEELE, J., concur.

34 Colo. 212

FELKER v. SULLIVAN.

(Supreme Court of Colorado. Oct. 2, 1905.)

1. CORPORATIONS—LIABILITY OF STOCKHOLDERS ON SUBSCRIPTIONS—PLEADING.

Where corporate stock was issued on payment of less than the face value thereof, and the corporation agreed that the subscriber should not be called on for any further or greater sum than paid, and on the corporation becoming bankrupt the trustee in bankruptcy brought an action to recover the unpaid balance, it was incumbent upon him to show in his complaint the amount which was actually required to discharge the obligations of such delinquent stockholder to the corporation creditors.

2. SAME—BANKRUPTCY—RELEASE OF SUBSCRIBER FROM UNPAID SUBSCRIPTION.

Where a corporation issued stock on payment of a small sum per share, and agreed that the subscribers should not be called on for any other, further, or greater sum than that paid, an action does not lie by the corporation's trustee in bankruptcy to recover against such subscriber on his subscription until the contract between the corporation and the subscriber is set aside as in fraud of creditors.

Error to District Court, Arapahoe County; P. L. Palmer, Judge.

Action by W. B. Felker, Jr., as trustee in bankruptcy of the W. D. Smith Cycle Company, against Dennis Sullivan, to recover unpaid subscriptions to stock. From a judgment for defendant, plaintiff brings error. Affirmed.

Rehearing denied November 6, 1905.

The complaint in this action alleges: That the W. D. Smith Cycle Company was a corporation capitalized with \$500,000, represented by 500,000 shares of the par value of \$1 each. That in 1899 the corporation was declared bankrupt and plaintiff was appointed trustee in bankruptcy. That he duly sold all of the property of the bankrupt corporation, except the claims against the stockholders for the amounts unpaid on the stock held by them; that the sale was approved. That the amount realized from the sale of the property was wholly insufficient to pay the debts of the bankrupt. That on, to wit, "the 24th day of June, 1899, this plaintiff as such trustee in bankruptcy duly filed in the said District Court of the United States in and for the District of Colorado, that being the court having jurisdiction of the bankruptcy proceedings against said corporation, his petition setting forth the proceedings theretofore had in relation to the bankrupt estate, the amount of debts and claims filed and allowed against said bankrupt and the funds in his hands available for the payment of the same, and praying for an order of court making a call and assessment upon all of the stockholders of the said bankrupt corporation who were holders of unpaid stock therein, for the purpose of raising money to pay the debts of said bankrupt corporation; and thereupon an order was duly made and entered in said bankruptcy proceedings, of which order the following is a copy: This matter coming on to be heard this day, upon

the petition of W. B. Felker, Jr., trustee in bankruptcy herein, praying for an order directing a call or assessment, upon the stock and stockholders in the bankrupt company, and it appearing to the court that a necessity exists therefor, and that all the property of the bankrupt has been sold and that the amount of money in the hands of the said trustee will not be sufficient to pay the debts of the said bankrupt, and that no means exist for paying said debts except the sums remaining unpaid by the stockholders in said bankrupt company for balance remaining unpaid on their stock, it is ordered, that a call or assessment be, and the same is hereby made upon the stock and stockholders of the said bankrupt company, excepting those who have paid in full therefor, their legal heirs, representatives and assigns, of 75 per cent. of the par value of the shares of said stock held by them, but crediting each stockholder in said company with the amount paid said company on his said stock; the same to be due and payable at once to W. B. Felker, Jr., trustee herein, at Denver, Colo.; and that the said trustee be, and he hereby, is authorized at once to proceed to collect said call and assessment, and make all necessary demands for such payments, and if any stockholder shall fail or refuse to pay said assessment or call within 20 days after personal demand therefor shall be made on him by said trustee, or within 30 days after a written or printed demand has been deposited in the post office, properly addressed to the post office address of such stockholder, the said trustee may employ such assistance and counsel, and take such action and institute such suits and proceedings in such courts as he shall be advised or deem expedient and proper for the purpose of enforcing the payment of said call and assessment." That defendant on the 11th day of January, 1898, subscribed for and purchased directly from the bankrupt corporation 10,000 shares of the then unissued capital stock, and paid therefor the sum of 25 cents per share and no more. That he has paid nothing more on account of said stock, and that he is still the owner and holder of said 10,000 shares upon which 75 cents per share is unpaid. That pursuant to the authority contained in the foregoing order, plaintiff on the 3d day of July, 1899, duly demanded of the defendant payment of the sum of \$5,000, being the amount due from the defendant to the plaintiff by virtue of the said call and assessment; that defendant failed to pay said call and plaintiff asks judgment for the \$5,000. Defendant answered, admitting the corporation, that it was adjudged bankrupt, and that plaintiff was appointed trustee; admits the sale of the property of the bankrupt by the trustee; admits that the amount realized from the sale of the property was insufficient to pay the debts of the bankrupt, and that the order as set forth in the complaint was duly made by the district court; but avers

that it was afterwards modified to read as follows: "Ordered that the aforesaid order, made and entered on the 24th day of June, 1899, be modified and amended by adding thereto, as follows: Providing that this order shall not preclude the stockholder against whom an assessment has been made from setting up the defense, that he is not indebted to the said trustee as representative of the creditors of the said bankrupt, or otherwise." Defendant denies that he subscribed for 10,000 or any other number of shares of the unissued capital stock, but alleges that he purchased from the bankrupt corporation 10,000 shares of this stock at the agreed price of 25 cents per share, which he paid, and that the stock was issued to him; that it was agreed by and between the company and defendant that the defendant should not be called upon for any other, further or greater sum per share than 25 cents. Defendant admits the making of the demand by plaintiff, and that he has not paid the call or assessment ordered by the United States District Court. By his replication plaintiff denies the making of the contract as alleged in defendant's answer.

The cause was duly tried, and it was shown in the making of plaintiff's case that the contract was made between defendant and the corporation substantially as alleged in the answer, that the order of the district court was made as alleged in the complaint, and that defendant failed to pay the call. It is not claimed by plaintiff that he either alleged or proved the amount of the indebtedness of the corporation. At the close of plaintiff's case defendant moved for a nonsuit for the following reasons: "First, because the complaint does not state facts sufficient to constitute a cause of action; second, under the pleadings and testimony in this case the plaintiff should not have judgment against the defendant; third, by the pleadings and evidence it appears that the plaintiff cannot maintain this suit against the defendant."

W. L. Dayton and James H. Pershing, for plaintiff in error. Clinton Reed, for defendant in error.

BAILEY, J. (after stating the facts). It will be observed that the order of the federal court does not assume to set aside the contract between the corporation and the defendant; neither does it find the amount of the indebtedness for the payment of which recovery must be had upon this trust fund. The complaint in this action does not allege the amount of the indebtedness, and the amount was not proven. It is incumbent upon the trustee in bankruptcy in a case like this to show the amount which was actually required to discharge the obligations of the delinquent stockholder to the corporation creditors because the stockholder does not owe the corporation any money, and he is only indebted to the trustee in bankruptcy, if at all, which we do not decide, in a sum

sufficient to discharge the obligations of the corporation. Until the amount of these obligations is determined, no judgment could be rendered against the stockholder.

In *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968, the proceedings were substantially as they are herein. A contract similar to the one involved here was made between the corporation and the stockholders. The court, speaking through Mr. Justice Woods, announced the following doctrine: "The doctrine of this court is that such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside; that when their rights intervene and their claims are to be satisfied, the stockholders can be required to pay their stock in full. The reason is that the stock subscribed is considered in equity as a trust fund for the payment of creditors. It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor has, therefore, the right to presume that the stock subscribed has been or will be paid up, and, if it is not, a court of equity will at his instance require it to be paid. In this case, the managers and agents of the bankrupt company had, in effect, represented to the public that all its capital stock had been subscribed for, and had been or would be paid in full. Considered, therefore, in the view of a court of equity, the contract between the company and its stockholders was this, namely, that the stockholders should pay, say, for example, \$20 per share on their stock and no more, unless it became necessary to pay more to satisfy the creditors of the company, and when the necessity arose and the amount required was ascertained, then to make such additional payment on the stock as the satisfaction of the claims of creditors required. When the company was adjudicated a bankrupt, the assignees were bound by this contract, thus equitably construed. Their duty was to collect a sufficient sum upon the unpaid stock, which, with the other assets of the company, would be sufficient to satisfy the company's creditors. They were authorized to collect no more. If it should turn out that the other assets were sufficient, no action would lie against the stockholder for the balance due on his stock. For if in a bankruptcy proceeding any surplus remained after payment of debts, it would go to the company and not to the stockholders. And we have seen that the company in this case would have no right to any surplus. * * * In this case there was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of the creditors was made for payment. The defendant owed the creditors nothing, and he owed the company nothing save such unpaid portions of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company his obligation was to pay to the assignees, upon demand, such an amount upon

his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything, until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete. But not only was it necessary that the amount required to satisfy creditors should be ascertained, but that the agreement between the company and the stockholder, to the effect that the latter should not be required to make any further payments on his stock, should be set aside, as in fraud of creditors. No action at law would lie to recover the unpaid balance due on the stock until this was done."

We consider the foregoing to be the law of this case. The judgment of the district court must therefore be affirmed.

Affirmed.

GABBERT, C. J., and GUNTER, J., concur.

FELKER v. MAXWELL

(Supreme Court of Colorado. Oct. 2, 1905.)

Error to District Court, Arapahoe County; P. L. Palmer, Judge.

Action by W. B. Felker, Jr., as trustee in bankruptcy of the W. D. Smith Cycle Company, against John M. Maxwell. From a judgment for defendant, plaintiff brings error. Affirmed.

Rehearing denied November 6, 1905.

W. L. Dayton and James H. Pershing, for plaintiff in error. Clinton Reed, for defendant in error.

BAILEY, J. The principles involved in this action are the same as those in *Felker, Trustee, v. Dennis Sullivan*, 83 Pac. 213 wherein the judgment of the district court was recently affirmed by this court. The same order will be entered herein, that the judgment of the district court be affirmed.

Affirmed.

GABBERT, C. J., and GUNTER, J., concur.

HARRISON v. CARBON TIMBER CO. et al.

(Supreme Court of Wyoming. Dec. 30, 1905.)

1. CORPORATIONS—CIVIL ACTIONS—VENUE — STATUTES.

Under Rev. St. 1899, § 3500, which provides that an action other than those brought for the recovery of real estate, specific performance, and for a fine, etc., when brought against a domestic corporation, may be brought in the county in which it is situate or has its principal place of business; section 3505, which declares that "every other action" than those against carriers, turnpike companies, and non-residents and foreign corporations, must be brought in the county in which a defendant resides; section 3510, which provides that when an action is rightly brought in a county a sum-

mons may be issued to any other county against other defendants; and section 3480, providing that any person may be made a defendant when a necessary party to the settlement of the controversy—an action against an individual residing in one county and a domestic corporation having its principal office in another county, for damages in consequence of their joint negligence in conducting log drives in a river, is properly brought in the county of the residence of the individual.

2. SAME—SERVICE OF PROCESS ON CORPORATIONS—STATUTES.

The word "county" in Rev. St. 1899, § 3516, which provides that a summons against a domestic corporation may be served on its chief officer, or, if he be not found in the "county," on subordinate officers, or, if none of these can be found, by a copy left at the office of the corporation, means the "county" in which the corporation has its principal office, and not the county in which it may be sued as a joint defendant; and when so sued, the summons must issue to and be served in the county of its residence, unless service is made as provided by *Seas. Laws 1903, p. 62, c. 53*, requiring every domestic corporation to appoint an agent on whom service of process may be made.

Error to District Court, Albany County; Charles E. Carpenter, Judge.

Action by Frank O. Harrison against the Carbon Timber Company and others. There was an order quashing and setting aside the summons and return thereon against defendant, the Carbon Timber Company, and plaintiff brings error. Affirmed.

N. E. Corthell, for plaintiff in error. McMicken & Blydenburgh, for defendant in error Carbon Timber Co.

BEARD, J. The plaintiff in error commenced this action in the district court of Albany county against the defendants in error to recover damages alleged to have been sustained by him by reason of the negligence of defendants in conducting log drives in Rock creek in the years 1901 and 1902. Summons was issued, directed to the sheriff of Albany county, and was there served upon the defendant Vagner personally, and service was attempted to be made at the same time and place upon the defendant Carbon Timber Company, a domestic corporation, by delivering a copy of the summons to Vagner; he being the president of said company. Summons was issued to Carbon county, and was there served upon the other defendants, Meyer and Oleson. The timber company appeared specially by its attorneys, and moved to quash and set aside the summons and the return of the sheriff thereon for the following reasons: (1) That the return of the sheriff did not show service of summons upon the company within the county of Albany. (2) That the principal place of business of the company was not within Albany county. (3) That the residence of the company was not situated within Albany county, nor was the corporation situated within said county. (4) That said corporation had no office or place of business and did not conduct its operations in Albany county. This motion was supported by affi-

davits, showing that the business operations of the company were conducted in Carbon county, where it had its principal office; that it had no office or other place of business outside of said county, or any residence elsewhere, and that it did not conduct its operations in Albany county, and was not situated there, and had no office or place of business there. These facts are not controverted. The motion was sustained by the district court, and the only questions in the case are whether or not that decision was right.

It is contended by counsel for the company that it could not be sued rightfully in Albany county, it being a corporation organized and existing under the laws of this state, and having its residence, principal office, and place of business in Carbon county, and having no office or place of business elsewhere; and that service could not be made upon it by service upon its president outside of the county in which it was situated or had its principal office or place of business. The questions thus presented must be determined upon the proper construction of our statutes as found in sections 3496 and 3505, c. 5, inclusive, and sections 3510 and 3516, c. 6, Rev. St. 1899, and chapter 53, p. 62, Sess. Laws 1903. The first four of those sections relate to the place where certain local actions must be brought, and it is conceded that this case does not come within either of those provisions. Section 3500 is as follows: "An action other than those mentioned in the first four sections of this chapter, against a corporation created under the laws of this state, may be brought in the county in which such corporation is situate, or has its principal office or place of business; but if such corporation is an insurance company, the action may be brought in the county wherein the cause of action, or some part thereof, arose." Sections 3501 and 3502 provide that certain actions against the owner or lessee of a line of mail stages or other coaches, against a railroad company, and against a turnpike road company may be brought in any county through or into which such road or line passes, or in which any part of the road lies. Section 3503 provides that when the charter prescribes the place where a suit must be brought, that provision shall govern. In this case it is not claimed that its charter provides where the corporation must be sued. Section 3504 relates to actions against nonresidents and foreign corporations. Section 3505 is as follows: "Every other action must be brought in the county in which a defendant resides or may be summoned, except actions against an executor, administrator, guardian or trustee, which may be brought in the county wherein he was appointed or resides, in which case summons may issue to any county." Section 3510 provides: "When the action is rightly brought in any county, according to the provisions of chapter five of this title, a summons may be issued to any other county, against one or more of the defendants, at the plaintiff's request; but no

maker or acceptor, or if the bill is not accepted, no drawer of an instrument for the payment of money only, shall be held liable in an action thereon, except on warrant of attorney, in any other county other than the one in which he, or one of the joint makers, or acceptors or drawers resides or is summoned."

There is no question raised by the motion in this case that the action was not rightly brought in Albany county against the defendant Vagner, nor is it claimed that, had the defendant Carbon Timber Company been an individual instead of a domestic corporation, with its principal office and place of business in Carbon county, it would not, under the facts alleged in the petition, have been rightly made a defendant in the action. But it is contended that, because it is a corporation created under the laws of this state, it could not be sued elsewhere than in the county of its residence, whether it was the only defendant, or was sued jointly with a resident of the county in which the action was commenced (that county being other than that of the residence of the corporation); and that section 3500 limits, under all circumstances, the right to bring an action against such corporation to the county in which it is situate or has its principal office or place of business. That section provides where a suit may be brought against such a corporation, and it may be conceded that, if it is the sole defendant, it must be brought in the county of its residence; but we fail to find anything in the statute prohibiting the joining of a corporation with other defendants where there is a joint liability. In this action the defendants are charged as joint tort feorsors, and are jointly and severally liable, if the allegations of the petition are true. It is provided in section 3480 that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination or settlement of a question involved therein." If, therefore, the corporation was rightly joined as a defendant with Vagner, and the suit was rightly brought against him in Albany county, it was then rightly brought in that county, and the court of that county would acquire jurisdiction of the person of the defendant company by proper service of summons upon it, unless section 3500 is exclusive. As stated above, it may be conceded that it is so in actions where the corporation is the only defendant; but if it be held to apply to actions in which the corporation is properly joined with other defendants, then the statute would prohibit the joining of two domestic corporations jointly liable, in an action either on contract or in tort, where they are residents of different counties. The policy of the law has always been to avoid a multiplicity of suits, and sections 3480 and 3510 were evidently enacted for that purpose.

The words "every other action," as used in section 3505, were not intended, we think,

to exclude actions such as the one at bar, where several defendants might be rightly joined. This construction is directly supported by the decisions of the court of common pleas in Ohio in the cases of *Stanton v. Inquirer Co. et al.*, 7 Ohio N. P. 589, and *Baldwin v. Wilson et al.*, Id. 506, and by the circuit court of Ohio in *Baltimore & O. R. Co. v. McPeck et al.*, 16 Ohio Cir. Ct. R. 87. While these decisions are not by courts of last resort, they are not without weight. And in *City of Fostoria v. Fox*, 60 Ohio St. 340, 54 N. E. 370, where the corporation was the sole defendant, the court, in considering section 5038 of the Ohio statute, which is identical with our section 3510, said: "This section can only apply where the action has been rightly brought in the county where commenced. This action had not been rightly brought in Hancock county, where the summons was issued to the sheriff of Seneca. It had not in law been brought at all, and could not be regarded as brought until the city had been rightly summoned. It is the only defendant to the action." This language is not decisive, but indicative of the application of that section to actions where a corporation is a joint defendant.

The case of *Western Travelers' Acc. Ass'n v. Taylor* (Neb.) 87 N. W. 950, is cited by counsel for defendant, but in that case the insurance company was the sole defendant, and it was held that it could not be sued outside of the county of its residence under the facts alleged; but the question we are now considering was not in that case. An individual cannot be sued in a county where he does not reside or cannot be summoned if sued alone; but when the action is rightly brought against him jointly with another in a county other than that of his residence, a summons may issue to and be served upon him in the county where he resides, and jurisdiction of his person be thus obtained; and we can see no good reason why the same rule should not apply to a corporation where it is a joint defendant. The only reason suggested in argument of counsel, other than that claimed under section 3500, is inconvenience; but we are unable to discover wherein a corporation would be more inconvenienced in such a case than an individual.

The construction we have placed upon sections 3500, 3505, and 3510 gives force and effect to each, and does violence to neither. We are of the opinion, therefore, that under the allegations of the petition the action was rightly brought in Albany county. We do not wish to be understood, however, as holding that by merely making a party a nominal defendant it would authorize the bringing of an action against a corporation or an individual resident in another county.

We come then to the question, can a domestic corporation be legally summoned in an action by making service upon its president outside of the county where it is situate or has its principal office or place of business,

and in a county where it has no office or agent, and where it conducts no part of its operations? The provisions of our statutes for service of summons against corporations such as the one in this case are contained in section 3516, Rev. St. 1899, and chapter 53, p. 62, Sess. Laws 1903, and, so far as applicable here, are as follows: "A summons against a corporation may be served upon the president, mayor, chairman or president of the board of directors or trustees or other chief officer, or if its chief officer be not found in the county, upon its cashier, treasurer, secretary, clerk or managing agent, or if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation with the person having charge thereof." The Session Laws above referred to provide for the appointment of an agent upon whom service may be made. The determination of this question depends upon the meaning of the word "county" as used in the portion of the section quoted above. If it means the county in which the action is brought, then service may be made in that county. If it means the county where the corporation is situate or has its principal office or place of business, it must be served there, whether upon the president or other chief officer, or otherwise. It is clear that the statute refers to a single summons, and a summons, when issued, shall be directed to the sheriff of the county, commanding him to notify the defendant that he has been sued, etc. If the defendant is a corporation, the sheriff must first seek the president or other chief officer; if neither of them can be found, then he is to look for the treasurer or other officer named in the section, and, if neither of them can be found, he may then leave a copy of the summons at the office or usual place of business of such corporation, with the person having charge thereof. Now it is apparent that, if the summons is issued to the sheriff of the county in which the action is brought, and no officer of the corporation can be found in his county, he could not go into another county, and there serve it by leaving a copy at its office. Three methods of service are provided for, and if the word "county" as used in this section means the county where the action is brought, then the service could not possibly be made by the sheriff of that county by the third method; while if "county" means the county of the residence of the corporation, the service can be made in either of the three methods. In *Western Travelers' Acc. Ass'n v. Taylor* (Neb.) 87 N. W. 950-954, it is said: "It is not reasonable to suppose that the Legislature intended search to be made by the sheriff where there was no prospect that the officers or agents of the corporation would be found. The place to look for the officers or agents of a corporation is at the place of business of such corporation, and not in some county distant from its place of business, where there would be no reasonable expecta-

tion of finding them. The presumption is that officers of a corporation will be found at its place of business." That case was a suit against an insurance company having its principal place of business in Hall county, Neb., and suit was commenced in Douglas county, and service attempted to be made upon the corporation by serving its secretary, who was found in Douglas county upon the business of the corporation out of which the suit arose, and it was held by the Supreme Court of that state that the service was insufficient, and gave the court no jurisdiction over the person of the defendant corporation. We are of the opinion that the county referred to in the section of the statute under consideration is the county where the corporation is situated or has its principal office or place of business, and not the county in which it may be sued as a joint defendant, and that summons against it in such case should issue to and be served in the county of its residence, unless service is made as provided in chapter 53, p. 62, Sess. Laws 1903. This construction of the statute finds some support in *City of Fostoria v. Fox*, supra, *Baltimore & O. R. Co. v. McPeck*, supra, *Holgate v. Oregon Pac. Ry. Co. (Or.)* 17 Pac. 859, and *San Antonio & A. P. Ry. Co. et al. v. Graves (Tex. Civ. App.)* 49 S. W. 1103, although most of these decisions were under statutes somewhat different from ours.

Some objections are made to the sufficiency of the return, but, as the ruling of the district court is sustained for the reasons above stated, they need not be considered. The order of the district court in sustaining the motion is affirmed.

Affirmed.

POTTER, C. J., and SCOTT, District Judge, concur.

VAN ORSDEL, J., having announced his disqualification to sit in this case, RICHARD H. SCOTT, judge of the district court of the first district, was called in to sit in his stead.

MAU v. STONER et al.

(Supreme Court of Wyoming, Nov. 8, 1905.
On Rehearing, Dec. 30, 1905.)

1. WATER AND WATER COURSES—IRRIGATION—PARTNERSHIP DITCH—DISTRIBUTERS OF WATER.

Under Rev. St. 1899, § 910, as amended by Sess. Laws 1903, p. 122, c. 93, providing that the hearing, on a petition to the district court of a partner in an irrigation ditch for appointment of a suitable person to distribute the waters, the partners being unable to agree on the distribution, shall be before the court, the judge thereof, or a court commissioner, on the day fixed in the summons for answer, or as soon afterwards as possible, and that the decision so rendered shall be final unless an appeal is taken to the district court, appeal will not lie from the district court from the order of appointment, the effect of which is temporary in character, and to meet an immediate emergency.

2. APPEAL—RIGHT UNDER CONSTITUTION.

Under Const. art. 5, § 2, providing that the Supreme Court shall have general appellate jurisdiction, and shall have a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law, section 18, providing that writs of error and appeal may be allowed from decisions of the district courts to the Supreme Court, under such regulations as may be prescribed by law, and section 23, providing that appeals shall lie from the final decisions of justices and police magistrates in such cases and pursuant to such regulations as may be prescribed by law, right of appeal to the Supreme Court is not guaranteed in all cases; but, at least in a special or summary proceeding unknown to the common law, the Legislature may make the judgment of the district court final.

On Rehearing.

3. WATERS AND WATER COURSES—IRRIGATION—PARTNERSHIP DITCH—PROCEEDINGS FOR DISTRIBUTION—APPEAL.

Rev. St. 1899, § 910, provides that the hearing on petition to the district court for appointment of a person to distribute the waters of a partnership ditch may be before the court, the judge thereof, or a district court commissioner, and that the decision of the court, judge, or commissioner shall be final. Sess. Laws 1903, p. 122, c. 93, amendatory thereof, provides that the decision so rendered shall be final unless appeal is taken to the district court. *Held*, that the words "the decision so rendered shall be final" do not mean that the decision shall be final as distinguished from an interlocutory order, but final in the sense that there shall be no further appeal.

4. SAME—MODIFICATION OF GENERAL STATUTE BY LATER SPECIAL STATUTE.

The general provision of Rev. St. 1899, § 4249, as to appeal, is modified so far as concerns the decision on application for appointment of a person to distribute the waters of a partnership ditch, by section 910, as modified by Sess. Laws 1903, p. 122, c. 93, providing that such decision shall be final.

Error to District Court, Uinta County; David H. Craig, Judge.

Action by John W. Stoner and others against Frank A. Mau. Judgment for plaintiffs. Defendant brings error. Dismissed.

See 76 Pac. 584.

J. H. Ryckman and S. T. Corn, for plaintiff in error. Hamm & Arnold and J. W. Lacey, for defendants in error.

VAN ORSDEL, J. This action was instituted in the district court of Uinta county by the defendants in error, plaintiffs below, for the appointment of a suitable person to distribute the water from a certain irrigating ditch in said county known as the "Mau Canal." The court in its decree found that the parties to the suit were joint owners of the canal, and made the appointment as prayed for in the petition. From this order the cause was appealed to this court.

Counsel for defendants in error contend that an appeal will not lie from the judgment of the district court in this case, and that this court is without jurisdiction in the premises. This action was brought under the provisions of sections 908 to 914, inclusive, Rev. St. 1899. Section 910 provides: "The hearing provided for under this chapter may be held either

before the court, the judge thereof sitting in chambers, or the district court commissioner of said county, and shall be had upon the day fixed in the summons for making answer to the petition filed, or as soon thereafter as possible, and the decision of the court, judge, or commissioner shall be final." This section was amended by chapter 93, p. 122, Sess. Laws 1903, to read as follows: "The hearing provided for under this chapter may be heard either before the court, the judge thereof sitting in chambers, or a district court commissioner of said county, and shall be had upon the day fixed in the summons for making answer to the petition filed, or as soon thereafter as possible. The decision so rendered shall be final unless an appeal is taken to the district court of the county, which may be taken in the manner provided for appeals from justice court, provided, however, that the judge or court commissioner shall fix the amount of the undertaking in appeal according to the value of the property involved and the damages which may be sustained." This section, as amended, provides only for an appeal from the judge in chambers or the court commissioner of the district court, leaving the decision of the district court final. We think this amendment will not bear any other reasonable construction. The very effect of the order sought is temporary in character and to meet an immediate emergency. It was manifestly the intention of the Legislature that, in a special proceeding of this kind, the order being for temporary purposes, the objects of the statute should not be obstructed and valuable property interests jeopardized by the delay of an appeal to this court, but that the decision of the district court should be final and conclusive. It is therefore contended that, inasmuch as the Legislature has declared the decision of the district court to be final, this court is without jurisdiction to entertain this appeal. If this contention is correct, a judgment of dismissal must necessarily follow. It is well settled that, in the absence of a direct constitutional requirement, the right of appeal does not exist unless expressly conferred by statute. The right to have a judgment of an inferior tribunal reviewed by writ of error or appeal is not a natural or inherent right. It pertains merely to the mode of judicial procedure or the remedy. Unless it is guaranteed as a matter of right in the Constitution, the Legislature has power to pass laws not only regulating the mode of proceeding, but limiting the cases in which the right may be exercised. The remedy by appeal was unknown to the English common law, hence it may be said that in both England and the United States the whole matter of appellate review is regulated almost entirely by statute law.

Since the Legislature has declared that the judgment of the district court shall be final in cases brought under the provisions of the statute under consideration, it becomes important to determine whether, under the Con-

stitution of this state, the right of appeal is guaranteed in all cases. The Constitution, in defining the appellate jurisdiction of the Supreme Court, provides: "The Supreme Court shall have general appellate jurisdiction, co-extensive with the state, in both civil and criminal causes, and shall have a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law." Const. art. 5, § 2. Section 18 of the same article provides: "Writs of error and appeals may be allowed from decisions of the district courts to the Supreme Court under such regulations as may be prescribed by law." And again in the same article section 23 provides: "Appeals shall lie from the final decisions of justices of the peace and police magistrates in such cases and pursuant to such regulations as may be prescribed by law." Section 2 merely defines and limits the jurisdiction of the Supreme Court, without attempting to define the manner of appeal or the class of cases in which appeals may be taken. It provides that the appellate jurisdiction of the Supreme Court shall extend throughout the state, both in civil and criminal cases, without attempting to define how it may be exercised. We think the expression "under such rules and regulations as may be prescribed by law" refers to and limits all the powers conferred by the section; in other words, prescribes how the exercise of these powers may be regulated and limited. The construction of section 2 is materially affected by the provisions of sections 18 and 23, which refer particularly to judgments of the district courts and justices of the peace and police magistrates, where the whole matter of writs of error and appeals is again referred to the Legislature. The provision in section 23, expressly allowing the Legislature to limit the cases which may be appealed from courts of justices of the peace or police magistrates, to that extent, clearly allows a limitation upon the general right of appeal in all cases to this court—a plain contradiction, on the face of the instrument itself, of the contention that the right of appeal in all cases is guaranteed by the Constitution. It will be observed that in section 23, where the word "shall" is employed, a word generally mandatory in its legal acceptance, the words "in such cases" are used; thus permitting the Legislature to limit the cases coming under that section which we think assist in the construction of section 18. By that section it was intended merely to provide that the Legislature might allow writs of error and appeals when it might deem it most expedient for the public welfare.

We have been able to find but two states where they have provisions in their Constitutions exactly similar to section 18 above quoted. In South Dakota, under a provision of the Constitution the same as ours (section 18, art. 5), the Supreme Court, construing it, said: "By it they provided that 'writs of

error and appeals may be allowed * * * under such regulations as may be prescribed by law.' The word 'may' is evidently used in that section in its proper sense as permissive, and not in the sense of 'must' or 'shall.' Again, by section 20 of the same article, it is provided that 'writs of error and appeals may be allowed from county to the circuit courts, or to the Supreme Court, in such cases and in such manner as may be prescribed by law.' If the contention of the respondent is correct, that by section 2 appellate jurisdiction is given in all cases to the Supreme Court, neither section 18 nor section 20 would be necessary, except so far as they might provide for the manner in which an appeal should be taken. The authority to allow appeals would be nugatory. It is quite clear from the provisions of sections 18 and 20 that the framers of the fundamental law intended to leave the power over the subject of appeals to the Legislature, to be exercised in such manner as public policy and the best interests of the people might require." *McClain v. Williams*, 10 S. D. 332, 73 N. W. 72, 43 L. R. A. 287, 289. In Illinois, under a similar constitutional provision, providing that "appeals and writs of error shall be allowed from final determinations of county courts as may be provided by law," the court said: "Plainly this does not confer the right to a writ of error from this court in all cases decided by the county court. Whether the case shall be taken, by appeal or by writ of error, to this court or to some other court, must be provided by law. It is but a direction to the General Assembly to prescribe by law how appeals and writs of error shall be allowed from final determinations of county courts." *Kingsbury v. Sperry et al.*, 119 Ill. 279, 10 N. E. 8. In Michigan, the court construing a provision of the Constitution vesting in the Supreme Court the general superintending control of all inferior courts, with power to issue original and remedial writs, and providing that "in all other cases it shall have appellate jurisdiction only," said: "The appellate jurisdiction in 'all other cases' is as plainly conferred by this section as is the appellate jurisdiction of the circuit courts in all cases of inferior tribunals. Among the other cases are those which arise in equity, and are tried on the chancery side of the circuit courts. In these cases the jurisdiction of this court is appellate, but it obtains no jurisdiction in this class of cases, except by this act of the Legislature allowing appeals." *Sullivan v. Haug*, 82 Mich. 548, 46 N. W. 795, 10 L. R. A. 263. In *Cady v. Manufacturing Co.*, 48 Mich. 137, 11 N. W. 841, Mr. Justice Campbell, stating the law as to the right of appeal under the Constitution of that state, said: "No appeal lies in any case except where given by statute." In West Virginia, where the Constitution provides that the Supreme Court shall have appellate jurisdiction in civil actions where the amount in controversy ex-

ceeds \$100, the court, construing this provision of the Constitution, said: "Failure to give an appeal or writ of error in every case is not the result of oversight in the people in the adoption of the Constitution, nor of the Legislature in making laws under it. On the contrary, there is a deliberate purpose to set limits upon litigation, after one trial in the court having jurisdiction, and put an end to the controversy. Though writs of error came into use as common law remedies more than seven centuries ago, there is no absolute right in the suitor to have a decision reviewed, which must be respected in making laws, and, in the absence of some constitutional inhibition, it is within the power of the Legislature to prescribe the cases in which, and the courts to which, parties shall be entitled to bring a cause for review." *Fleshman v. McWhorter*, 54 W. Va. 161, 46 S. E. 116.

This court held in the case of *In re Boulter*, 5 Wyo. 263, 39 Pac. 875, as follows: "We have no direct constitutional provision allowing appeals as a matter of right in criminal cases, except that this court is clothed with appellate jurisdiction in criminal as well as in civil causes, and is vested with a general superintendence and control over all inferior courts, under such rules and regulations as may be prescribed by law (Const. art. 5, § 2); but the statute relating to appeals, and which has stood practically untouched for a quarter of a century, provides for allowance of writs of error in criminal causes 'for good cause shown,' upon the application of the defendant. It has been the practice lately in this court to allow writs of error pro forma, but this is a matter of grace. Either the court or judge to whom the application for the writ of error is made may refuse the writ, if it does not appear that sufficient reasons exist for its allowance." In this state the Legislature has assumed the right to regulate, to some extent at least, the subject of appellate procedure. Section 4249, Rev. St. 1899, providing that "a judgment rendered or final order made by the district court, may be reversed, vacated, or modified by the Supreme Court, for errors appearing on the record," was in force, not only at the time of the adoption of the Constitution, but has been ever since. Recently the Legislature has provided for the bringing of criminal cases to this court by petition in error, instead of by writs of error, as formerly. Chapter 63, p. 65, Sess. Laws 1901. Writs of error and certiorari had been abolished in civil cases by the territorial Legislature long prior to the adoption of the Constitution. Rev. St. 1899, § 4270.

It is not necessary, however, in this case, for us to express an opinion as to whether there is a constitutional right of appeal or review in cases which proceed according to the course of the common law. The statute under consideration provides for a special or summary proceeding unknown to the common

law, created by the Legislature for the purpose of affording temporary relief only, and to meet immediate emergencies that may arise under it. The Legislature clearly had the power in such a proceeding to declare that the decision of the district court should be final, and deny the right of appeal therefrom. We therefore hold that the Legislature in this proceeding had the right to declare the judgment of the district court final, and that it has done so by the statute under consideration. It is unnecessary to consider the errors assigned in the record.

The appeal is dismissed.

POTTER, C. J., concurs. BEARD, J., having announced his disqualification, did not sit in the case.

On Rehearing.

VAN ORSDEL, J. This cause was decided at the present term of this court. Within time, counsel for plaintiff in error filed a petition for rehearing. It is contended by counsel for plaintiff in error that the clause, "the decision so rendered shall be final," as used in chapter 93, p. 122, Sess. Laws 1903, merely defines the judgment of the district court as a final order, and distinguishes it from an interlocutory order, as the same are defined and distinguished by the statutes of the state, allowing appeals from final orders only. It is therefore claimed that the order or judgment complained of, being so expressly defined as a final order of the district court, comes within the scope of section 4249, Rev. St. 1899, which provides generally that appeal will lie to the Supreme Court from judgments rendered or final orders made by the district court. There are decisions of courts of high respectability which hold that the words "final and conclusive," when used in reference to the decisions of inferior courts, are employed in the sense of declaring the judgment final and not interlocutory. The great weight of authority, however, seems to regard the use of such terms as indicative of a final and conclusive determination of the litigation and the further right of appeal, rather than as defining the character of the judgment. See opinion of Crockett, J., in Appeal of S. O. Houghton, 42 Cal. 35. In the case of McAllister v. Albion Plank Road Company, 10 N. Y. 353, a case closely analogous to one here under consideration, where it was provided by the statute of 1847 that the report of the road reviewers when confirmed by the Supreme Court should be final, and by the later amendatory act of 1851 that it should be final and conclusive, the Court of Appeals, in construing the effect of these expressions as used in the respective statutes, said: "It is not perceived how any effect can be given to these expressions, unless it be to take away and prevent any further appeal or review. They certainly add nothing to the force or validity of the decision,

which would be just as binding and operative in all respects without as with them; and it will hardly do, after they have been inserted in the original act and repeated in the amendment, to treat them as redundant and meaning nothing." In the case here under consideration, like the one just cited, the Legislature has emphasized its intention both in the original act and in the amendment. In section 910, Rev. St. 1899, it is declared that the decision of the court, judge, or court commissioner shall be final, without the use of any qualifying clause whatever, and again in chapter 93, supra, which is amendatory of section 910, it is declared that the decision shall be final unless an appeal is taken from the judge or court commissioner to the district court. We are of the opinion that the qualifying clause, providing for appeal from the court commissioner or judge in chambers, clearly signifies that the word "final" is used, not in the sense of distinguishing the judgment as a final, and not an interlocutory, one, but rather as putting an end to the litigation, and precluding the further right of appeal. Section 4249 relates to appeals generally from the judgments and final orders of the district courts. No doubt, if section 910, as amended by chapter 93, had contained no provision regarding the finality of the decision of the district court in causes brought under it, appeal would lie from a judgment of this character, under the general provisions of section 4249; but a declaration by the Legislature that the decision of the district court shall be final in a special proceeding of this kind takes this action out of the scope of the general statute. It is a general rule of statutory construction that where a special statute is later than a general statute relating to the same subject, the enactment operates necessarily to restrict the effect of the general act, from which it differs. Sutherland on Statutory Construction, § 158. We think this is the condition in regard to the statutes here under consideration. The clause, "the decision so rendered shall be final," as used in chapter 93, supra, refers to all three tribunals mentioned in the preceding part of the section—"the court, the judge thereof sitting in chambers, or the district court commissioner." The decision is declared by the language of the statute to be final as to each of said tribunals, unless an appeal is taken from the judge in chambers or the court commissioner to the district court. This leaves the decision of the district court final. If it had been intended by the Legislature that an appeal should be allowed from the decision of the district court, under the provisions of section 4249, no declaration as to the final determination of the same would have been necessary, and no reason is apparent why the law-makers should have placed any express limitation upon the right of appeal.

If, as contended by counsel, the statute

under consideration is subject to abuse by reason of the limitations placed upon the right of appeal, and its failure to provide that the distributor of water appointed under its provisions shall give a bond, these are proper subjects to present to the Legislature for its consideration. If a legislative enactment violates no constitutional provision or principle, its existence as a statute of the state, so far as the courts are concerned, is conclusive evidence of the justice, propriety, and policy of its passage. These are questions entirely with the legislative department of the government, and upon which the judicial department has no power to act. If a statute has been passed improvidently, the responsibility is with the Legislature, and not with the courts. Rehearing denied.

POTTER, C. J., concurs. BEARD, J., did not sit.

KEELY v. GREGG (BURLINGAME, Intervener).

(Supreme Court of Montana. Jan. 29, 1906.)

1. MORTGAGES—FORECLOSURE—ADJUSTMENT OF EQUITIES.

Where defendant and plaintiff's assignor had an accounting of all dealings between them, and defendant executed notes and a mortgage to secure the balance found due from him to his assignor, and it appeared, in a suit brought by plaintiff to foreclose the mortgage, that his assignor had held the record title to a separate tract of land not covered by the mortgage, in order to secure a sum which was afterwards included in the accounting, and had agreed to convey such separate tract to defendant, but had not released such tract from its position as security, the court, in decreeing foreclosure, should adjust all equities arising out of the transaction, and require plaintiff, who had succeeded to his assignor's title to the separate tract, to convey such tract to defendant, on the payment by defendant of the sum which the separate tract was held to secure, or so much thereof as remained unpaid after foreclosure and settlement of the mortgage, together with interest, taxes, and assessments on such tract.

2. PUBLIC LANDS—FRAUDULENT TRANSACTIONS—CONCEALMENT OF EQUITIES—RIGHTS OF PARTIES.

The fact that a person perfecting the title to scrip land was acting as trustee for another, and that both he and his cestui que trust intended to conceal from the federal land office their true relations, does not preclude the enforcement of the trust, where all the facts were known to and considered by the government officials before issuing the patent, and the government knowingly and willingly conveyed the land to the trustee, leaving him and his cestui que trust to settle the equities between themselves.

On rehearing. Former decision modified.
For former opinion, see 82 Pac. 27.

MILBURN, J. This case is before the court on rehearing, having been heretofore decided. For statement of facts and opinion, see 82 Pac. 27, 33 Mont. —. Our decision before was that the decree below should be modified by striking from it all reference to

the Lakey 80 acres, which will be hereinafter called the "Lakey land." After consideration of argument of counsel on rehearing, we now say that we erred in ordering the particular modification of the decree which we in the former opinion directed to be made. The contemporaneous instrument of December 18, 1893, shows that the mortgage for \$20,000 was given to secure certain indebtedness, evidenced by four promissory notes of \$5,000 each, after an accounting as to all dealings between Kendall and Gregg. There is not any statement therein that there was made, or intended to be made, any release of the Lakey land, held by Kendall as security for a certain sum of \$3,000, being on such accounting considered as part of the \$20,000 theretofore advanced by him to Gregg, or that the debt of \$3,000, or any part thereof, had been discharged in any way. The fact of this land being held as such security being set up by defendant Gregg in the equity suit to foreclose the \$20,000 lien on other property, we are now of the opinion that the court below was correct in attempting to adjust all the equities growing out of the whole transaction, and in requiring Keely, the successor of Kendall, to convey the Lakey land to Gregg, but was not correct in directing Gregg to pay only the taxes and assessments on said land accrued, with interest, but should have added a further condition to be performed by Gregg, to wit, to pay the \$3,000 and interest, or so much thereof as might remain unpaid after foreclosure and settlement of the \$20,000 mortgage. Counsel for plaintiff and appellant admitted in open court on rehearing that he would not complain of such amendment of the decree. It appears that the Lakey land was taken as security for the \$3,000. As the \$3,000 and interest item was included in the settlement of December 18, 1893, interest should be computed on \$3,000 from the date that the debt was incurred, to wit, April 22, 1889, until December 18, 1893, at the then statutory rate, and at 8 per cent. upon the total of such \$3,000 and interest from December 18, 1893, until the time of settlement or foreclosure of the \$20,000 mortgage. If upon such settlement of the foreclosure suit under the decree there be a deficiency or a balance still unpaid, thus leaving the \$3,000 and interest computed as aforesaid, or any part thereof, unpaid, then such sum of \$3,000 and such interest, or so much thereof as is unpaid by such foreclosure, shall, with the amount now reported by counsel to be deposited with the clerk for taxes and assessments on the Lakey land, be paid to Keely, and then the said Lakey land shall be by Keely, or the clerk of the court as commissioner, conveyed to Gregg.

Upon further reflection and after further examination we find that we were in error in this case in our conclusion that because Kendall and Gregg apparently had intended to conceal from the federal land office the fact that Gregg, and not Kendall, was the

purchaser under the scrip, any promise of Kendall to convey the land patented to him in pursuance of such secret plan, could not be enforced. It seems that the facts upon which we based our conclusion that the arrangement to procure title in Kendall, and not in Gregg, were all known and considered by the Interior Department before issuance of patent, and that the government knowingly and willingly conveyed the land to Kendall intentionally, leaving him and Gregg to settle the equities between themselves, if any there were, in the courts after patent issued. For this reason we revoke what was said in the former opinion as to the arrangement between the parties being void, and that the courts would not enforce the intended trust. It now appears that Kendall took the patent in his own name to secure the sum of \$3,000 and interest, and his successor should convey the same to Gregg whenever the amount for which it was held as security, such amount to be ascertained as hereinbefore said together with said taxes and assessments, is fully paid by or on behalf of Gregg.

Let the decree below, appealed from, be modified accordingly, and let the foreclosure of the \$20,000 mortgage proceed as decreed. Everything in the former opinion not in conformity herewith is revoked. The decree, when amended as above decided, shall stand affirmed. Remittitur forthwith.

Modified and affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

STATE v. LEE.

(Supreme Court of Montana. Nov. 17, 1905.)

NAMES—IDEM SONANS—INFORMATION—VARIANCE.

A variance between an information alleging robbery from "Frank Rex" and testimony showing that the name of the person robbed was "Frank Röck" is fatal, and is not an immaterial variance, within the meaning of Pen. Code, § 1838, providing that, when an offense is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured is not material.

Appeal from District Court, Silver Bow County; Michael Donlon, Judge.

Marion Lee was convicted of robbery, and appeals. Reversed.

Maury and Hogeroll, for appellant. Albert J. Galen, Atty. Gen., for the State.

MILBURN, J. This case is before us on appeal from a judgment of conviction for the crime of robbery. The defendant was informed against by the county attorney in and for the county of Silver Bow, being charged with having committed the crime of robbery, in that he did willfully, etc., take certain moneys from the possession and person of one Frank Rex, etc. The testimony of the prosecuting witness clearly showed that his

name was "Frank Röck." There is not one word of testimony showing or tending to show that the injured person was named, or had been known as, "Frank Rex." The point was made, and preserved below, that there was a fatal variance. This point is now before us for decision.

Section 1838 of our Penal Code is as follows: "When an offense involves the commission of, or attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material." In *State v. Sullivan*, 9 Mont. 490, 24 Pac. 23, a like section (189) of the criminal practice act (Comp. St. 1887) was considered by this court. The defendant in that case pleaded a former acquittal of the same offense. The person injured was described in the indictment as "John Maze." In a former indictment, upon which he had been acquitted, the person said to have been by him injured was named as "John Moys." The court held that as the surnames were not alike in sound or in spelling, and the offense was not described with sufficient certainty in other respects to identify the act, the variance was material, and the former acquittal was not a defense to the second prosecution.

We do not find any description in the information which tends to make it sufficiently certain, or at all certain, that Frank Rex and Frank Röck are one and the same person. The names are not of the same sound. In the light of what is said in the case of *State v. Sullivan*, and for the reason above stated, we find the court was in error. The variance was fatal to conviction.

The judgment must be, and is, reversed, and the cause is remanded for a new trial. It is not necessary to consider the other points raised in the briefs.

Reversed and remanded.

BRANTLY and HOLLOWAY, JJ., concur.

In re KELLY. (No. 1,688.)

(Supreme Court of Nevada. Dec. 18, 1905.)

1. CRIMINAL LAW—EVIDENCE—STATEMENTS OF PROSECUTRIX—RES GESTÆ.

Statements made by prosecutrix the day after an alleged rape are too remote to constitute *res gestæ*.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 819, 820.]

2. SAME—CONFESSIONS—EVIDENCE—SUFFICIENCY.

On a preliminary examination on a charge of rape, evidence by a medical expert that from an examination of prosecutrix soon after the alleged offense he thought she had had intercourse with some one, and by other witnesses that they had seen marks of violence on her person, was sufficient, when coupled with an admission by defendant shortly after the offense that he had committed it, to justify the commitment of defendant to answer for the crime.

3. SAME — PRELIMINARY EXAMINATION — PROOF REQUIRED.

In order to justify a committing magistrate in holding an accused to answer to a charge, the evidence need not show guilt beyond a reasonable doubt.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 493.]

Application by Frank P. Kelly, on behalf of H. Osuna, for a writ of habeas corpus. Writ dismissed.

Wm. Woodburn, for petitioner. Jas. G. Sweeney, Atty. Gen., for the State.

NORCROSS, J. Upon the application of Frank P. Kelly, in behalf of H. Osuna, a writ of habeas corpus was issued returnable before this court. It appears from the return of the writ that H. Osuna is held in the custody of J. F. Bradley, sheriff of Esmeralda county, upon a commitment of the justice of the peace of Hawthorne township, to answer the charge of rape committed upon one Harriett Averill on the night of the 3d of October, 1905. It is complained by petitioner that this commitment was issued without reasonable or probable cause, and in support of this contention the following specific charges are made respecting the testimony introduced upon the preliminary examination of the defendant: "That the said prosecuting witness, Harriett Averill, upon whom the said crime of rape was alleged to have been committed, failed to appear and testify at said examination, but a written statement, signed by one Harry Averill, and attested by two witnesses, a day after the commission of said alleged offense, was admitted in evidence by the said justice of the peace against the objection of the attorney of the said Osuna; that no legal testimony was given showing that Harry Averill, who signed said statement, was the same person as Harriett Averill, mentioned in said complaint, and upon whom the said rape was alleged to have been committed; that no legal evidence was introduced by the state at said examination, which is shown by a certified copy of the testimony taken at said examination, and which is hereunto annexed, and made a part of this petition; that there was no proof that the crime of rape, or any other offense, had been committed on Harriett Averill or upon Harry Averill, or that there was sufficient cause to believe the said Osuna guilty of committing a public offense." It appears from the record that Osuna was arrested and brought before the justice of the peace at Hawthorne on the 6th day of October, 1905, and the complaint of the prosecuting witness, charging him with the crime of rape, read to him. At the request of the defendant, the examination was continued until October 10th, at which time the defendant appeared with his attorney, and the examination was proceeded with. It appears that the complaining witness was not present, and her name was called at the door without response. The deputy sheriff, A. N. Jones, was then

called and sworn as a witness, and testified that, when he brought the defendant to Hawthorne, the complainant and her mother accompanied them. Upon being asked, "Where is Harry Averill now?" answered, "I think she has gone." The absence of this important witness, who is called in the testimony both as Harriett and as Harry Averill, and who is shown at one time to have been within reach of the process of the court, is not accounted for in the record, nor does it appear what steps were taken to procure her testimony at the hearing. Upon this showing of the absence of the witness Harriett Averill, the District Attorney offered in evidence what purported to be a written statement of the facts of the alleged rape, signed by the said Harriett Averill on the evening of the 4th of October, in the presence of witnesses, and declared in their presence to be a true statement of the facts of the alleged crime. This written statement was admitted in evidence over the objection of the defendant's attorney. A witness to this written statement, Robert A. Lovegrove, farmer, in charge of the Walker Lake Indian Reservation, was permitted, over defendant's objection, to testify that he had written this statement for the complainant as she detailed the facts, and that he read the same over to her before she signed it, and that he warned her of the seriousness of the charge she was making against the defendant. S. W. Hance, a telegraph operator, residing at the place where the crime is alleged to have been committed, was also permitted to testify, over defendant's objection, that he was a witness to this written statement, and heard the complainant detail the facts therein stated; also, that at noon of the same day the said Harriett Averill had come to his office and had made the same charge against the defendant to him, and that at her solicitation he dictated a telegram to her mother, who was then in San Francisco, relative to the assault, and requesting her to come home at once. A copy of this telegram was offered, and admitted in evidence over defendant's objection. Dr. F. C. Pache, a physician residing at Hawthorne, was also permitted to testify, over defendant's objection, that at the time of making an examination of the person of the complainant, some days after the alleged offense was committed, she informed him that the defendant had made a criminal assault upon her, and with violence accomplished his purpose.

The position taken by counsel for the petitioner that these statements of the complainant were made at a time too remote to form a part of the *res gestæ*, were hearsay, and for that reason were inadmissible, must be sustained. *State v. Campbell*, 20 Nev. 126, 17 Pac. 620. It appears, however, from the record that after the complainant had signed the written statement, the witness Lovegrove called in the defendant, and that the witness read the statement over to him;

that at the same time the witness warned the complainant that it was a serious charge she was making, and that she had better be careful what she said; that she said it was true; that he then told the defendant that he would place him under arrest, to appear before a court to answer the charge; that he asked the defendant what he had to say to the charge, and that the defendant said he "would answer before a court, or when it was time to make them." This portion of the testimony of the witness does not seem to have been considered by counsel upon either side in the presentation of this case, as standing in a different position from the testimony relative to the statements of the complainant heretofore referred to, made without the presence of the defendant. We think, however, it presents a question worthy of careful consideration of court and counsel, but, as it has not been presented in the briefs or argument in this matter, and as, in the view we take of the case, the action of the magistrate, in holding the defendant to answer, can be sustained upon other portions of the testimony alone, the question will not now be determined.

It is urged by counsel for petitioner that, with the statements made by the complainant excluded, there is no competent proof of the corpus delicti. Two witnesses, C. O. Wilson and A. N. Jones, the deputy sheriff, gave testimony relative to an admission made by the defendant while he was being taken upon the train from the place where the offense is alleged to have been committed to Hawthorne. That portion of the testimony of the witness Wilson relative to the admission is as follows: "This defendant was brought into the car at a place called Schruz, between here and Reno, with Mr. Jones and a young lady I afterwards found to be Harry Averill, and they took possession of a seat I had occupied up to that time. I took the seat across the aisle. Seeing the man with bracelets on excited more or less curiosity, and when he came into the car the young lady went into the car behind, and got another lady, which I learned was her mother. This mother came in, and was talking to the defendant. The mother asked him what made him do it. The defendant says, 'I don't know.' The mother was hysterical, and she made the remark, 'I ought to kill you.' He assented; he did, yes. 'Well,' she says, 'why don't I do it?' and repeated the remark several times, and about that time she fainted and swooned away." The testimony of the deputy sheriff relative to this admission was substantially to the same effect.

Counsel for petitioner say in their brief: "The testimony of Wilson and Jones, deputy sheriff, as to the admissions of the defendant to his wife on a railroad car after his arrest are clearly inadmissible, because there was no proof that a crime had been committed, and the corpus delicti cannot be established by the confession of the defendant." It will

be conceded that the overwhelming weight of authority in this country is to the effect that an extrajudicial confession or admission of a prisoner, not corroborated by independent proof of the corpus delicti, will not justify conviction. It is not requisite, however, that the crime charged be conclusively established by evidence independent of the confession or admission. It is sufficient if there be other competent evidence tending to establish the fact of the commission of the crime. In *People v. Badgley*, 16 Wend. (N. Y.) 53, Nelson, C. J., said: "Full proof of the body of the crime—the corpus delicti—independently of the confession is not required by any of the cases, and in many of them slight corroborating facts were held sufficient." In the case of *State v. Hall*, 31 W. Va. 505, 7 S. E. 422, the court said: "We know of no decisions anywhere that hold the admissions of the defendant are not competent evidence tending to prove the corpus delicti. Such admissions may not be sufficient proof of the corpus delicti, but they certainly are competent evidence tending to prove that the crime charged has been committed." In the case of *Matthews v. State*, 55 Ala. 187, where many authorities are cited and reviewed, the court, by Bricknell, C. J., says: "Nor must we be understood as affirming that the proof of the corpus delicti must be as full and conclusive as would be essential if there was no confession to corroborate it. Evidence of facts and circumstances attending the particular offense, and usually attending the commission of similar offenses, or of facts to the discovery of which the confession has led, and which would not probably have existed if the offense had not been committed, or of facts having a just tendency to lead the mind to the conclusion that the offense has been committed, would be admissible to corroborate the confession. The weight which would be accorded them, when connected with the confession, the jury must determine, under proper instructions from the court." The case of *People v. Simonsen*, 107 Cal. 346, 40 Pac. 440, cited in petitioner's brief, is in line with the authorities above quoted. The court in that case say: "The term 'corpus delicti' means exactly what it says. It involves the element of crime. Upon a charge of homicide, producing the dead body does not establish the corpus delicti, it would simply establish the corpus; and proof of the dead body alone, joined with a confession by the defendant of his guilt, would not be sufficient to convict, for there must be some evidence tending to show the commission of a homicide before a defendant's confession would be admissible for any purpose. * * *

To be sure, the appearance of the dead body, the nature of the wounds, the evidences of a struggle, the physical circumstances surrounding the affair, may furnish evidence of the corpus delicti—they may indicate that a crime has been committed—but there must be proof of the fact from some source other

than the defendant's admissions." The court cites other examples, and then, referring to the case under consideration, says: "Laying aside the evidence of defendant's admissions, there is nothing whatever in the record even pointing towards the commission of a crime." See, also, *People v. Jones*, 31 Cal. 567; *State v. Lamb*, 28 Mo. 219; *State v. Guild*, 10 N. J. Law, 180, 18 Am. Dec. 414. In the case of *State v. Ah Chuey*, 14 Nev. 92, 33 Am. Rep. 530, this court held that "proof of the corpus delicti may be established by circumstantial evidence, provided it is satisfactory." In the case before us we think there was competent evidence, independent of the admissions of the defendant, tending to establish the corpus delicti. Dr. Pache testified that on Saturday, four days after the alleged offense was committed, he made an examination of the person of the complainant, Harriett Averill, who is shown to be but slightly over 15 years of age; that he found that her hymen was inflamed, and at some time evidently had been lacerated; that the young lady was rather hysterical, and would only permit ocular inspection and digital examination, on account of the extreme tenderness of the parts. He further testified: "From the evidence I found, I would state that in all probability Miss Averill at some time had had intercourse with a member of the opposite sex." There was other testimony of the witness relative to what appeared to be blood stains upon the complainant's skirt. The witness Hance, who saw the complainant at noon of October 4th, testified that she was then agitated and nervous, and appeared to have been crying; that he observed marks of violence upon her nose and upper lip; that she showed him marks upon her wrists; also a mark on the side of her throat, and that her throat seemed to be swollen and red. The witness Lovegrove also testified to observing on the evening of October 4th a mark upon the nose and on the side of complainant's throat, apparently scratches. It also may be gathered from the evidence that the defendant, a man of but 21 years of age, and the complainant, his stepdaughter, were at the time of the alleged assault occupying a box car as a home (the defendant being in the employ of the railroad), the defendant's wife, mother of the complainant, being absent, and the complainant being left in defendant's care. We think these facts and circumstances tended to prove the corpus delicti, and were sufficient, together with the defendant's admissions, to justify the magistrate in holding the defendant to answer.

We are not called upon on this hearing to pass upon the sufficiency of this evidence to warrant the conviction of the defendant, and upon that question express no opinion. In this connection it is proper to observe that a magistrate, in holding a defendant to answer for a crime, is not required to have submitted evidence sufficient to establish the guilt of the person charged beyond a reasonable doubt.

As was said in a recent decision (*In re Mitchell* [Cal. App.] 82 Pac. 347): "In order to hold defendant and put him on his trial, the committing magistrate is not required to find evidence sufficient to warrant a conviction. All that is required is that there be a sufficient legal evidence to make it appear that 'a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof.'"

The writ issued herein is dismissed.

FITZGERALD, C. J., and TALBOT, J., concur.

STATE v. KNUDTSON.

(Supreme Court of Idaho. Dec. 2, 1905.)

1. WITNESSES—COMPETENCY—CODEFENDANT IN CRIMINAL PROSECUTION.

One who has been jointly indicted with a defendant on trial, and has entered a plea of guilty, is a competent witness for the state on the trial of his codefendant.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 244-246.]

2. CRIMINAL LAW—TESTIMONY OF ACCOMPLICE—CORROBORATION—INSTRUCTIONS.

An instruction as to the evidence necessary to corroborate the testimony of an accomplice, which states the law on that question to the jury in as favorable light to the defendant as it is given in section 7871, Rev. St. 1887, is sufficient, and not open to objection by the defendant.

3. SAME.

Under the provisions of section 7871, Rev. St. 1887, the corroboration of the evidence of an accomplice must be on some material fact or circumstance, and such that, when standing alone and independent of the evidence of the accomplice, tends to connect the defendant with the commission of the offense.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1128, 1129.]

(Syllabus by the Court.)

Appeal from District Court, Latah County; E. C. Steele, Judge.

John Knudtson was charged with the crime of arson. From a judgment of conviction, and an order denying a new trial, he appeals. Affirmed.

See 79 Pac. 641.

S. S. Denning, for appellant. J. J. Guheen, Atty. Gen., Edwin Snow, and F. S. Wettach, for the State.

AILSHIE, J. The defendant and one Fred Hanning were charged jointly, on information by the prosecuting attorney, with the crime of arson. Previous to the trial Hanning pleaded guilty, and at the trial of the defendant Knudtson the state called Hanning as a witness against this defendant. Defendant objected to Hanning testifying against him, on the ground that Hanning had not been discharged from the information. Counsel for defendant placed his chief reliance upon the provisions of sections 7860, 7861, and 7862, Rev. St. 1887, which sections provide as follows:

"Sec. 7860. When two or more defendants

are jointly indicted for a felony, any defendant requiring it must be tried separately. In other cases the defendants jointly indicted may be tried separately or jointly in the discretion of the court.

"Sec. 7861. When two or more persons are included in the same indictment, the court may, at any time before the defendants have gone into their defense, on the application of the district attorney, direct any defendant to be discharged from the indictment, that he may be a witness for the people.

"Sec. 7862. When two or more persons are included in the same indictment, and the court is of opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, it must order him to be discharged from the indictment before the evidence is closed, that he may be a witness for his co-defendants."

It may often happen that either the state or one of several defendants jointly indicted will want to place one of the defendants on the witness stand, and the foregoing sections were evidently enacted for the purpose of enabling the court in its discretion to compel such a witness to testify. But in view of the requirements of section 8143, where it is enacted that "A defendant in a criminal action or proceeding to which he is a party, is not, without his consent, a competent witness for or against himself," the court would have no right to compel one of two or more defendants jointly indicted to testify either for the state or the defendant, without first discharging him from the indictment or information. As soon, however, as one of the defendants has entered the plea of guilty, the requirements of the provisions of these statutes as to such defendant are fully met, and the reason no longer exists for either the court to discharge him from the indictment, or for his refusing to testify. We have discovered no legal reason why a defendant who has entered the plea of guilty cannot thereafter, upon the trial of a codefendant, be required to testify either for the state or the defendant as the case may be; and neither the state nor the defendant on trial has any legal grounds for objection to a codefendant testifying under such circumstances. The Supreme Court of California, in *People v. Labra*, 5 Cal. 184, under statutes very similar to our own, held that when a codefendant elects to be tried separately he becomes a competent witness for the other codefendant. The doctrine of *People v. Labra* was approved and followed in *People v. Newberry*, 20 Cal. 439. In *State v. Magone* (Or.) 51 Pac. 452, several defendants were jointly indicted, and one of the defendants entered the plea of guilty. Thereafter, upon the trial of his codefendant Magone, the state offered the defendant who had pleaded guilty as a witness against Magone, and the defendant objected and excepted. The Supreme Court of Oregon held that the witness was competent, and that his evidence was properly admitted

against his codefendant. In *McGinness v. State*, 31 Pac. 978, 53 Pac. 492, the Supreme Court of Wyoming held that "a codefendant who has been jointly indicted with defendant, and whose trial has been severed, is a competent witness for defendant as well as for the state," and cite *People v. Labra*, supra, with approval. This question has frequently been before the courts, though many of the cases discussing the question have been in states having no statutes similar to ours. See notes and citations in 12 Cyc. 452.

Defendant's second assignment of error is that "the instructions given by the court which were excepted to at the time by the defendant, in that the same were misleading, as they did not relate to the corroborative evidence which was necessary in aid to the defendant Hanning's testimony to support the corpus delicti." The instruction on the question of the necessity of evidence corroborating the testimony of an accomplice is in conformity with the provisions of section 7871, Rev. St. 1887, and, while quite lengthy and going into considerable detail, is as favorable to the defendant as the law would authorize. Section 7871 provides: "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof." The authorities are not entirely harmonious as to the extent of the corroboration necessary in such cases under a statute similar to ours. While some authorities have held that such corroboration must be upon all the material facts, others have held that corroboration upon any one material fact would be sufficient. This question receives consideration by Mr. Underhill on Criminal Evidence at sections 73, 74, and 75, and, after some discussion of the subject and citation of many authorities, he says: "But the corroborative evidence, whether consisting of acts or admissions, in itself and without that of the accomplice, must at least tend to prove the guilt of the accused by connecting him with the crime." It is clear to us that under the provisions of section 7871, supra, the corroboration must be upon some material fact or circumstance, and that, standing alone and independent of the evidence of the accomplice, it must tend to connect the defendant with the commission of the offense. This proposition is fully covered by the instruction of the court in the case at bar. If the defendant had any specific instructions upon the question of corroboration which he desired the court to give, it was his duty to have submitted such request to the court, and, if the court refused to give the instruction, to then take his exception. *People v. Biles*, 2 Idaho (Hasb.) 114, 6 Pac. 120.

The third assignment of error is as to the

court permitting the prosecuting attorney to cross-examine the defendant while on the stand in regard to where he kept his money after the fire had occurred. We find no error in the ruling of the court in this respect.

Lastly, it is urged that the evidence of the accomplice is not sufficiently corroborated by other and independent evidence to support the verdict. It is unnecessary, and can serve no useful purpose, for us to recite the evidence in this opinion. We have examined it carefully and feel that it justified the jury in returning the verdict of guilty. We find no error in the case.

The judgment is affirmed.

STOCKSLAGER, C. J., concurs. SULLIVAN, J., sat at the hearing, but took no part in the decision.

STATE v. BURKE.

(Supreme Court of Idaho. Nov. 11, 1905.)

BURGLARY — CIRCUMSTANTIAL EVIDENCE — INSUFFICIENCY OF EVIDENCE.

Evidence in this case examined and reviewed, and held insufficient to support a verdict and judgment of conviction.

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

David W. Burke was convicted of burglary, and appeals. Reversed.

F. E. Fogg and Geo. W. Tannahill, for appellant. J. J. Guheen, Atty. Gen., Edwin Snow, and F. S. Wettach, for the State.

AILSHIE, J. The defendant, David W. Burke, was charged upon information, jointly with his father, George Burke, with the crime of burglary. He entered the plea of not guilty, and upon a separate trial was convicted of burglary in the first degree, and sentenced to a term in the penitentiary. All the evidence produced by the state upon the trial was substantially as follows: That George Burke, the father of the defendant, was residing upon a farm near the town of Mohler, in Nez Perce county, and the defendant, who had been stopping with his father for a couple of weeks, was employed to assist in the farmwork, but had no interest in the farm or the business, nor in any of the property about the farm, except as an employé. Upon an adjoining farm was situated a farmhouse and granary belonging to one L. M. Englehorn. On the night of April 9, 1904, the granary, which up to that time had contained a considerable quantity of barley and oats, was burned. It is not known at what hour in the night the fire occurred, but about 7 o'clock the next morning it was discovered the building had been burned. Englehorn and other neighbors, who gathered in the next morning, discovered the tracks of a man from the granary to the road, and it appeared that the person had made frequent trips back and forth, and they also found

the track of a wagon that had driven up during the night, and where sacks had been placed on the ground previous to loading. The tracks of the wagon were much heavier from the time they left the place where the grain appeared to have been loaded than they were in driving up to the gate. They followed these tracks from that point on along the public highway to where they turned into the residence of George Burke. Following these tracks, they found the wagon at George Burke's place, and on the floor of the wagon box found some scattered barley. They also found 20 or 25 sacks of barley in George Burke's granary, which did not belong to him, and which he did not claim. They also found some pony tracks in the neighborhood of the burned granary, which were identified as being very similar to the tracks made by a pony which the defendant, David Burke, rode on the following day. This pony did not appear to belong to the defendant, but had been kept on the Burke place, and really did not appear to belong to any of the Burke family. It seems uncertain, in fact, as to who was the owner of the pony—probably a young woman whom defendant married later. George Burke, who was jointly indicted with his son, was placed on the stand by the state, and testified that he retired about 6 o'clock on the evening of April 9th, and that he knew of nothing that occurred between that and the next morning. He testified that he and his son were at home that night; that somebody had been killing his horses, and that during the last two or three weeks he had had six horses and two hogs killed at nights, and that the horses had been killed by being stabbed just back of the ribs; that he had been up three or four nights watching the horses, to keep anyone from injuring them, and that on this evening he was very tired and sleepy and retired early, and sent his son, David Burke, to the barn to watch the horses; that on the morning of April 10, when some of the neighbors came and inquired as to how much grain he had in his granary, he told them he thought he had about 40 sacks in there, and that after an examination was made it was found there was 20 or 25 sacks of barley in the granary that he did not claim and did not own. He testified he did not know how the barley came into his granary. The defendant's step-mother testified on the part of defendant that defendant went to the barn early in the evening to watch the horses that night, and that he returned to the house about 11:30 o'clock, and came into her room to get a lamp, and lighted it and went upstairs to bed, and that to the best of her knowledge he did not leave his room until about 6 o'clock the next morning. Defendant testified that he staid at the barn and watched the horses until about 11:30, when he came to the house and went to his room and went to bed, and that he had never been on Englehorn's place; had never been at his granary;

that he knew nothing about the grain nor the burning of the granary. It also appeared that a considerable amount of grain, anywhere from 50 to 100 sacks, remained in the granary, and was still burning and smoldering the next morning, when it was discovered that the granary had been burned. It was shown with reasonable certainty that from 15 to 25 sacks of barley had been hauled on the night of the fire from the Englehorn granary to George Burke's granary, and placed in the latter granary, and that the hauling was done on George Burke's wagon. There is no evidence tending to show with whose team the hauling was done. George Burke testified that he had one pretty good wagon harness, but that the breast straps had been loaned, and that one of the tugs was broken, and that all the other harness he had was plow harness. One witness testified that he passed the Englehorn premises between 11 and 12 o'clock the night of April 9th, and that the building was standing at that time, and that he reached home as the clock struck 12. It appears that the defendant and Englehorn had had no dealings with each other and were practically unacquainted. Englehorn testifies that he knew the defendant only by sight. So far as shown by the record, the defendant never made any claim upon this grain, and never made any claim to having any grain on his father's place or in the granary; and it is not shown that he ever made any other or different statement than that he knew nothing about the removal of the grain or the burning of the granary. It also appears that previous to the trial on the charge of burglary he had been tried upon the charge of arson for burning the granary, and had been acquitted by a jury. The state showed by defendant on his cross-examination that he had been previously convicted of a felony in the state of Washington. This was done apparently for the purpose of impeaching the witness. The foregoing contains the substance of every fact and circumstance shown upon the trial.

Counsel for defendant took exceptions to various statements made by the prosecuting attorney upon the argument of the case before the jury, in which the prosecutor referred to the defendant as a man who had "shown himself not to be a law-abiding citizen," and also to the statement where the prosecutor said: "Counsel wants to know who killed the horses. I do not know who killed the horses. It may have been that the man who killed the horses was the man who stole the grain. But, gentlemen of the jury, I want to say to you that, if this was the case, then the man who killed the horses was David Burke." And, again, the prosecutor said: "He went over to Fletcher the next day, counsel said, to see his sweetheart. It might have been to see his sweetheart, or it may have been to arrange for the sale of this grain." The defendant,

through his counsel, excepted to these various statements made by the prosecuting attorney, upon the ground that there was no evidence in the record upon which to found such statements or argument, and that they were done purely for the purpose of prejudicing the jury against the defendant. In view of the evidence which had been introduced in this case, these statements, coming from the prosecuting attorney, were in a measure calculated to prejudice the minds of the jurors. *State v. Irwin* (Idaho) 71 Pac. 608, 60 L. R. A. 716; *State v. Harness* (Idaho) 76 Pac. 788. They are not of such a character, however, as would call for a reversal of the judgment. *State v. Harness* (Idaho) 80 Pac. 1129.

Upon the sufficiency of the evidence, or rather lack of evidence, in this case, a more serious question arises. The fact that a burglary was committed is admitted, but we have searched the record in vain to find any circumstance connecting this defendant with the commission of the offense. The evidence introduced is in no respect inconsistent with the defendant's innocence. It may be also said that it is consistent with his guilt. That is in a sense true, and in the same sense it is just as consistent with the guilt of any other citizen living in the neighborhood of the Englehorn premises. It is true the grain was found in the granary belonging to defendant's father, but, in the absence of any showing whatever that the defendant was exercising control or dominion over this granary, or had been in the habit of keeping grain or any other property in the granary, it would be quite a stretch of legal principle to say that this constituted a possession of the stolen property by the defendant. He never made any claim to the grain, nor assumed to deal with it in any manner, nor has it been shown that he even knew the grain was there. The well-established rule of law is that the evidence must not only be consistent with the guilt of defendant, but it must be inconsistent with his innocence. We agree with the prosecuting attorney that it is probable that the man who had been killing the old man Burke's horses and hogs was the same person who burglarized the Englehorn granary, but there is not an intimation in the evidence that the defendant had been killing his father's stock, and, indeed, every consideration would lead to the conclusion that, whatever criminal turn of mind the defendant might have, he would not have committed this offense against the property of his own father while in his father's employ, and on apparently friendly terms with the family.

The Attorney General has called our attention to *People v. Sears*, 119 Cal. 267, 51 Pac. 325; *People v. Arthur*, 93 Cal. 536, 29 Pac. 126; *Harris v. State*, 84 Ga. 269, 10 S. E. 742; *People v. Wood*, 99 Mich. 620, 58 N. W. 638; *Burks v. State* (Ga.) 17 S. E. 619;

Gregory v. State, 80 Ga. 271, 7 S. E. 222; State v. Tucker (Or.) 61 Pac. 894, 51 L. R. A. 247—as similar cases sustaining verdicts on evidence which he thinks as meager as in this case. Upon an examination of these cases it will be seen that there were some specific circumstances pointing directly to the defendant in each case. In *People v. Sears* part of the goods were found in defendant's pocket, and the defendant gave an improbable and unsatisfactory account of how he came into possession of the property. In *People v. Arthur* footprints were traced from the building burglarized to a vacant building, where both defendants were found asleep, and the goods stolen, together with some burglary tools concealed near them, were in the building; and other circumstances were shown pointing directly to the defendants. In *Harris v. State* the defendant was seen near the place about the time of the burglary, and tracks testified to as being the defendant's were found leading from the burglarized place to his house, and the goods were found in the defendant's possession. In *People v. Wood* there was evidence that the defendant was seen going in the direction of the building burglarized, and the property was found in his actual possession. In *State v. Tucker* tracks were traced from the place of the burglary to within a very short distance of the place where defendant lived, and a letter addressed to defendant was found along the line of tracks, and the defendant later sold the property, which was identified as the property which had been taken from the burglarized building. In *Gregory v. State* there was the most meager evidence to be found in any of these cases, but even there it was shown that the person who had committed the crime made a peculiar track, and the defendant volunteered upon the trial to make a track in a box of sand in the presence of the jury, and this track corresponded exactly with the track previously described by the witness. In that case, however, Chief Justice Bleckley, the distinguished Georgia jurist and humorist, in a page and a half opinion, took occasion twice to observe that the case was one of considerable doubt.

We conclude that the utter absence of evidence, in this case, connecting the defendant with the commission of the offense, makes it necessary for us to grant a new trial. Whether or not the defendant is a man capable of committing such an offense, or has paid the penalty for the commission of an offense in another state, he is, nevertheless, entitled to a fair trial, and, if guilty, to be convicted upon evidence, and not upon insinuations and innuendo. The administration of even-handed justice demands it, and the law will sanction no other kind of a conviction. It is not enough to say a crime has been committed and somebody has committed it, and that somebody shall pay the penalty therefor, and that the state has been unable to

find any other person upon whom they could fasten the crime, and that it is entirely possible and was altogether convenient for the defendant to have perpetrated the offense. Something more must be done. Facts or circumstances should be developed, tending to connect the defendant with the commission of the offense, such as would be inconsistent with the actions and conduct of an innocent man.

Since this case must be sent back for a new trial, it becomes necessary for us to consider the assignments of error with reference to the admission and exclusion of evidence, and the instructions given and rejected. After examining the rulings complained of in the admission and exclusion of evidence we are satisfied no error has been committed. It does appear, as contended by counsel, that the trial court was rather strict with defendant when cross-examining the state's witnesses. The instructions, when examined and read, as a whole, appear to fairly state the law of the case, and to cover all the points on which defendant made special requests.

Judgment reversed, and a new trial granted.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

GOODING et al. v. PROFITT et al.

(Supreme Court of Idaho. Nov. 1, 1905.)

1. CONSTITUTIONAL LAW—TAX LEVY—STATE PURPOSES—WHAT ARE.

The tax levy authorized by section 9 of article 7 of the Constitution "for state purposes" is intended to cover the current and running expenses of maintaining and conducting the state government—legislative, executive, and judicial—and operating and maintaining the state institutions.

2. SAME—MAXIMUM RATE.

Public or bonded indebtedness incurred under the provisions of section 1 of article 8 of the Constitution for internal improvements and the erection of public buildings and institutions is not anticipated or comprehended within the provisions of section 9 of article 7, and a tax levy for the purpose of paying the interest on such indebtedness and bonds and providing a sinking fund therefor does not fall within the limits of the maximum rate of taxation as specified and provided by section 9 of article 7.

3. SAME—LIQUIDATING STATE DEBT.

It is within the power of the Legislature to pass an act, as done by act of March 6, 1905 (Sess. Laws 1905, p. 278), authorizing the board of commissioners of any county indebted to the state on account of state taxes due from such county to the state to make a sufficient levy, not exceeding a maximum rate therein specified, for the purpose of paying and liquidating such indebtedness.

(Syllabus by the Court.)

Application by F. R. Gooding and others, the state board of equalization, for a peremptory writ of mandate against John C. Proffitt and others, the board of commissioners of Nez Perce county, compelling and requiring said board of commissioners to make a sufficient

tax levy to raise the county's proportion of state revenue, and for special levies on account of certain bond issued. Writ granted.

J. J. Guheen, Atty. Gen., Edwin Snow, and F. S. Wettach, for petitioners. B. S. Crow, Co. Atty. of Nez Perce County, J. E. Gyde, Co. Atty. of Shoshone County, and W. E. Stillinger, Co. Atty. of Latah County, for defendants.

AILSHIE, J. This is an action prosecuted by the state board of equalization against the board of commissioners of Nez Perce county to secure a peremptory writ of mandate against the board requiring them to make and enter upon the tax rolls a sufficient tax levy to raise Nez Perce county's proportionate share of state taxes for the year 1905, as certified by the secretary of the board of equalization. The defendants have demurred to the complaint, upon the grounds that it fails to state facts sufficient to constitute a cause of action or entitle the plaintiffs to any relief. On August 31, 1905, the State Auditor, who is ex officio secretary of the board of equalization, certified to the auditor of Nez Perce county the amount required to be raised by Nez Perce county as its share of state taxes for the year 1905 as equalized, determined, and apportioned by the state board of equalization. This certificate is as follows:

"To the County Auditor of Nez Perce County, State of Idaho—Dear Sir: You are hereby notified that the state board of equalization of the state of Idaho at its regular session held at the state Capitol in the city of Boise, state of Idaho, beginning August 14, A. D. 1905, has determined and apportioned to Nez Perce county, state of Idaho, the sum of thirty-three thousand thirty-nine dollars and twenty cents (\$33,039.20) as its proportion of state taxes for the year 1905, as provided for by act of the Legislature, Sess. Laws 1905, p. 293.

"Other Taxes.

"Your attention is also called to the following acts of the Legislature: Sess. Laws 1893, p. 30; 1903, pp. 18, 330; 1905, pp. 50, 160, 279, 280. The provisions of each of said acts require the making of special levies as in the respective acts set out. On account of such provisions of said acts Nez Perce county has been charged with special taxes for the year 1905, as follows, to wit:

State wagon road bond sinking fund tax..	(1893)	\$2,356 00
Industrial school " " " " " "	(1903)	314 13
Live stock sanitary fund tax.....	(1905)	541 33
Public building endowment fund tax..	(1905)	471 20
General interest and sinking fund tax..	(1905)	7,853 33
County indebtedness.....		7,853 33

"Very respectfully yours,

"[Signed] Robt. S. Bragaw,

"State Auditor and Ex Officio Secretary of the State Board of Equalization."

The real question presented for our determination and the one upon which the county relies is this: That the aggregate

amount which the state requires the defendant county to raise by tax levy for the year 1905, is in excess of 5 mills upon each dollar of valuation of the taxable property of Nez Perce county as assessed and equalized for the year 1905, and it is therefore in violation of the provisions of section 9 of article 7 of the Constitution. It is conceded that the total assessed valuation of the state for the year 1905 exceeds \$50,000,000, and is less than \$100,000,000, and therefore the maximum rate of taxation for state purposes cannot exceed five mills on each dollar of valuation. The Attorney General contends, however, on behalf of the state, that the limitation for purposes of taxation as fixed by section 9 of article 7 applies only to the levy for "state purposes," and that such purposes consist in maintaining and conducting the state government—legislative, executive, and judicial, and the operation and maintenance of the state institutions. The Attorney General insists that section 9 of article 7 has no application whatever to indebtedness incurred under the provisions of article 8 of the Constitution for internal improvements and the acquiring of public grounds and the erection of state institutions. A correct solution of this proposition will be determinative of the issue presented.

Upon the threshold of this discussion the defendants have cited *People v. Scott* (Colo. Sup.) 12 Pac. 608, as a leading authority in support of their position. An examination of that case will disclose at once that the Colorado Supreme Court were only called upon to consider the provisions of article 10 of their Constitution which very nearly corresponds with article 7 of our Constitution. It will also appear that the state of Colorado has no provisions in its Constitution similar to section 1 of our article 8. See *In re State Board of Equalization* (Colo. Sup.) 51 Pac. 498. Again, it will be observed that the principal, if not the entire sum sought to be raised by tax levy in *People v. Scott*, was for the purpose of defraying the ordinary expenses of the state government, and the maintaining and operating the state institutions. It is true, however, that the court finally arrived at the conclusion in that case that taxation for "state purposes" includes "all state purposes" and therefore comprehended every character of revenue that the state could raise by taxation. The reasoning employed by the court in that case and the subsequent cases down to and including *In re State Board of Equalization*, supra, indicate very strongly to us that the court might have arrived at a very different conclusion had the Colorado Constitution contained an article closely corresponding to article 8 of our Constitution. The separate and distinct purposes intended by the provisions of articles 7 and 8 of our Constitution have seemed clear and unambiguous to us, and while the question here under consideration was not then under discussion, still in *Stein v. Morrison*

(Idaho) 75 Pac. 253, we attempted, in a way, to point out the separate purposes and objects of the two sections. It is there said: "A careful examination of articles 7 and 8 of our Constitution discloses two separate and distinct purposes had in view in the adoption of the two articles. Article 7 defines the fiscal year, provides methods for raising revenue, exempts certain classes of property from taxation, provides for uniformity of taxation, fixes a maximum rate of taxation upon real and personal property that shall never be exceeded, provides for appropriations for current expenses, for a board of equalization, and for a system of county finances. The complete plan outlined in this article provides for the raising of revenue to meet the current expenditures. When legislative appropriations are made, they are made for the future, and to extend over a period of two years. During the time for which the expenditures are being made the revenue is being collected, and even though claims may be presented and allowed before sufficient revenue has been collected to meet the same, the complete scheme for the collection of taxes and revenue and the payment of the current expenses of the state looks to one general purpose of ending the two years for which the appropriations are made with the expenses of maintaining the state government for that period paid. On the other hand, article 8 contemplates the contracting of indebtedness, the issuance of state bonds, prohibits the loaning of the state's credit to individuals and corporations, etc. This article, differing from the other, was entitled by the framers of the Constitution, thus: 'Public indebtedness and subsidies.' Between the two extremes, the one meeting the expenditure for maintenance of the state government, and the other meeting expenses in case of war, to repel invasion, or suppress insurrection, the Constitution has anticipated a necessity which must arise of making public improvements, erecting public buildings, educational, penal and reformatory institutions, and that, for the construction of the same, the state would necessarily be obliged to incur indebtedness. It authorizes the Legislature to create debts not to exceed 1½ per centum upon the assessed valuation of the taxable property therein."

We can understand that much confusion might arise by the reading of one of these articles, and not constantly keeping in mind the provisions of the other article. Article 7 is devoted to outlining a plan for raising revenue for current expenses in the running and maintaining the state government and its institutions, and it places certain limitations upon the lawmaking and tax-raising powers of the state government. It will be noticed by the provisions of section 9 of that article that upon the organization of the state a tax levy of 10 mills on each dollar of assessed valuation was permitted and a sliding scale was therein fixed by which the rate should

constantly decrease as the assessed valuation should increase until the time arrives when the total assessed valuation of the state shall have reached \$300,000,000, we cannot raise any more revenue by taxation for "state purposes" than we could raise when the total assessed valuation of the state only amounted to \$45,000,000. After the assessed valuation shall have reached \$300,000,000 the tax levy for "state purposes" can never exceed 1½ mills on each dollar of assessed valuation. Now, keeping in mind the provisions of this section and immediately turning to section 1 of article 8, we find that an ever increasing state indebtedness is authorized at the rate of 1½ per centum upon the assessed valuation of the taxable property in the state, no matter how large our assessed valuation may grow. While the rate of taxation for "state purposes" is ever diminishing as the assessed valuation increases, the state "debt or debts, liability, or liabilities" are authorized to forever increase as the assessed valuation increases. When our total assessed valuation was only \$45,000,000, a state indebtedness of only \$675,000 could be incurred by the Legislature, but when the valuation reaches \$300,000,000 an aggregate state indebtedness of \$4,500,000 may be incurred. If, therefore, the total tax levy, both for the purpose of running and maintaining the state government and its institutions, and for meeting interest on the public indebtedness and providing a sinking fund, must fall within the rate prescribed by section 9 of article 7, it would follow that the time will probably come when it will take the entire tax levy for "state purposes" to pay the interest upon the public indebtedness and provide a sinking fund and that no revenue whatever would be left for maintaining and operating the state government and public institutions. Such a construction could certainly never have entered the minds of the framers of the Constitution.

It is clear to us that the "for state purposes" mentioned in section 9 of article 7 is for the running and current expense in carrying on and operating the different departments and institutions of the state government which is intended to be upon a cash basis as provided by section 11 of the same article. If "for state purposes" means all the revenue the state can raise by taxation, then why use these words at all. Of course all the revenue received by the state must be for state purposes in the sense that it becomes the state's money and is disbursed by the state. But the framers of the Constitution evidently meant something other and different than that when they said: "The rate of taxation * * * for state purposes shall never exceed," etc. It will also be observed that in section 1 of article 8 in prescribing the manner of incurring public and bonded indebtedness the words "for state purposes" were not used, but the words "object or work" are employed, and the bonds are

authorized to be used for some single "object or work." Clearly, then, this section is providing for the raising funds for internal improvements, public buildings, etc. The right to incur the indebtedness under this provision of the Constitution necessarily carries with it the right to raise sufficient funds to pay the interest and provide a sinking fund, but the framers of the Constitution saw fit to limit that, not by the rate of taxation, but by the total amount of indebtedness which may be incurred, and have left the rate of taxation and the manner of levying and collecting it to be fixed by the Legislature. We agree with counsel at once that if indebtedness should be incurred and bonds issued under section 1 of article 8, for the purpose of raising funds for running the state government or public institutions or for defraying bills already incurred in the maintaining of the state government and institutions or to pay deficiencies, then a tax levy to defray such bonds or indebtedness would fall within the provisions of section 9 of article 7, and go to make up the 5-mill rate allowed by that section. It is also true that, as suggested by the Attorney General, any indebtedness incurred or bonds issued for the suppressing of insurrection are not covered by either article 7 or 8, but are exempted from the operations of both articles. It was stated upon the argument, and was not disputed, that \$108,000 of the public indebtedness of the state comes down from territorial days, and \$64,000 was incurred in suppressing insurrection and maintaining martial law.

We conclude from the foregoing, that the special levies authorized and required by acts of the Legislature as set forth in the State Auditor's certificate hereinbefore, for meeting the bond issues for state wagon road, industrial school, and other public buildings and internal improvements, do not fall within the 5-mill limit. That being true, the sum required to be raised from Nez Perce county by tax levy is not in excess of the constitutional limitation; and the board of commissioners are not for that reason authorized or justified in refusing to make the levy and enter it upon their tax rolls.

The county attorney insists, however, that the act of the Legislature approved March 6, 1905, entitled "An act requiring the levying of special ad valorem tax by the board of county commissioners of those several counties of the state of Idaho which are indebted to the said state on account of various taxes levied for special and state general purposes since the year 1890 and prior to the year 1903" (Sess. Laws 1905, p. 278), is unconstitutional, and void, as being in conflict with section 6 of article 7 of the Constitution which provides that "the Legislature shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may by law invest in the corporate authorities thereof, respectively,

the power to assess and collect taxes for all purposes of such corporation." It is argued that if the 1-mill levy authorized by act of March 6, 1905, is for a county purpose, then it is in violation of the foregoing provision of the Constitution, and if, on the other hand, it is for a "state purpose" then it falls within the 5-mill limit and is unconstitutional for being in excess of the amount authorized by section 9 of article 7 for "state purposes." It will be seen that the act of March 6th only authorizes and directs the board of commissioners to make sufficient levy, not exceeding 1 mill, to pay the amount such county is indebted to the state. The question does not arise here as to the amount of the indebtedness nor of what it consists. Questions of fact as well as of law will probably arise in determining that, and of course the Legislature could not arbitrarily fix the amount as that becomes a judicial question in case the county and state do not agree as to the amount. It is evident, however, that any levy which the board may make for the purpose of meeting the indebtedness of the county to the state is not a levy for payment of current expenses, but is rather the payment of a debt due from the county to the state. While the sum collected under such a levy will be payable to the state, and become the property of the state, and in that sense is for a state purpose, still it is not for a state purpose in the sense in which that term is used in section 9 of article 7 of the Constitution. It is probable that the board could have been compelled to make a levy to meet such obligation in the absence of a statute. On the other hand, we find no provision in the Constitution that would forbid the Legislature authorizing the board of commissioners to make such a levy, as in the judgment of the board will meet and liquidate its then existing indebtedness to the state. The Legislature undoubtedly has such powers, unless it is limited in their exercise by some provision of the Constitution. We do not pretend to say, and, indeed, the case is not in such position that we can determine the fact from the record before us, whether or not it is the duty of the board of commissioners to make a sufficient levy to raise the amount called for in the certificate of the State Auditor. It may be that the sum claimed is largely in excess of what is really due from the county, and the state certainly cannot constitute itself the sole judge in fixing the amount. In a proper proceeding instituted for that purpose the county may be able to show that it is indebted to the state in only a small portion of the amount claimed by the state. We therefore hold that it is the duty of the county to make a sufficient levy for the purpose of liquidating its past due indebtedness to the state; but as to the amount of such indebtedness or the rate of levy to meet the same, we express no opinion whatever. Neither do we express any view as to the effect, if any, the case of *State v.*

Ada County, 7 Idaho, 261, 62 Pac. 459, has on this particular question of county indebtedness.

The writ will issue to the effect above indicated. No costs awarded.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

GOODING et al. v. ANDERSON et al.

(Supreme Court of Idaho. Nov. 1, 1905.)

Application by F. R. Gooding and others, the state board of equalization, for a peremptory writ of mandate against Wash. W. Anderson and others, the board of commissioners of Latah county, compelling and requiring the board of commissioners to make a sufficient tax levy to raise the county's proportionate share of state revenue, and for special levies on account of certain bond issues. Writ granted.

J. J. Guheen, Atty. Gen., Edwin Snow, and F. S. Wettach, for petitioners. W. E. Stillinger, Co. Atty. of Latah County, J. E. Gyde, Co. Atty. of Shoshone County, and B. S. Crow, Co. Atty. of Nez Perce County, for defendants.

AILSHIE, J. The facts in this case are substantially the same as the facts in the case of Gooding et al. v. Profit et al. (just decided) 83 Pac. 230. The questions of law involved are identical with those determined in the Gooding-Profit Case, and upon the authority of that case the judgment in this case will be entered in favor of the plaintiffs, and the writ will issue.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

GOODING et al. v. COWEN et al.

(Supreme Court of Idaho. Nov. 1, 1905.)

Application by F. R. Gooding and others, the state board of equalization, for a peremptory writ of mandate against Israel B. Cowen and others, the board of commissioners of Shoshone county, compelling and requiring said board of commissioners to make a sufficient tax levy to raise the county's proportionate share of state revenue, and to make special levies on account of certain bond issues. Writ granted.

J. J. Guheen, Atty. Gen., Edwin Snow, and F. S. Wettach, for petitioners. J. E. Gyde, Co. Atty. of Shoshone County, W. E. Stillinger, Co. Atty. of Latah County, and B. S. Crow, Co. Atty. of Nez Perce County, for defendants.

AILSHIE, J. The facts in this case are substantially the same as the facts in the case of Gooding et al. v. Profit et al. (just

decided) 83 Pac. 230. The questions of law involved are identical with those determined in the Gooding-Profit Case, and upon the authority of that case the judgment in this case will be entered in favor of plaintiffs, and the writ will issue.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

BUTLER v. CITY OF LEWISTON et al.

(Supreme Court of Idaho. Nov. 7, 1905.)

1. MUNICIPAL CORPORATIONS—CHARTER—EFFECT.

Under a special charter, the city of Lewiston is a legal municipal corporation of the state.

2. SAME—AMENDMENT.

The amendment of the special charter of the city of Lewiston by act approved March 9, 1903 (Sess. Laws 1903, p. 105), held constitutional and valid.

3. STATUTES—TITLE.

The title to said act is sufficient, and does not contravene the provisions of section 19, art. 3, of the state Constitution.

4. SAME—LOCAL LAWS—AMENDMENT OF SPECIAL CHARTER.

Under the provisions of the Constitution the Legislature has the power to amend the charter of the city of Lewiston in matters germane to the object and purposes of said charter.

5. SAME—LAWS IN EFFECT AT ADOPTION OF CONSTITUTION.

Under the provisions of section 2, art. 21, of the state Constitution, all laws not repugnant to the Constitution are continued in force until they expire by their own limitation or are altered or repealed by the Legislature. That provision applies to all laws, special as well as general, continued in force after the date of the adoption of the Constitution, and the word "altered," as used in said section, means to make different without destroying identity, to vary without entire change.

6. SAME—TITLE OF ACT.

The title to said act approved March 9, 1903 (Laws 1903, p. 105), is sufficiently comprehensive to include all provisions germane to the city charter.

7. MUNICIPAL CORPORATIONS — CHARTERS GRANTED BEFORE CONSTITUTION.

The existing city governments, under special charters at the date of the adoption of our Constitution, were not abolished by the provisions of section 1 of article 12 of the Constitution, but were continued in force; and by the provisions of section 2, art. 11, of the Constitution, the power of the Legislature to grant, extend, change, or amend charters of incorporation by special laws was restricted to such municipal, charitable, educational, penal, or reformatory corporations as are or may be under the control of the state.

8. SAME—LIMITATION OF INDEBTEDNESS.

By the proviso of section 3, art. 8, of the state Constitution, the provisions of that section are not applicable to the ordinary and necessary expenses of the city authorized by the general laws of the state.

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

Action by C. E. Butler against the city of Lewiston and others. From a judgment for defendants, plaintiff appeals. Affirmed.

R. E. McFarland, for appellant. Eugene A. Cox, for respondents.

SULLIVAN, J. This action involves the legality of the proposed issue of bonds by the city of Lewiston to pay the warrant indebtedness of the city, amounting to \$62,500. Said indebtedness accrued on account of salaries of city officers, employes, and other municipal expenses, excepting about \$10,000 thereof, which was the amount of judgment obtained against said city. The cause was heard in the court below upon stipulated facts, and judgment was entered for the respondent city upon all of the points and questions raised by the facts. This appeal is from the judgment.

The questions submitted to the court below involve 15 or more points, the first of which is whether the city of Lewiston is a legally organized municipal corporation of the state. That city existed under special charter granted by an act of the Legislature of Washington territory, approved January 15, 1863. Its corporate existence antedates the creation of the territory of Idaho by nearly three months, as Idaho territory was organized by act of Congress approved March 3, 1863. In *Wiggin v. City of Lewiston*, 8 Idaho, 527, 69 Pac. 286, this court, in effect, held that the city of Lewiston existed under a special and local law and that such law was not in conflict with the provisions of section 19 of article 3 of the state Constitution, which prohibits local or special legislation upon the several subjects therein enumerated. As bearing upon this question, see *In re Ridenbaugh*, 5 Idaho, 371, 49 Pac. 12. The act granting a special charter to the city of Lewiston is not repugnant to any of the provisions of the state Constitution. Section 2 of article 21 of that Constitution is as follows: "All laws now in force in the territory of Idaho, which are not repugnant to this Constitution shall remain in force until they expire by their own limitation or be altered or repealed by the Legislature." Under the organic act of the territory, the enactment of special laws was not prohibited. The special act granting a charter to the city of Lewiston was continued in force by the provisions of the Constitution. Under the provisions of said section 2, all acts not repugnant to the provisions of the Constitution were continued in force until they expired by their own limitation or were altered or repealed by the Legislature. The act granting such charter has not been repealed, but has to some extent been altered by amendment. The question as to whether the Legislature has the power to amend a special law will be discussed hereafter.

That part of said section 19 of article 3, involved in the question under consideration, is as follows: "Sec. 19. The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Creating offices, or prescribing the powers and duties of officers in counties, cities, townships, election districts,

or school districts, except as in this Constitution otherwise provided." In connection with this section I will also here quote other sections bearing on this question. Section 2 of article 11 is as follows: "No charter of incorporation shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are or may be, under the control of the state; but the Legislature shall provide by general law for the organization of corporations hereafter to be created; provided, that any such general law shall be subject to future repeal or alteration by the Legislature." Section 1 of article 12 is as follows: "The Legislature shall provide by general laws for the incorporation, organization and classification of the cities and towns in proportion to the population, which laws may be altered, amended or repealed by the general laws. Cities and towns heretofore incorporated may become organized under such general laws, whenever a majority of the electors at a general election shall so determine, under such provision therefor as may be made by the Legislature."

I have no doubt that the Legislature, under the several provisions of our Constitution above quoted, has the authority to amend the special act granting a charter to the city of Lewiston, as long as such amendment or amendments are germane to the object and purposes of such charter. In *Farnsworth v. Lime Rock R. R. Co.*, 83 Me. 440, 22 Atl. 373, the Supreme Court of that state held, under a Constitution similar to our own, which requires the formation of corporations to be under general statutes, this did not apply to a charter granted by the Legislature before such constitutional amendment. The court said: "The Legislature, having granted a charter before 1875 [that being the date of the constitutional amendment], may amend it [the charter] after that date; the amendment being germane to the original act." Of course, such amendment or amendments must relate to some subject within the appropriate range of municipal control. The provisions of said section 19, art. 3, is a prohibition upon legislative power as to all matters enumerated in said section, and prohibits the enactment of local or special laws on the subjects therein enumerated. This section differs from a similar section in other state Constitutions in some particulars. In the former-named Constitutions is found a provision prohibiting special laws where general laws can be made applicable. In our own Constitution local and special laws are prohibited in regard to the matters therein specifically mentioned. The prevailing spirit of most of the state Constitutions is opposed to special legislation. However, such spirit is not prohibitory of all special legislation, but only of such as relate to certain specified subjects and to such other cases as general laws can be made applicable. Under the provisions of our Constitution the Legisla-

ture is master of its own discretion in passing special laws on subjects not prohibited by the Constitution, and the question arises in the case at bar whether the amendment of the Lewiston city charter comes within any of the prohibited subjects. The amendments relate to and are germane to the purposes and objects of city government. Such amendments are therefore germane to the object and purpose of said special charter. Section 2 of article 21 above quoted provides that "all laws not repugnant to the Constitution shall remain in force until they expire by their own limitation or be altered or repealed by the Legislature." The words "limitation," "altered," and "repealed." I think apply to all laws, special as well as general, in force at the date of the adoption of the Constitution and not repugnant to any of its provisions. By the provisions of that section the Legislature has the right and authority to alter any law which still remained in force after the adoption of the Constitution.

What is the meaning of the word "alter" as used in that section? It certainly means to make different without destroying identity, to vary without entire change. It certainly will not be contended, nor do I hold that a corporate charter of one kind can be altered to a charter of an entirely different kind. And it was held, in *Attorney General v. Chicago N. W. Ry. Co.*, 35 Wis. 427, as follows: "But a corporate charter may be altered so as to make it different in detail, so long as the general identity of the corporation remains; so that it is varied without entire change." See, also, *Black River Imp. Co. v. Holway* (Wis.) 59 N. W. 126, and authorities therein cited; also, *De Hay v. County Com'rs.* 66 S. C. 229, 44 S. E. 790; *Brown v. City of Denver*, 7 Colo. 305, 3 Pac. 455. In *Carpenter v. People*, 8 Colo. 116, 5 Pac. 828, it is held that a special charter may be amended by a special law where a general law cannot be made applicable thereto. The provision of section 2, art. 11, to wit: "No charter of incorporation shall be granted, extended, changed or amended by special law except for such municipal, charitable, educational, penal or reformatory corporations as are or may be under control of the state"—is the same as section 2 of article 15 of the Constitution of the state of Colorado, and that provision of the Colorado Constitution was considered by the Supreme Court of Colorado in the last case above cited. It was sought in that case to have the court construe the words "municipal corporation" as meaning "quasi municipal corporation," which the court refused to do. The title of the chapter in which said section 2 is found is "Corporations, Public and Private," and clearly includes all corporations therein named. It was sought in the Colorado case to have the court construe the words "under the control of the state" to mean "under the ministerial control" and not the "legislative control." That the court

refused to do, and in that case the court held the amendment to the charter of the city of Denver valid. See, also, *Rogers v. People*, 9 Colo. 450, 12 Pac. 843, 59 Am. Rep. 146; *State v. Hitchcock*, 1 Kan. 178, 81 Am. Dec. 503. As to the authority or power of the Legislature to pass special laws under Constitutions similar to our own, see *State ex rel. Henderson v. County Court of Boone County*, 50 Mo. 317, 11 Am. Rep. 415; *State ex rel. Robbins v. County Court of New Madrid*, 51 Mo. 82.

I am aware that courts of Iowa, Indiana, Maryland, and perhaps other states, have held that special charters could not be amended under the provisions of the Constitutions of their several states; but, so far as I have examined, the provisions of the Constitutions of those states differ from the provisions of our own Constitution.

Section 1, art. 12, of the Constitution, above quoted, provides for the incorporation, organization, and classification of cities and towns by general law, and that such general laws may be altered, amended, or repealed by general laws. It also provides that cities and towns incorporated prior to the adoption of the Constitution may become organized under such general laws whenever a majority of the electors at a general election shall so determine under such provisions as may be made by the Legislature. The Legislature of this state has not enacted any law providing the method or manner of such change. I take it, from all of the provisions of the Constitution above quoted, that the framers of our Constitution intended to authorize the amendment of special laws within the scope and purpose of such laws. While it might be well for the Legislature to submit acts passed for the amendment of special charters of cities to the electors of such cities prior to their going into effect, our Constitution does not in terms, or by implication, require that to be done.

It is also contended that said act violates the provisions of section 16, art. 3, of the Constitution, by reason of its having more than one subject. Said section of the Constitution is as follows: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title." The title of said act is as follows: "An act to amend an act entitled, an act to amend the charter of the city of Lewiston, approved February 9, 1881, and to amend an act entitled: [Here contains a designation of the several acts affecting and amending the charter of said city.] And establishing a new and complete charter for said city." Laws 1903, p. 105. The title covers more than a page of printed matter, and is sufficiently full and complete to in-

clude every provision in said act. The act contains nothing not germane to the general subject expressed in the title. In *Pioneer Irr. Dist. v. Bradley*, 8 Idaho, 310, 68 Pac. 295, 101 Am. St. Rep. 201, this court said: "Provisions of an act may be numerous, but, however numerous, if they can by fair intendment be considered as falling within the subject-matter of the legislation or necessary as ends and means to the attainment of the subject, the act will not conflict with the Constitution." The act under consideration amends a city charter, and the title is sufficiently comprehensive to include all provisions germane to a city charter. In *State v. Doherty*, 3 Idaho (Hasb.) 384, 29 Pac. 855, this court said: "It [the title] is sufficient if the act treats of but one general subject and that subject is expressed in the title." The title is sufficient.

The next question is, does said act contravene or violate said section 19 of article 3 of the Constitution of the state of Idaho, for the reason that it is a special act and prescribes the duties of city officers? We have answered this question above by holding that said act is not in contravention of any of the provisions of section 19, art. 3, of the Constitution.

It is next contended that said act contravenes and violates the provisions of section 1, art. 12, of the state Constitution, which section is as follows: "The Legislature shall provide by general laws for the incorporation, organization and classification of the cities and towns in proportion to the population, which laws may be altered, amended or repealed by the general laws. Cities and towns heretofore incorporated may become organized under such general laws, whenever a majority of the electors at a general election shall so determine, under such provision therefor as may be made by the Legislature." As heretofore stated, all cities existing in Idaho prior to the adoption of the state Constitution were existing under charters granted by special laws. The section last above quoted did not abolish the then existing city governments. By the provisions of said section 2 of article 11, the power of the Legislature to grant, extend, change, or amend charters of incorporation by special laws was restricted to such "municipal, charitable, educational, penal or reformatory corporations as are or may be under the control of the state." The framers of the Constitution evidently had in mind the fact that certain cities existed in the state under special charters, and it was the intention to permit such cities to remain under special charter if they desired to so remain. After having left the power to amend a special charter unimpaired, it was also provided by section 1, art. 12, of the Constitution, for the incorporation of cities under general laws. That section contains a grant of power and a restriction upon the application

of that power. Cities and towns theretofore incorporated by special act may become organized under the general city incorporation laws of the state whenever a majority of the electors shall so determine, under such provisions of law as may be made by the Legislature. The Legislature has passed general laws for the incorporation of cities, but it has not yet provided a specific method for the surrender of special charters and a reorganization or incorporation under the general laws. The electors of Lewiston have never attempted to avail themselves of the provisions for the incorporation of that city under the general laws. In commenting upon the provisions of section 1 of article 12 of the Constitution, in *State v. Steunenberg*, 5 Idaho, 1, 45 Pac. 462, this court said: "The first part of said section clearly indicates that towns may be organized into cities under the general laws. In other words, the power is directly given by said section to the Legislature to enact general laws for the incorporation of cities, towns, and villages, and to alter, amend, or repeal such laws. * * * The latter part of said section of the Constitution points out a means by which towns or villages which have been incorporated prior to the adoption of the Constitution may be organized into cities under such general laws. * * * It is clear, from the reading of said section of the Constitution, that the intention was to grant to towns theretofore incorporated the right to organize under any general laws passed by the Legislature in pursuance of said section upon a majority vote of the legal electors of such town at a legal election held therefor." There is nothing in said act in contravention of any of the provisions of said section.

The next question presented is, does section 3 of article 8 of the Constitution prohibit the issuance of bonds to take up outstanding warrant indebtedness of said city incurred for the current pay of officers and ordinary expenses of the city? Said section is as follows: "No county, city, town, township, board of education or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state."

The bonds proposed to be issued are to be issued for the purpose of funding the outstanding warrant indebtedness of the city. Such bonds will not increase the legal indebtedness of the city, but simply change the form of existing indebtedness from warrant to bond. Said section 3 of the Constitution would be very clear and plain were it not for its proviso. The section first provides that no city shall incur any indebtedness in any manner or for any purpose exceeding in that year the incoming revenue provided for it for that year, without the assent of two-thirds of the qualified electors voting at an election held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay all interest on indebtedness as it falls due and to constitute a sinking fund for the payment of the principal thereof within 20 years from the time of contracting the debt. It also provides that any indebtedness or liability incurred contrary to this provision shall be void. Then comes the proviso to the effect that said section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state. This section is peculiarly worded, and the proviso is sweeping and includes all ordinary and necessary expenses authorized by the general laws of the state. That part of said section preceding the proviso evidently refers to indebtedness not included in the terms "ordinary and necessary expenses authorized by the general laws of the state." The question arises, then, whether the warrant indebtedness which is sought to be changed to bonded indebtedness arose from the ordinary and necessary expenses authorized by the general laws of the state. It is stipulated that the said warrant indebtedness accrued on account of salaries of city officers and employes and other necessary and municipal expenses authorized by the general laws of the state of Idaho, excepting \$10,000 thereof, which is evidenced by a judgment in favor of McClain and wife against the city of Lewiston, which judgment had been paid by city warrants. Certainly the salaries of city officials and employes and other necessary expenses clearly come within the proviso of said section, and, as the judgment referred to was obtained by reason of a defective sidewalk in said city, the payment of that judgment was a necessary expense. We must conclude, therefore, that the proviso of said section 3 of article 8 of the Constitution includes the said \$62,500 indebtedness. It is clear from the provisions of said section it was intended that the annual revenue of each year, so far as necessary, should be applied to the payment of ordinary and necessary expenses of the city, and that whatever remained thereafter of such revenue might be expended, but that all indebtedness and liability incurred, except as therein specified, should be absolutely void. It must be borne

in mind the issuance of said bonds was submitted to a vote of the electors of said city and carried by more than a two-thirds majority.

The remaining questions presented involve the validity of the city ordinances authorizing the submission of the question of issuing city bonds to a vote of the electors of said city, the sufficiency of the notice calling the election, the legality of the election held, the authority of the city to issue such bonds, the validity and binding effect of the bonds, and the right of the appellant to the writ of injunction to restrain the issuance of such bonds, and some other questions. I have considered each and every of said questions, but do not consider it necessary to pass upon each seriatim in this opinion further than to say that, after considering each of them, I find on all of said points and questions in favor of the city and against appellant. I find that all of the proceedings in regard to the issuance of said bonds are regular and legal, and that when issued they will become a valid and legal indebtedness against said city.

The judgment of the district court must therefore be affirmed, and it is so ordered.

STOCKSLAGER, C. J., concurs. AILSHIE, J., concurs in the conclusion.

CHRAST et ux. v. O'CONNOR et al.

(Supreme Court of Washington. Jan. 5, 1906.)

1. EVIDENCE — RECORDED INSTRUMENTS — PROOF OF GENUINENESS.

Under Ballinger's Ann. Codes & St. § 6046, providing that a copy of a deed recorded pursuant to law, when certified by the officer having legal control of the record, shall be received in evidence as the original itself, a certified copy of a duly recorded deed is of itself prima facie evidence of the genuineness of the original deed, and of the signatures thereto, and may be introduced in evidence without first proving the genuineness of the original.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1317, 1318.]

2. NAMES—ABBREVIATED SIGNATURES.

A certified copy of a deed, signed by "Fannie C.," as wife of the grantor, the notary's certificate to which stated that "Fannie C.," who executed the same, was the wife of the grantor, was properly admitted in evidence, although the true name of the grantor's wife was "Frances C.," without first showing that "Frances C." and "Fannie C." were one and the same person.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Names, §§ 4, 6.]

3. EJECTMENT—PLEADING — GENERAL ISSUE—ADMISSIBILITY OF EVIDENCE.

Where, in a suit to recover land, defendants allege title generally, without denigrating it, plaintiffs may, under a reply pleading the general issue, attack a deed in defendants' chain of title as a forgery.

Appeal from Superior Court, Lincoln County; W. T. Warren, Judge.

Action by Thomas Chrast and wife against John O'Connor and others. From a judgment

in favor of defendants, plaintiffs appeal. Reversed.

H. N. Martin and J. T. Mulligan, for appellants. Merritt & Merritt, for respondents.

FULLERTON, J. This action was brought by the appellants to recover the possession of and quiet title to certain real property situate in Lincoln county. In their complaint the appellants alleged that they were the owners of the premises in question by virtue of a patent to the land from the government of the United States to one John Smith, and by deed from John Smith, who was an unmarried man, to themselves. They further alleged that the respondents wrongfully entered into the possession of the land and dispossessed the appellants, and wrongfully and without right claim some interest in and title to the property. The respondents O'Connor answered, disclaiming any title or interest in the property further than that they had a mortgage on the same from the respondents Chrast to secure the payment of an indebtedness owing to them by the Chrasts. The respondents Chrast for answer denied generally the allegations of the complaint, and by way of a further and separate answer set up the following: "(1) That they are the owners in fee simple and in possession of the following described real estate situated in the county of Lincoln, in the state of Washington, to wit: The S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, of section 4, township 21, N. range 35, E. W. M. (2) That plaintiffs claim to have some right or interest in and to said real estate which claim is without right, unfounded, and a cloud upon defendants' title. Wherefore defendants pray that plaintiffs take nothing by this action, and that the title to said real estate be forever quieted in defendants as against any claim or claims of plaintiffs or either of them, or any person or persons claiming by, through or under plaintiffs, or either of them, and that they have judgment for their costs and for all other proper relief." The reply was a denial of the new matter in the answer, and an affirmative plea to the effect that the respondents had placed instruments of record purporting to affect the appellants' title to the property which were clouds thereon, and prayed that, in addition to the relief demanded in the complaint, these clouds be removed from their title. On the trial, after the appellants had introduced their evidence and rested, the respondents offered a certified copy of the record of a deed from Thomas Chrast and Fanny Chrast to the respondent John O'Connor, purporting to have been duly executed and acknowledged. To this deed the appellants objected, which objection was overruled, and the copy admitted in evidence. After the respondents had rested the appellants offered evidence tending to show that no deed of this property was ever given by the appellant Frances Chrast to the respondent John O'Connor, and that the deed,

the purported copy of which was introduced in evidence, bearing the name of Fanny Chrast, was never executed or acknowledged by her, or delivered by her to John O'Connor or any one, and that, if her name appeared thereon, it had been placed there without her knowledge and consent, by forgery and fraud. This evidence was excluded by the court on the ground that the fraudulent execution of the deed had not been pleaded in the reply. The appellants thereupon asked leave to amend their reply in the particular named, so as to make it correspond with the court's idea of a requisite pleading, but this request was also denied. The appellants then rested, whereupon the court on the motion of the respondents' counsel instructed the jury to return a verdict for the respondents. On the return of the verdict, judgment was entered thereupon for the respondents according to the prayer of their affirmative answer, and this appeal is taken therefrom.

It is first assigned that the court erred in overruling the objections made to the introduction in evidence of the certified copy of the deed from Thomas Chrast and Fannie Chrast to John O'Connor. The deed was objected to on the ground that it was not shown that the signatures to the original deed were genuine, and that it did not on its face purport to be the deed of the appellant Frances Chrast. To the first part of the objection it is a sufficient answer to say that the deed was admissible under the statute which provides that a copy of a deed recorded pursuant to law, when certified by the officer having the lawful control of the record over the seal of his office, shall be received in evidence to all intents and purposes as the original itself. Ballinger's Ann. Codes & St. § 6046. This statute was intended to make available as evidence the record of instruments recorded pursuant to the recording acts; and under it a certified copy of the record of an instrument which was entitled to be recorded is of itself prima facie evidence that the instrument is what on its face it purports to be. It is presumed to be genuine and to have been made for the purposes for which it purports on its face to have been made, and one asserting the contrary must prove it. To hold that such copy cannot be introduced in evidence without first proving the genuineness of the original is to render the statute nugatory.

The second part of the objection has its foundation in the fact that Frances Chrast was the wife of Thomas Chrast at the time the land was acquired by him, and has been such at all times since, while the deed in question was executed by Thomas Chrast and Fannie Chrast. But while the names "Frances" and "Fannie" are not of the same sound, the latter is a very common form of the former, if not an accepted abbreviation of it. Moreover, the deed was in the chain of title, and bore the notary's certificate to the effect that "Fannie Chrast" was the wife

of Thomas Chrast. Under these circumstances we think it was not error to admit the certified copy of deed without first showing that "Frances Chrast" and "Fannie Chrast" were one and the same person.

It is next contended that the court erred in refusing to allow the appellants to show that the deed purporting to have been executed by the appellant Frances Chrast was a forgery. This contention must be sustained. Had the respondents in their further and separate answer deraigned their title so that it would have appeared that this deed formed a part of the chain of title on which they intended to rely in proving their case, the appellants could not have attacked it without first setting forth the grounds of their attack in their reply. But title is alleged generally without deraigning it; and, where such is the case, the party contesting the claim of title may plead the general issue, and thereunder introduce any evidence which tends to defeat the evidence of title shown by the party asserting title. This question was before this court in *Parker v. Dacres*, 1 Wash. St. 190, 24 Pac. 192. In that case the plaintiff alleged title in fee in himself without deraigning his title. The defendant answered by a general denial, and by a plea of title in himself. The court below, over plaintiff's objection, allowed the defendant to dispute the plaintiff's evidences of title, notwithstanding he had not attacked them in his pleadings. The plaintiff assigned the ruling as error on appeal, and ruling thereon we said: "Had the plaintiff in this action set out fully his chain of title, so that it would have appeared that he claimed under said Shell, it might have been necessary for defendant, in order that he might show acts of said Shell, to have set out the same in his answer. But when, as in this case, a defendant is not at all advised as to the source of the plaintiff's title, he can content himself with a general denial, and thereunder introduce any legal evidence that tends to defeat the title of the plaintiff, as shown by his proofs. Any other rule would work great hardship to a defendant, while the enforcement of said rule cannot work hardship to a plaintiff, as he can, if he so desires, so shape his complaint as to compel defendant to fully disclose his defense in his answer." The same question was before the Supreme Court of Wisconsin in *Mather v. Hutchinson*, 25 Wis. 27, where it was said: "The evidence upon this subject was objected to upon the ground that these facts were not alleged in the answer. But the action was for the recovery of real estate. The complaint was in the ordinary form, and did not disclose the origin of the plaintiff's title. And we have held that in such an action, under such a complaint, the defendant, under the general denial, must be allowed to prove anything which would defeat the title offered by the plaintiff. Any other rule would place him at a great disadvantage. The plaintiff,

not being bound to disclose the title relied on in his complaint, may, at the trial, offer any evidence of title which he pleases. With such a rule as to the plaintiff, it would be manifestly unjust to exclude the defendant from proving that the title offered by the plaintiff was void for fraud or any other reason, because he had not specifically set forth the facts in his answer. It would require him to foreknow and avoid, by specific allegations, a title which the plaintiff was not bound to disclose at all." See, also, *Carkeek v. Boston National Bank*, 16 Wash. 401, 47 Pac. 884.

The last assignment, namely, that the court erred in refusing to allow the reply to be amended, is not material, since we hold that the pleadings were sufficient to admit the rejected evidence without amendment, and we shall not discuss it.

The judgment is reversed, and cause remanded for a new trial.

MOUNT. C. J., and DUNBAR, ROOT, HADLEY, and CROW, JJ., concur.

McKENNA et ux. v. COSGROVE.

(Supreme Court of Washington. Jan. 5, 1906.)

1. EXECUTORS AND ADMINISTRATORS — APPOINTMENT — COLLATERAL ATTACK — PRESUMPTIONS.

On a collateral attack on an order appointing a successor of an executrix, all facts necessary to support the order and not actually disproved are to be presumed in its favor.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 182.]

2. SAME — SALE OF REALTY — ORDER — COLLATERAL ATTACK.

On a collateral attack on an order authorizing an administrator to sell real estate on petition of the administrator, it would be presumed, in the absence of evidence to the contrary, that the court was advised that there was no personal property of the estate which had not already been properly applied.

3. SAME — JURISDICTIONAL FACTS — EVIDENCE.

On a collateral attack on an order for a sale of real estate by an administrator, the fact that there was other real estate not specifically devised which should have been sold first for the satisfaction of debts was not established by the mere fact that the executrix, the administrator's predecessor, had included certain other real estate in an inventory filed by her.

4. SAME — COMPETENCY.

On a collateral attack on an order for the sale of real estate by an administrator, a contention that there was other real estate not specifically devised which should have been first sold could not be established by the testimony of a witness that he understood that certain other real estate belonged to the deceased.

5. SAME — MORTGAGE BY EXECUTRIX — PRESUMPTION OF REGULARITY.

Ballinger's Ann. Codes & St. § 6257, authorizing executors to mortgage real estate under certain conditions, an executrix having mortgaged real estate; and the administrator, who succeeded her, having obtained an order for the sale of the real estate, from the proceeds of which sale the mortgage was dis-

charged—it would be presumed, on a collateral attack on the appointment of the administrator and the sale of the property, that the mortgage was regularly executed in behalf of the estate.

6. SAME—SALES—RIGHTS OF PURCHASERS.

Where the purchasers at a sale by an administrator under order of the court of land devised to the intestate's widow paid in cash the adequate value of the property in reliance upon the probate proceedings, and the same were not void, the purchasers took the land from the estate free from any charge for the personal obligations of the widow.

Appeal from Superior Court, Lincoln County; C. H. Neal, Judge.

Action by E. A. McKenna and wife against George M. Cosgrove and another. From a judgment in favor of plaintiffs, defendant Cosgrove appeals. Affirmed.

Merritt & Merritt, for appellant. H. N. Martin and J. T. Mulligan, for respondents.

HADLEY, J. This action was brought to enjoin a sale of real estate under execution, and to remove a cloud upon the land by reason of a judgment and attachment. The following facts appear in the record: In April, 1897, one James Holmes was the owner of lot 8, block 17, in the city of Sprague, Lincoln county. During said month he died, leaving a will, with codicil attached, and by the terms of the codicil he specifically devised to his wife, Lizzie Holmes, the said lot, and nominated her as the executrix of his will. The will was duly admitted to probate, and Mrs. Holmes was appointed as executrix, and was duly qualified as such. Thereafter she petitioned the court for an order to sell personal property of the estate. An order authorizing such sale was entered by the court, and by the terms of the order the executrix was directed to apply the proceeds arising from the sale to the payment of physician's accounts, aggregating \$133, and the balance to the payment of such other debts "as may exist against said estate." The record shows also that said Lizzie Holmes, in her capacity as executrix, executed a mortgage upon the aforesaid lot to Minnie Brunnehan, to secure a note for the sum of \$500, also executed by her as executrix. It is also disclosed that said executrix presented to the court her written resignation as executrix, because of her removal from the state, and requested the appointment of one T. M. Cooper. Thereafter, on the petition of said Cooper, he was appointed as administrator of said estate, and entered upon the discharge of his duties as such. Thereupon said Cooper, as administrator, petitioned the court for an order to sell said lot for the purpose of paying obligations of the estate. Such an order was made after due notice to show cause, and, in pursuance of the order, the administrator sold the lot to E. A. McKenna, as the highest bidder, for the sum of \$800. The sale was thereafter duly confirmed by an order entered by the court. In reporting by final account to the court the application made of the proceeds of the sale, the administrator showed that

of the sum received \$710 was paid to discharge the mortgage aforesaid, and the balance was applied upon payment of expenses of administration. After due notice, the court, upon examination of the account and vouchers, fully approved the account. Meantime, prior to said sale proceedings, George M. Cosgrove, in a suit then pending against said Lizzie Holmes, caused an attachment to be issued and levied upon said lot. After the sale a judgment was rendered against Mrs. Holmes in said action. An execution was then issued under said judgment, and placed in the hands of J. H. Gardner, as sheriff of Lincoln county. Claiming to act under authority of such execution and by direction of said Cosgrove, the said sheriff attempted to levy upon said lot, and advertised the same for sale for the purpose of satisfying said judgment. This action was then brought by said McKenna and his wife to enjoin the making of such sale, and to clear the lot of the cloud cast upon it by said attachment, execution, and levy. Said Cosgrove and the sheriff were made parties defendant, and the former answered the complaint, alleging that at the time the administrator made the sale aforesaid there were no debts against said estate, that the sale was unnecessary, and that it was made for the sole purpose of defrauding said Cosgrove and preventing the collection of his said judgment against Lizzie Holmes. The cause was tried by the court, and a judgment was rendered in favor of plaintiffs, permanently enjoining the defendants from selling said lot under said execution, and removing the cloud cast upon the lot by reason of said attachment, execution, and levy. The defendant Cosgrove has appealed.

It is first contended that the appointment of Cooper as administrator was void, and that all his acts in the premises were nullities. The argument in support of this contention is that at the time of Cooper's appointment Mrs. Holmes was still the duly qualified and acting executrix of the estate, that she had never made a final accounting, and had never been discharged from her trust. Appellant's own pleading, however, shows that she did tender her resignation in writing, and the appointment of Cooper followed. There is no evidence in the record which shows affirmatively that Mrs. Holmes did not render a final account, or that she was not duly and regularly discharged. The court had jurisdiction of both the estate and of the executrix. The order appointing her successor has the solemnity of a judgment, and, when collaterally attacked, as it is here, every fact necessary to support the order, and which is not actually negated by the record, will be presumed in its favor. *Kalb v. German Savings & Loan Society*, 25 Wash. 349, 65 Pac. 559, 87 Am. St. Rep. 757; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757.

It is next urged that the court was without jurisdiction to order a sale of the real estate, and that the order of sale was void.

It is contended that the petition for the sale was defective, in that it did not show the amount of personal property which had come into the hands of the executrix, the predecessor of the administrator. The petition does state, however, that, at the time of the appointment of the administrator, there was no personal property belonging to the estate. Other portions of the record of the estate show that the executrix sold personal property and was directed by the court to apply the proceeds upon payment of debts of the estate. The sale having been made under direction of the court, and the court still having jurisdiction of the estate, when it considered the administrator's petition, it must be presumed here, in aid of the proceedings, in the absence of positive facts appearing in the record to the contrary, that the court was advised that there was no personal property of the estate which had not already been properly applied. There is no affirmative showing here that there was personal property of the estate which had not been properly applied to the payment of debts, as was true in *Wallace v. Grant*, 27 Wash. 130, 87 Pac. 578, cited by appellant.

The next point made by appellant is that the petition for the order of sale was defective, for the reason, as alleged, that it did not show the amount of real property of which the testator died seised. It does state, however, that the only property belonging to the estate was the lot in question. It will be remembered that this lot was specifically devised to Lizzie Holmes, and it is as her property that appellant seeks to sell it in satisfaction of his judgment against her. He therefore seeks to make it appear that there was other real estate not specifically devised, which should have been sold first for the satisfaction of debts of the estate. We find no competent showing in this record that there was any other such real estate. The executrix seems to have included one other lot in an inventory, but the inventory shows upon its face that it was signed by her at Salt Lake City, Utah, and she was doubtless then of the opinion that the lot belonged to the estate; but the mere inclusion of the lot in the list does not establish that the estate had title to it. A witness also testified orally at the trial of this case that he understood that the lot belonged to the deceased. But such evidence is wholly incompetent to establish that the estate had title to the lot. There are therefore no competent facts appearing in the record which negative the statement in the petition that the lot in question was all the property belonging to the estate; and, in aid of the proceedings against this collateral attack, it must be presumed that there was no other real estate.

It is argued that the debt which was secured by the mortgage that was satisfied from the proceeds of the sale of the lot was not the debt of the estate, but was the personal debt of Lizzie Holmes, and that the purpose of the

appointment of Cooper as administrator, and the subsequent sale of the lot through the probate proceedings, was to defraud appellant and prevent him from collecting his debt against Mrs. Holmes. It is true the mortgage was executed after the death of her husband, but Mrs. Holmes executed both the note and mortgage in her representative capacity as executrix, and there is nothing appearing in the record which shows that it was not done to serve in some manner the interests of the estate. Upon the face of the note and mortgage they were such obligations of the estate as should have been discharged out of its assets. Authority for the executrix to mortgage the real estate is conferred by section 6257, Ballinger's Ann. Codes & St., under conditions there specified. The record shows that the court was advised of the existence of the mortgage and approved of the application of the proceeds of the sale to its payment. In the absence of anything in the record affirmatively showing the contrary, it will therefore be presumed that the mortgage was regularly and authoritatively executed in behalf of the estate. Fraud is not established by the record or the evidence, and with the above facts appearing, together with the court's order confirming the sale, the proceedings are not shown by the face of the record to have been void, and their regularity is not subject to attack in this collateral manner as against a bona fide purchaser. *Ackerson v. Orchard*, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605; *Otis Bros. Co. v. Nash*, 26 Wash. 39, 66 Pac. 111; *Huberman v. Evans* (Neb.) 65 N. W. 1045; *Phillips v. Phillips* (S. D.) 83 N. W. 94; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742. It is not shown that respondents were not purchasers in good faith. They paid in cash the adequate value of the property, relying upon the probate proceedings and the authority of the administrator to sell, together with the court's order confirming the sale. The proceedings not appearing to have been void, respondents took the land from the estate free from any claim of lien or charge against it by appellant for the personal obligation of Mrs. Holmes. The judgment is affirmed.

MOUNT, C. J., and FULLERTON, CROW, DUNBAR, and ROOT, JJ., concur.

WILLIAMS et al. v. CITY OF SEATTLE et al.

(Supreme Court of Washington. Jan. 5, 1906.)

1. EMINENT DOMAIN — CONDEMNATION PROCEEDINGS — NEW TRIAL — DISCRETION OF COURT.

The granting of a motion for a new trial on the issue of damages in condemnation proceedings on the ground that the verdict is contrary to the evidence is peculiarly within the discretion of the trial court.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 577, 685.]

2. APPEAL—QUESTIONS FOR REVIEW—MATTERS NOT INCLUDED IN RECORD—VIEW BY JURY.

An award of a view in condemnation proceedings does not place the jury in possession of evidence in addition to that given by witnesses on the trial, in such sense as to preclude the Supreme Court from reviewing the facts on the ground that the evidence on which the jury based their verdict is not all before it.

3. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—QUESTIONS FOR JURY—VALUE OF PROPERTY.

It is permissible for the jury, in assessing damages in condemnation proceedings, to estimate the damages at less than the value placed on the premises by the opinion of any witness, where, in addition to the opinions of the witnesses on the question of value, there is also testimony describing the property, showing the selling price of other property in the vicinity, and that the property in question has practically no market value.

4. SAME—SETTING ASIDE VERDICT—GROUNDS—INSUFFICIENCY OF AWARD.

It was not an abuse of discretion for the trial judge to refuse to set aside a verdict in condemnation proceedings which assessed damages at a less sum than the value placed on the property by the opinion of any witness, where there was other evidence than the opinions of witnesses as to the character and consequent value of the property, and there was nothing to show passion or prejudice on the part of the jury.

Rudkin and Hadley, JJ., dissenting.

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Condemnation proceedings by the city of Seattle and others against W. E. Williams and others. From the judgment rendered, defendants appeal. Affirmed.

Fred H. Peterson and H. C. Force, for appellants. Scott Calhoun and O. B. Thorgrimson, for respondents.

ROOT, J. The respondent city instituted condemnation proceedings to acquire a strip of land belonging to appellant Williams, which parcel of land was a portion of an unplatted tract, and which would be situated between the lines produced of one of the public streets of said city, and was desired for public street purposes, so that said street could be connected with a street upon the opposite side of said property, thus making a continuous street, of full width, a narrow lane or alley already connecting the two portions of the street extending in either direction from said parcel of land. A jury was impaneled and sworn to fix the value of the property to be thus taken by the city. Numerous witnesses gave evidence as to the value of the parcel sought to be appropriated. These witnesses testified as to the location, character, surroundings, accessibility, desirability, and disadvantages of said strip of real estate, and each gave his estimate as to its reasonable value. The lowest estimate of value placed upon the property by any witness was \$400, and several of them fixed the amount in many times this sum. The jury, by consent of the parties, viewed the premises, and, having heard all of the evidence, re-

turned a verdict wherein they fixed the value of said property at \$300. The appellant moved for a new trial upon the ground that the jury erred in assessing the amount of the recovery, in that it was too small, and that the verdict was not supported by the evidence, but that it was contrary thereto, in that the amount of the recovery was grossly inadequate. This motion was overruled by the trial court, and judgment entered upon the verdict. An appeal is taken therefrom.

It was urged by appellant that the amount of the verdict, \$300, being less than the lowest estimate of value fixed by any witness, said verdict is unsupported and contrary to the evidence, and that for that reason the trial court should have granted a new trial. We do not think this necessarily follows. In a case of this kind the granting of a motion for a new trial is peculiarly within the discretion of the trial court. It was suggested by respondent that, inasmuch as the members of the jury themselves viewed the premises and doubtless used the information they thereby gathered, we cannot review their verdict for the reason that what they learned themselves by an inspection of the premises constituted evidence which we cannot have before us, and that we must therefore apply the rule which prevents an appellate court from reviewing questions of fact where all of the evidence is not brought up. We do not think the rule invoked should be applied to a matter of this kind. The jury is not permitted to view the premises for the purpose of gathering evidence, but for the purpose of better understanding the evidence which has been adduced before it regarding said premises. We will therefore review questions such as are presented here, notwithstanding it appears that the premises were inspected by the jury.

Answering appellants' contention that there was no evidence to sustain a verdict for less than \$400, we call attention to the fact that the placing of an amount upon this property by each of the witnesses as its value was merely the expressing of the opinion of such witness. If there were no evidence in the case except these expressions of opinions by the various witnesses, and no evidence or facts which could be deemed at variance therewith, we would doubtless feel that a case was presented wherein the trial court should have granted a new trial. But there was other evidence. One of the witnesses, although he had fixed the value of the parcel of land at a certain sum, nevertheless, in speaking thereof, said it had "virtually none, in the ordinary way and sense of selling property." Each and all of these witnesses gave a description of this property, and stated numerous facts calculated to show its advantages and disadvantages; considerable evidence being given as to the selling price of other real estate in that part of the city. All of this evidence had to do with facts which the jury had a perfect right, and which it

was their duty, to consider in arriving at their verdict. The facts thus established by this evidence evidently led the jury to reach an opinion in their own minds which was different from that of any of the witnesses. The evidence of these various witnesses as to the condition, qualification, environment, merits, and demerits of this property, and as to the prices for which other property had sold in that neighborhood, viewed in the light of their own observations when they viewed the premises, induced the jury to fix the value of said premises in an amount lower than that estimated by any witness except the one who said it had "virtually none." As a matter of law, it was certainly the privilege of the jury to do this. Having done so, and the appellants having moved for a new trial, it then became the duty of the trial judge to ascertain whether or not there were any reasons for setting aside such verdict. If he believed the verdict to be grossly inadequate or that a fair legal trial was not had, he should have granted a new trial. No passion or prejudice, or facts from which it would necessarily be inferred, are charged; and this is not made a ground of the motion for a new trial. We cannot, therefore, presume that the jury was thus affected.

To the contention that in the light of all of the evidence the verdict was so grossly inadequate as to make it an abuse of discretion for a trial judge to permit it to stand, we must say that it does not so appear. The case was tried by a resident judge of Seattle, who may be reasonably presumed to have known, at least in a general way, of the situation, character, and value of this property, and perhaps not unacquainted with the witnesses. The latter were personally before him. He heard their testimony, and saw their appearance and conduct upon the stand. He could observe their manner of answering questions and giving testimony. All of these matters furnished the trial judge a much better opportunity to weigh the testimony than has a judge in an appellate court. In view of these facts, and especially in view of the fact that the amounts stated by the various witnesses were but the expression of opinion, and keeping in mind that there was much other evidence touching the character and condition of the property, we cannot say that the trial judge was guilty of an abuse of discretion in not granting the motion for a new trial. That courts should be slow to overturn verdicts rendered in proceedings of this kind may be seen by an examination of the following authorities: 7 Ency. Pl. & Pr. 581, 593, 594; Parks v. Boston, 15 Pick. (Mass.) 198; Chicago, etc., Co. v. Jacobs, 110 Ill. 414; McReynolds v. B. & O. Co., 106 Ill. 152; City of Kansas v. Street, 36 Mo. App. 666; City of Kansas v. Butterfield, 89 Mo. 646, 1 S. W. 831; Guyer v. Davenport, etc., R. Co., 196 Ill. 370, 63 N. E. 732; Conness v. Indiana, etc., R. R. Co., 193 Ill. 464, 62 N. E.

221; Kiernan v. Chicago, etc., R. Co., 123 Ill. 188, 14 N. E. 18; Omaha, etc., Co. v. Walker, 17 Neb. 432, 23 N. W. 348; Groves, etc., R. Co. v. Herman, 206 Ill. 34, 69 N. E. 36; Mitchell v. Ill., etc., Co., 85 Ill. 566; Shoemaker v. United States, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170; Washburn v. M. & L. R. R. Co. (Wis.) 18 N. W. 330; Beveridge v. Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 59 L. R. A. 581, 92 Am. St. Rep. 188; Fort Street, etc., Co. v. Jones, 83 Mich. 415, 47 N. W. 349; Lehigh Valley Coal Co. v. Chicago (C. C.) 26 Fed. 415; In re Smith (Sup.) 15 N. Y. Supp. 516; Stockton v. Chicago, 136 Ill. 434, 26 N. E. 1095; Gorgas v. Philadelphia, etc., Co., 144 Pa. 1, 22 Atl. 715.

In the case of Conness v. Railroad Company, supra, the court said: "In this class of cases, where the jury is allowed to go and view the premises, and act from their own knowledge, as well as from the evidence, we should only feel warranted in setting it aside where it appeared grossly inadequate or grossly excessive." In the case of Beveridge v. Lewis, supra, the court used this language: "The jury may be permitted, in weighing the evidence in an eminent domain proceeding, to exercise their individual judgment as to values upon subjects within their knowledge which they have acquired through experience and observation." In the case of Railway Company v. Herman the court spoke as follows: "In proceedings for the condemnation of land, the jury may base their verdict on knowledge gained from inspection of the premises, as well as upon the testimony of witnesses whose statements were mere opinions and conclusions as to the question of the damages. When the jury have viewed and examined the premises in proceedings to recover damages sustained by the construction of a railroad, their own observation is just as good as that of any of the witnesses, and while they are not to disregard the testimony produced on the trial, they are, nevertheless, not required to repudiate the evidence of their own senses." And in the case of City of Kansas v. Butterfield, supra, the court used this language: "That they are not bound by the testimony of experts and others concerning valuation of the land proposed to be taken and the actual damage done, but may apply their own judgment and knowledge as to such valuation and damage in connection with the testimony in the case." It will be noticed that these courts have gone much further than we find it necessary or proper to go in this case.

No error being assigned except that upon the action of the trial court in overruling the motion for a new trial, and it not being made to appear that such ruling was erroneous, the judgment of the superior court is affirmed.

MOUNT, C. J., and FULLERTON, CROW, and DUNBAR, JJ., concur.

RUDKIN, J. (dissenting). The sole question at issue in this case was the value of a

tract of land sought to be appropriated for a public use. The verdict of the jury is substantially less than the lowest estimate placed on the property by any witness on either side. Such a verdict is in my opinion contrary to the evidence, and should be set aside. I therefore dissent.

HADLEY, J., concurs.

BELL v. STAACKE et al. (S. F. 4,398.)
(Supreme Court of California. Jan. 2, 1906.)

1. APPEAL—FILING TRANSCRIPT—TIME.

Supreme Court Rule 2 (78 Pac. vii) provides that appellant in a civil action shall, within 40 days after the appeal is perfected, serve and file a printed transcript of the record, provided that, when there is a proceeding pending for the settlement of a statement which may be used in support of such appeal, the time for filing the transcript shall not begin to run until the settled statement or bill of exceptions has been filed, and that, when a party appealing from the judgment has given notice of a motion for a new trial before perfecting the appeal, the time for filing and serving a printed transcript shall not begin to run until the motion for a new trial has been decided or the proceedings dismissed for want of prosecution, and the appeal from the judgment and from the order denying a new trial may, in all cases, be presented on the same transcript. *Held* that, where a motion for a new trial has been made, the time for filing the transcript on an appeal from the judgment began to run from the date the order denying or dismissing the motion for the new trial was filed with the clerk, and not from the date the appeal from the order denying the new trial was perfected.

2. NEW TRIAL—DENIAL—ORDERS—NOTICE.

A party making a motion for a new trial is bound to take notice of the filing of an order denying the same, and is not entitled to the service of notice thereof by the adverse party.

3. APPEAL—FILING TRANSCRIPT—DENIAL OF NEW TRIAL.

Where a party moving for a new trial is not entitled to notice of the making, filing, or entry of the order denying the new trial, the time for an appeal therefrom and the time for filing the transcript on appeal begin to run at once upon the filing or entry of such order.

In Bank. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by John S. Bell against George Staacke and others. From a judgment in favor of defendants, plaintiff appeals. On motion to dismiss. Granted.

See 74 Pac. 774.

Richards & Carrier, James L. Crittenden, and B. F. Thomas, for appellant. Canfield & Starbuck and T. Z. Blakeman, for respondents.

SHAW, J. The defendant Teresa Bell, as administratrix with the will annexed of the estate of Thomas Bell, deceased, moves the court to dismiss the appeal of the plaintiff from the judgment of the superior court entered therein on October 28, 1904. The motion is made on the ground that the time

allowed by law and by the rules of this court for the filing of the transcript on appeal has expired, and hence that under the provisions of rule 5 (78 Pac. viii) the appeal from the judgment must be dismissed. At the time the appeal was perfected a proceeding was pending for the settlement of a statement of the case to be used on a motion then pending in the lower court for a new trial. The time for the filing of the transcript of the record in this court, under such circumstances, is fixed by subdivision 1 of rule 2 (78 Pac. vii), which is as follows: "(1) The appellant in a civil action shall, within forty days after the appeal is perfected, serve and file the printed transcript of the record, duly certified to be correct by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken; provided, that when there is a proceeding pending for the settlement of a bill of exceptions or a statement which may be used in support of such appeal, the time for filing and serving the transcript shall not begin to run until the settled and authenticated statement or bill of exceptions has been filed; and provided further, that, when a party appealing from a judgment has given notice of motion for a new trial before perfecting said appeal, the time for filing and serving the printed transcript shall not begin to run until the motion for a new trial has been decided or the proceeding dismissed for want of prosecution; and the appeal from the judgment and from an order denying a new trial of the issue may in all cases be presented upon the same transcript." The statement to be used on the motion for a new trial was settled, authenticated, and filed on May 29, 1905, and the motion for new trial was denied by an order filed with the clerk of the superior court on June 24, 1905. The date of its entry is uncertain. The purpose of this part of rule 2 was to give the appellant an opportunity, if he so desired, to present the appeals from the judgment and from the order denying a new trial upon the same transcript. To give effect to this purpose it is necessary to construe the words of the last proviso as meaning that the time for filing the transcript shall not begin to run until the order denying or dismissing the motion for a new trial has not only been made, but has also been either entered on the minutes of the superior court, or filed with the clerk thereof, so as to give an immediate right to appeal therefrom, under section 939 of the Code of Civil Procedure, and the decisions of this court construing the same in that particular. Upon this construction of the rule, the time prescribed for the filing of the transcript began to run at all events on June 24, 1905, when the order denying the motion for new trial was filed with the clerk, and, according to the language of the rule, the time expired 40 days thereafter; that is, on August 3, 1905. The notice of motion to dismiss this appeal for this cause was served on the attorney for the appellant

and filed in this court on August 16, 1905. At that time no transcript of the record had been filed nor had it been filed on September 5, 1905, the date when the appellant's affidavit in opposition to this motion was sworn to by his attorney. We are therefore constrained to hold that the motion is well founded, and that the appeal from the judgment must be dismissed.

It is further contended, on behalf of the appellant, that the last clause of the subdivision of the rule above quoted, that "the appeal from the judgment and from the order denying a new trial of the issue may in all cases be presented upon the same transcript" was intended to allow still further time for the filing of the transcript, and must be construed to allow the appellant to file his transcript on an appeal from the judgment, at any time within 40 days after he has perfected an appeal from the order denying a new trial. In furtherance of this contention he shows by affidavit that on August 15, 1905, he perfected an appeal from that order, and that the time for filing the transcript on that appeal would not expire until September 24, 1905, which was after the submission of this motion to dismiss. In answer to this contention, we have to say that such was not the purpose of the rule, and it is not so expressed. It should be, and is, the policy of the court to expedite proceedings on appeal, rather than to delay them, or permit opportunities for delay. The rule in question, in order to avoid the expense of unnecessary and oftentimes burdensome costs, where a party intends to appeal both from the judgment and from the order denying a new trial, and there is unavoidable delay in the decision of the motion for new trial, so far departs from this policy as to permit such further delay only as may be sufficient to enable a party, by proper diligence, to have both appeals heard together and on the same transcript. But the rule was not intended to encourage delay, nor to give more time than, with diligent effort, is necessary to accomplish the object sought. When the order denying a new trial is filed or entered, the party aggrieved may immediately perfect an appeal therefrom, and the 40 days allowed by the rule after the day when the time for that appeal begins to run is ample time within which to print, serve, and file the transcript, including the record on both appeals. If a party chooses to delay for more than 40 days the taking of an appeal from the order, he thereby loses the opportunity afforded to him by the rule to save the expense of twice printing the judgment roll and the clerk's fee for an additional filing.

In view of some matters alleged in the affidavit filed on behalf of the appellant on the hearing of this motion, it may be further stated that the appellant was not entitled to notice from the adverse party, or from any one, of the making, filing, or entry of the order denying a new trial, and that the time for an appeal therefrom, and also the time for the

filing of the transcript on the present appeal, began to run at once upon such filing or entry, without regard to any notice or knowledge thereof by the appellant, or his attorneys. Parties and their attorneys are bound to take notice and inform themselves of such proceedings without assistance from the adverse parties. This is the general rule. The time for the doing of an act or the taking of a step in a proceeding in court begins to run from the service of a notice of some previous act or step, only in cases where by some law or rule of court it is so provided.

The appeal from the judgment is dismissed.

We concur: BEATTY, C. J., VAN DYKE, J.; MCFARLAND, J.; HENSHAW, J.; ANGELLOTTI, J.; LORIGAN, J.

148 Cal. 280

LOS ANGELES CITY SCHOOL DIST. OF
LOS ANGELES COUNTY et al. v.
LONGDEN et al., County Sup'rs.
(L. A. 1,802.)

(Supreme Court of California. Dec. 26, 1905.)

1. SCHOOLS AND SCHOOL DISTRICTS—NATURE
OF SCHOOL DISTRICT—CORPORATE ENTITY—
MERGER IN CITY.

A school district is a corporation of quasi municipal character, and, though its territorial limits may be actually coterminous with those of a city, the identity of the school district as a corporate entity is not lost or merged in that of the city.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Schools and School Districts, §§ 39, 40.]

2. SAME — DISTRICTS EMBRACING CITY —
POWER TO ISSUE BONDS.

Const. art. 11, § 6, provides that city charters adopted by authority of the Constitution shall be subject to and controlled by general laws, except in municipal affairs. Article 4, § 25, subd. 27, prohibits the passage of local laws for the management of common schools. Article 9, § 5, requires the Legislature to provide for a system of common schools. Pol. Code, § 1576, provides, in effect, that a city, together with territory annexed thereto for school purposes, shall constitute a separate school district. Sections 1880-1887 authorize the board of trustees of a school district to issue bonds to raise money for purchasing school sites or building and improving schoolhouses, etc., and prescribe the procedure for the issuance of such bonds. *Held*, that while a city may, when authorized by its charter, issue municipal bonds for school purposes, yet its power so to do is not exclusive, and the school district, embracing the city and territory attached thereto for school purposes, may, independently of the city, issue district school bonds in the manner prescribed by the Political Code.

In Bank. Application by the Los Angeles city school district of Los Angeles county and others for a writ of mandate, prayed to be directed against O. W. Longden and others, constituting the board of supervisors of Los Angeles county. Writ awarded.

W. B. Mathews and S. B. Robinson, for plaintiffs. J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy, for defendants.

HENSHAW, J. This is an original application to this court for a writ of mandate, growing out of the following facts: The Los Angeles city school district of Los Angeles county comprises for its territory the city of Los Angeles and certain contiguous outlying lands. Its governing body is the board of trustees of Los Angeles city school district of Los Angeles county, whose members are the same as those of the board of education of the city of Los Angeles. This board of trustees, in compliance with the provisions of section 1880 et seq. of the Political Code, initiated proceedings for the issuance of bonds of the school district, which proceedings were regularly carried to the point where the board of trustees certified to the board of supervisors of the county its action in the premises, as provided by section 1884 of the Political Code. The board of supervisors has refused to issue the bonds, as required by section 1884, upon the ground that the city of Los Angeles, as a municipal corporation, has, under its charter and the laws of the state, the sole and exclusive right to issue bonds for the purpose specified. This is the only issue presented by this controversy. It has been repeatedly decided that a school district is a corporation of quasi municipal character, and, though its territorial limits may be actually coterminous with those of a city, the identity of the school district, as a corporate entity, is not lost nor merged in that of the city. *Estate of Bulmer*, 59 Cal. 131; *Hughes v. Ewing*, 93 Cal. 414, 28 Pac. 1067; *Kennedy v. Miller*, 97 Cal. 429, 32 Pac. 558; *In re Wetmore*, 99 Cal. 146, 33 Pac. 769; *Board of Education v. Board of Trustees*, 129 Cal. 599, 62 Pac. 173; *Mitchell v. Board of Education*, 137 Cal. 372, 70 Pac. 180; *Hancock v. Board of Education*, 140 Cal. 554, 74 Pac. 44. Thus, in the last-cited case, it is said: "Every city constitutes a separate school district, including such outlying territory as may be legally attached to it. (Pol. Code, § 1576.) * * * A city charter adopted under the provisions of the constitution, has no effect whatever upon the existence or legal character of a school district formed under the general law."

That school districts may, in proper cases, issue bonds, is, of course, not disputed. It remains to be considered whether this general power to issue bonds, which has been granted to school districts, has been taken away from this particular school district by force of the charter of the city of Los Angeles. Upon this proposition the contention of respondent is that all matters touching schools within the corporate limits of a city are "municipal affairs," and that as, under the provisions of section 6 of article 11 of the Constitution, the charter of a city is supreme in municipal affairs, the charter of Los Angeles thus becomes the sole guide, authority, and power for the issuance of school bonds; that the charter of Los Angeles denies the power to its board of education to take

the initiatory steps towards the issuance of school bonds, and confers that power upon its city council; and that its city council, under the provisions of section 78 of the charter, draws its power from the provisions of the general improvement act of 1901. Herein reliance is placed upon the language of this court in the case of *Law v. San Francisco*, 144 Cal. 384, 77 Pac. 1014. There this court had under consideration the question of the power of the municipality to issue bonds for the erection of new schoolhouses and the improvements of existing schoolhouses, and the case of *In re Wetmore*, 99 Cal. 151, 33 Pac. 769, was cited and quoted from, to the effect that, as schoolhouses are essential aids in the promotion of education, their erection is but incidental to the maintenance of the schools, and falls as completely within the functions of a municipal government, as does the erection of a hospital for its indigent poor, or buildings for its fire engines. It thus may be taken as decided and settled that a city, as such, may bond itself for public school purposes, and that this power extends to all cases where the object is in furtherance, and not in derogation of, or in conflict with, the general school system established by the state. For in this connection it must be remembered, as was said in *Hancock v. Board of Education*, 140 Cal. 554, 74 Pac. 44, that the school system of the state is a matter of general concern, and not a municipal affair. It may be well to dwell upon this distinction with more particularity, and in so doing to point out the well-recognized and oft-repeated difference between the acts of the city as a city, and the acts of the school district, which may comprise the same territory. They are essentially the acts of two different corporate entities—the powers of the city being drawn from its charter, the powers of the school district being derived from the provisions of the Political Code; the bonds which the city issues being municipal bonds of that city, and the power to issue them being derived from the charter taken with the general laws, while the bonds of the school district are, in name and in fact, school district bonds, the right and power to issue them being derived from the Political Code. What, therefore, the *Wetmore Case* and the *Law Case* decided was that the erection of schoolhouses within the corporate limits of a municipality was justly to be regarded as a municipal affair, and that the city, therefore, as such, could create a bonded indebtedness for such and like purposes, even though power to do the same thing was, under the general school system of the state, vested in a school district, which, while occupying the same territory as that of the city, was still in point of law a distinct corporate entity. It follows, therefore, that the declaration of this court that the issuing of bonds for the building of schoolhouses by a city is a municipal affair constitutes in no sense a negation of the fact

that another corporate entity—the school district—may, under the general school system of the state, do the same thing for the same purpose.

Moreover, it should be finally emphasized that the power of a municipality in this regard can only run current with, and never counter to, the general laws of the state touching the common school system. To such general laws, if conflict arises, all municipal charters must be subservient. Const. art. 9, § 5, and article 4, § 25, subd. 27. In the case of *In re Wetmore*, 99 Cal. 146, 33 Pac. 769, the identical question here presented was, under a somewhat dissimilar guise, considered and disposed of, and an analysis of the *Wetmore* Case will make this plain. In that case the city council of the city of Oakland had issued its bonds for school purposes under the act of March 19, 1889; the successor to which act being the present general improvement act of 1901. A taxpayer called in question the validity of the bond issue, and urged, as one of his objections, that such bonds could be issued only by the school district. It will be noted, therefore, that the question under consideration in *Re Wetmore* was the reverse of the one here presented; in the *Wetmore* Case it being contended that the school district had exclusive power to issue school bonds, while in the case at bar the contention is that the city holds this exclusive power. This court declared that the provisions of sections 1880-1887 of the Political Code for the issuance by the supervisors of the county of school district bonds do not limit or qualify the power conferred by the act of March 19, 1889, upon an incorporated city to issue its own bonds for the same purpose, notwithstanding the provisions of section 1576 of the same Code making such incorporated city a school district, saying: "There is not, however, any inconsistency between the two acts. The bonds authorized by these sections of the Political Code are different obligations from those issued by the municipal corporation under the act of March 19, 1889. A school district has not, like an incorporated city, any financial officers, nor has it been intrusted with the power of assessment and taxation which is conferred upon an incorporated city, and for these reasons, as well as others, the Legislature would naturally intrust to the supervisors of the county, as being the body having the financial supervision of the school district, the function of issuing and providing for the payment of school district bonds; and as by the Constitution bonds cannot in any case be issued, except upon a vote of two-thirds of the qualified electors of the district voting upon the question of their issuance, the agency by which they might be executed would seem immaterial, and there would be little likelihood of an issuance being authorized to be made for the same purpose by each agency. * * * If it should be conceded that the power to issue bonds for the same purposes

rests in the supervisors at the instance of the school district, and also in the city itself, the bonds which are authorized by the Political Code are to be issued in the corporate name of the school district, which by section 1575 of that Code must be '— district of — county,' whereas the bonds in question are those of the municipality of the city of Oakland, and their validity is to be determined by the power of the municipal corporation to issue them."

It follows from the foregoing that while the city of Los Angeles, in a proper case, would have the power to issue its municipal bonds for the erection of new schoolhouses and the improvement of existing ones, for the acquisition of land for these purposes, and the like, the school district, petitioner herein, has also its separate and independent power to do the same thing, and that the bonds so issued are not municipal bonds of the city of Los Angeles, but are the bonds of the school district proper, and the writ of mandate should issue accordingly.

Let the mandate issue as prayed for.

We concur: McFARLAND, J.; ANGELLOTTI, J.; VAN DYKE, J.; LOBIGAN, J.

LOS ANGELES CITY HIGH SCHOOL

DIST. et al. v. LONGDEN et al.,
County Sup'rs. (L. A. 1,803.)

(Supreme Court of California. Dec. 26, 1905.)

In Bank. Application by the Los Angeles city high school district and others for a writ of mandate, prayed to be directed against O. W. Longden and others, as supervisors of the county of Los Angeles. Writ awarded.

W. B. Mathews and S. B. Robinson, for plaintiffs. J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy, for defendants.

PER CURIAM. The question here presented is identical with that considered and decided in *Los Angeles City School District v. Longden et al.* (L. A. 1,802) 83 Pac. 246; the bonds in this case being for the purpose of acquiring lands for high school purposes and for the erection of appropriate high school buildings.

For the reasons given in L. A. 1,802, let mandate issue as prayed for.

148 Cal. 393

HAWLEY et al. v. KAFITZ et al. (L. A. 1,454.)

(Supreme Court of California. Dec. 30, 1905.)

1. DEEDS — CONSTRUCTION — COVENANTS — CONDITIONS SUBSEQUENT.

Where a deed provided that it was "upon the express agreement" of the grantee to build or cause to be built on the premises, within six months, a dwelling house to cost not less than \$1,500, which agreement was considered as a part of the consideration for the convey-

ance, such provision constituted a mere personal covenant on the part of the grantee, and was not a condition subsequent, authorizing a forfeiture for nonperformance.

2. EVIDENCE—EXPLANATION OF DEED BY PAROL.

Where a clause in a deed providing for the construction of a building was neither ambiguous nor equivocal, and whether it created a condition subsequent or a mere personal covenant was a matter of pure legal interpretation, parol evidence was inadmissible to show that the parties intended it to be a condition subsequent and clause of forfeiture.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2068.]

Department 2. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Action by F. Robert Hawley and others against William Kaftz and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

J. Marlon Brooks and Edward H. Bentley, for appellants. P. W. Dooner, for respondents.

LORIGAN, J. The plaintiffs on November 28, 1901, executed to defendant William Kaftz a grant, bargain, and sale deed of a lot in the Electric Railway Homestead Association Tract in the city of Los Angeles for a money consideration of \$375. The deed contained the following provision: "This deed is given by the parties of the first part, and accepted by the second party, upon the express agreement of the second party to build, or cause to be built, upon the said premises within six (6) months from the date hereof a dwelling house to cost not less than fifteen hundred (\$1,500.00) dollars. Said agreement being considered by the parties hereto as part consideration for this conveyance." No dwelling of any kind was built upon the lot within the six months specified, and subsequent to the expiration of that period plaintiffs brought this action to have the right of defendant in said lot declared forfeited and for a decree requiring a reconveyance to them by defendant of the property. Defendant had judgment, from which plaintiffs appeal; their appeal being accompanied by a bill of exceptions.

The only question arising on this appeal from the judgment is as to the nature of the provision inserted in the deed relative to the building of a house on the lot granted within six months and the correctness of the construction the trial court gave it. As to this provision it is insisted by plaintiff that by virtue of its incorporation in the deed an estate on condition subsequent was created, and, defendant having failed to perform the condition, his interest in the property was subject to forfeiture at the instance of plaintiffs for nonperformance of the condition. The trial court held that this provision did not create a condition subsequent; that it amounted simply to a personal covenant. We think there can be no question of the accuracy of the construction placed upon it by

the court. Conditions subsequent are those which in terms operate upon an estate conveyed and render it liable to be defeated for breach of the conditions. Such conditions are not favored in law because they tend to destroy estates, and no provision in a deed relied on to create a condition subsequent will be so interpreted, if the language of the provision will bear any other reasonable construction. While no precise form of words is necessary to create a condition subsequent, still it must be created by express terms or by clear implication. Merely reciting in a deed that it is in consideration of a certain sum, and that the grantee shall do other things specified therein, does not create an estate upon condition. There must be language used which is so clear as to leave no doubt but that the grantor intended that an estate upon condition subsequent should be created—language which *ex proprio vigore* imports such a condition. *Cullen v. Sprigg*, 83 Cal. 64, 23 Pac. 222; *Behlow v. S. P. R. R. Co.*, 130 Cal. 19, 62 Pac. 295.

In the case at bar the provision in question, which it is claimed created a condition subsequent, contains no language which in terms declares such a condition, or which by necessary implication imports one. There is an entire absence of any of those apt or appropriate words or expressions which are usually employed for the purpose of creating a condition subsequent—technical terms, which, if a condition subsequent is intended to be created, generally follow the granting clause of the deed, and declare that the estate conveyed is upon "express condition" that certain things shall be done, or "provided, however," or "in the event that" certain terms imposed are or are not complied with, the deed shall be void, and the estate granted shall be terminated and forfeited. Neither is there in the deed any declaration that in the event of the failure of the grantee to build within the stipulated time the deed shall be void, nor any provision declaring a forfeiture or right of re-entry for breach of condition. Nor does it appear from the deed that any specified purpose was to be attained by the grantor in having the building erected on the lot within the given time, or that its erection was the sole consideration for the conveyance. In fact, there is not only an entire omission on the part of the grantor to use any technical language, such as is ordinarily employed to create an estate on condition subsequent, but there is also an entire absence of any language indicating that for noncompliance with the stipulation to build it was the intention of the grantor that the estate granted should be defeated and forfeited. Not only is there no language which would create a condition subsequent, but the language actually employed, "this deed is upon the express agreement," implies a personal covenant, and not a condition. As supporting this conclusion we refer to *Cullen v. Sprigg*, supra; *Behlow v. S. P. R. R. Co.*, supra; *City of Portland v. Terwilliger*, 16 Or. 465, 19 Pac. 80; *Palm-*

er's Ex'r v. Ryan, 63 Vt. 227, 22 Atl. 574; Graves v. Deterling, 120 N. Y. 447, 24 N. E. 655; and Stone v. Houghton, 139 Mass. 175, 31 N. E. 719. In this last case cited a provision almost identical with the instant provision under review here was declared not to create a condition, and one of the same general nature was, in Behlow v. S. P. R. R. Co., supra, construed as simply a personal covenant.

Under the bill of exceptions, accompanying the appeal from the judgment, the only point presented is as to the ruling of the lower court upon the admissibility of certain evidence offered on the part of the plaintiffs. The offer was to prove that the clause in the deed was understood by the parties as "intended to be a condition subsequent and clause of forfeiture." The court refused the offer, and properly so. The clause in the deed was in no wise ambiguous or equivocal. Its language was plain and clear, and whether the clause created a condition subsequent, as contended by plaintiffs, or a mere personal covenant, as insisted by defendant, was a matter of pure legal interpretation for the court. That neither evidence of the understanding of the plaintiffs nor the interpretation they desired to place upon the unambiguous language of the clause in their deed was admissible is so elementary that it is disposed of merely by stating it.

The judgment appealed from is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

148 Cal. 385

LOS ANGELES COUNTY v. KIRK,

Superintendent of Public Instruction. (L. A. 1,837.)

(Supreme Court of California. Dec. 27, 1905.)

1. SCHOOLS AND SCHOOL DISTRICTS — STATE SCHOOL FUND—APPORTIONMENT.

Const. art. 9, § 5, requires the Legislature to provide for a system of "common schools" by which a free school shall be kept up and supported in each district. Section 6 provides that the "public school system" shall include "primary and grammar schools," and such high schools, evening schools, etc., as may be established by legislative or local authority, and further provides that the entire revenue derived from the state school fund shall be applied exclusively to the support of "primary and grammar schools." Pol. Code, §§ 1622, 1861, reiterate the requirement that the revenue of the state school fund shall be applied solely to primary and grammar schools. Section 1532 requires the Superintendent of Public Instruction to apportion the balance of the state school fund which remains after providing for teachers to the several counties according to their "average daily attendance," as shown by reports of the county superintendents for the preceding year. Sections 1617, 1662, and 1663 recognize, and make certain provisions in relation to, the adoption of kindergartens as part of the "public primary schools" in cities and towns. *Held* that, notwithstanding the legislative designation of kindergartens as "primary" schools, such institutions are not "primary and grammar schools," within the meaning of the

constitutional and statutory provisions for the distribution of the state school fund, and the kindergarten attendance is not to be computed in ascertaining the proportion of the school fund to which a county is entitled.

2. SAME—ESTABLISHMENT OF KINDERGARTENS —CONSTITUTIONAL PROVISIONS.

Pol. Code, §§ 1617, 1662, 1663, which recognize and make provision for the establishment of kindergartens in cities and towns, do not, when construed so as not to entitle kindergartens to participate in the state school fund, conflict with Const. art. 9, § 5, requiring the Legislature to provide a system of common schools by which a free school shall be kept up and supported in each district, and section 6 of the same article, requiring the state school fund to be applied exclusively to the support of primary and grammar schools.

3. STATUTES—SPECIAL LEGISLATION.

Nor do such sections, when so construed, conceding that they are applicable only to cities and towns, conflict with Const. art. 4, § 25, subd. 27, prohibiting the passage of local or special laws providing for the management of common schools.

In Bank. Application by the county of Los Angeles for a writ of mandate, prayed to be directed against Thomas J. Kirk, Superintendent of Public Instruction. Denied.

J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy, for petitioner. U. S. Webb, Atty. Gen., for respondent.

ANGELLOTTI, J. This is an application for a writ of mandate compelling the Superintendent of Public Instruction of the state, in making his apportionment of the state school fund to the various counties, to include and consider, as a part of the average daily attendance of the schools of plaintiff, the attendance of children between the ages of four and five years, who have been regularly admitted to the kindergarten classes established by the educational authorities of certain cities of plaintiff county. It appears from the petition that defendant proposes to include the attendance on such classes of children between five and six years of age, but, in view of his conclusion as to the effect of certain provisions of our Codes, has determined that children between the ages of four and five years should not be included. We do not deem it necessary to consider the argument relative to this position of the defendant, for we have concluded that the point made by the Attorney General upon the argument, to the effect that under our law the attendance upon kindergarten classes cannot be considered as a part of the attendance for purposes of apportionment of the state school fund, is well made. The rule laid down by the Legislature for the guidance of the Superintendent of Public Instruction in the apportionment of the state school fund, is to be found in section 1532 of the Political Code, as amended March 18, 1905. It is there declared as follows, viz.: "It is the duty of the Superintendent of Public Instruction: * * * Fourth. To apportion the state school fund: * * * In apportioning said fund he shall apportion to every county and to every city

and county two hundred fifty dollars (\$250) for every teacher determined and assigned to it on school census by the county or city and county school superintendent for the next preceding school year, as required; * * * and after thus apportioning two hundred fifty dollars on teacher or census basis, he shall apportion the balance of the state school fund to the several counties or cities and counties according to their average daily attendance as shown by the reports of the county or city and county school superintendents for the next preceding school year."

The question presented, it will thus be seen, is as to the meaning of the words "average daily attendance" as used in this section. It is admitted that in view of the provision of section 6 of article 9 of our Constitution, declaring that "the entire revenue derived from the state school fund and from the general state school tax shall be applied exclusively to the support of primary and grammar schools," the corresponding provisions of sections 1622 and 1861, Pol. Code, and the decision of this court in *Stockton School District v. Wright*, 134 Cal. 64, 66 Pac. 34, only the attendance upon the primary and grammar schools is included within the words "average daily attendance" as used in this section. It was clearly shown in the case cited, where a similar provision regarding apportionment of state school moneys was construed, that it could never have been intended to include attendance upon other schools, such as high schools or evening schools, for the maintenance of which no part of the state school money could, under the law, be used. Plaintiff's case must therefore rest upon its claim that the kindergarten classes are, under the law, part and parcel of the primary schools of the state, that state school money may be appropriated to their maintenance, and that attendance thereon is attendance upon "primary schools," within the meaning of that term as used in the constitutional provisions quoted above. This is, in fact, the claim upon which plaintiff rests its case. The nature and object of kindergarten classes were quite fully discussed in the case of *Sinnott v. Colombet*, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594. It was there shown that the term "kindergarten" was devised to apply to a system elaborated for the instruction of children of very tender years, which, by guiding their inclination to play into organized movement, and investing their games with an ethical and educational value, teaches, besides physical exercises, habits of discipline, self-control, harmonious action and purpose, together with some definite lesson of fact. It is apparent that the work contemplated by such a system is purely preliminary to, and entirely different in character from the ordinary work of the common school; and is, in fact, designed to fit very young children, whose minds and bodies are, solely because of their tender age, not yet capable of the instruction con-

templated in an ordinary school, for such school work.

It may be conceded that the work contemplated is of such a character that it might, to some extent, be included by the Legislature in the general primary school system of the state, just as it may be conceded that the Legislature may extend the general grammar school course so as to include some subjects that have hitherto been pursued only in the more advanced schools, such as high schools. But the statutory provisions upon the subject of the kindergarten make it clear that the Legislature has not made the same a part of the "system of common schools, by which a free school shall be kept up and supported in each district at least six months in every year," which, by section 5 of article 9 of the Constitution, the Legislature is required to provide, but, at most, has made it only a part of the "public school system" described in section 6 of the same article, in the same way that high schools, evening schools, normal schools, and technical schools established directly by the Legislature, or by municipal or district authority, are parts of such public school system. The two constitutional provisions cited, taken together, contemplate (1) the establishment of a uniform system of "common schools," including solely the primary and grammar schools, which shall be applicable and mandatory in every school district of the state, as to which all local or special laws are expressly forbidden (Const. subd. 27, § 25, art. 4), and to the support of which the entire revenue derived from the state school fund and the general state school tax shall be exclusively applied; and (2) the establishment, either by the Legislature or by municipal or district authority, under statutes authorizing the same, of other schools, such as high and technical schools, which, however, can in no degree, be supported from the state school fund, but must obtain their whole support from other sources. The intention of the framers of the Constitution to devote the whole of the revenue of the state school fund and the general state school tax, exclusively to the support of the schools included in the first class mentioned above, viz., those which are known as "common schools," and which by the Constitution are required to be maintained in every district of the state, is too clear to admit of question.

Coming to a consideration of the only existing statutory provisions relative to kindergarten schools, we find the following, viz.: Section 1663, Pol. Code, provides that "the public schools of California, other than those supported exclusively by the state, shall be classed as high schools, technical schools, and grammar and primary schools [including kindergarten classes], and no teacher shall be employed to teach in any school if the certificate held by the teacher is of a grade below that of the school or class to be taught:

* * * Provided that nothing herein con-

tained shall be construed as prohibiting the employment of any person holding a valid special certificate for kindergarten work heretofore granted * * * as a teacher in any kindergarten class of a primary school. * * * Section 1662, Pol. Code, provides that "every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district: * * * Provided, that in cities and towns in which the kindergarten has been adopted or may hereafter be adopted as part of the public primary schools, children may be admitted to such kindergarten classes at the age of four years." * * * Section 1617, Pol. Code, provides that "the powers and duties of trustees of school districts, and of boards of education in cities, are as follows: * * * Ninth. To exclude from schools children under six years of age: Provided that in cities and towns in which the kindergarten has been adopted, or may hereafter be adopted, as a part of the public primary schools, children may be admitted to such kindergarten classes at the age of four years."

These are the only provisions relative to the kindergarten that are to be found in our statutes. They show, at most, an intention on the part of the Legislature to authorize the maintenance by any district, as its option, of kindergarten classes, for the doing of a special work preliminary to the beginning of what is generally designated as primary school work. The fact that it is entirely optional with any district to do or not to do this preliminary special work is alone sufficient to exclude kindergarten classes from the uniform and mandatory system of common schools called for by section 5 of article 9 of the Constitution; and, consequently, from the term "primary and grammar schools," as those words are used in section 6 of the same article, in relation to the use which may be made of the general state school funds, and relegate them to that portion of the "public school system," which includes schools constituted by municipal or district authority, and maintained from other sources. In view of this fact, the fact that the Legislature may have declared that when the kindergarten is adopted by any district, it shall be a part of the public primary schools, is unavailing, so far as the question under consideration is concerned. Such a declaration might make it a part of the public school system, maintainable from other sources than the state fund, but could not operate to bring it within the uniform and mandatory system of common schools applicable in every district, and to the support of which the general state funds must be exclusively applied, any more than could a declaration in regard to a technical or high school established by a district, to the effect that the same, if established, shall be a part of the public grammar schools, make such school a part of such system. It must be borne in mind that

we are not in any way questioning the power of the Legislature to add to or take from the course of study to be pursued in the "common schools" of the state, but are simply discussing the status of a system useful only for the training of children, who have not attained the ordinary school age, which it is left optional with a district to adopt or not to adopt, in its relation to the "common schools" of the state, to which alone any portion of the general state fund may be devoted, and our conclusion is that it is no more a part of such common schools than is the high or technical school. Under these circumstances, the case of Stockton School District v. Wright, supra, is conclusive against plaintiff's claim.

We have no disposition to question the correctness of the decision in *Sinnott v. Colombet*, supra. That case involved the question as to the right of a teacher holding a special certificate for kindergarten work, to be paid for her services in teaching kindergarten classes from the "grammar and primary school fund" of the city of San José, which fund consisted of money levied and collected by said city for school purposes within its limits other than for the maintenance of high schools. The kindergarten system had been adopted by the city board of education as a special study to be taught in the public schools of said city. There was no question in that case as to whether the kindergarten so adopted had become a part of the "common school system" of the state, for the support of which general state school money could be used; and that question was in no way discussed. The decision, in effect, goes simply this far, that when a city has adopted this special system, the kindergarten becomes a part of the primary schools of such city, to the extent that it may legally be maintained at the expense of the city, just as a high or technical school may be so maintained, and does not compel a conclusion that the adoption by a district of this special system makes it a part of the "common schools" of the state, or a part of the "primary schools" of the state, within the meaning of those words as used in the Constitution. To construe the decision as warranting any such conclusion, would, in our judgment, make it clearly opposed to the plain intent of the Constitution. We are inclined to the opinion that the language of section 6 of article 9 of the Constitution is broad enough to authorize provision by the Legislature for the establishment by districts, at their option, of kindergarten schools, as a part of the public school system of the state, supported from other sources than general state school money. At any rate, there is therein no express prohibition of any such provision, and the case of *Sinnott v. Colombet*, supra, is authority for the proposition that this may be done.

The conclusion we have reached probably avoids all constitutional objections that may be successfully made to the legislation rela-

tive to the kindergarten. Construed in this way, such legislation does not conflict with the requirements of the Constitution for a uniform system of common schools in every district of the state, for which alone the general state school money shall be used. This construction, we think, also overcomes the objection that if the kindergarten law is applicable only to "cities and towns," it is violative of other provisions of the Constitution relative to local or special laws. Regarding the kindergartens as a special mode of education to be adopted and maintained at their own expense by such communities as desire them, there appear to be natural and intrinsic reasons which would warrant legislation making provision for their establishment in cities and towns; for we cannot conceive that there could be any demand for or any possibility of the successful practical working of such a system, outside of the centers of population, such as cities and towns, where there are a sufficient number of children of kindergarten age near enough to the school to avail themselves of the privilege thereof.

The alternative writ of mandate heretofore issued is discharged, and the application for a peremptory writ is denied.

We concur: MCFARLAND, J.; VAN DYKE, J.; HENSHAW, J.; LORIGAN, J.; BEATTY, J.

SHAW, J., deeming himself disqualified, does not participate in the foregoing.

148 Cal. 407

HUBBS & MINER DITCH CO. v. PIONEER WATER CO. (Sac. 1,059.)

(Supreme Court of California. Jan. 2, 1906.)

WATERS—APPROPRIATION—PRESCRIPTION.

Where for nine years an appropriator of water continuously diverted a certain amount of water, which deprived an appropriator lower on the stream of the full quantity appropriated by him, and the ditch of the former was maintained continuously and uninterruptedly under a claim of right, and during that time the diversion was not disturbed by the lower appropriator, the upper appropriator acquired a prescriptive title to the use of such amount of water.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, §§ 13-15, 143-152.]

In Bank. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Hubbs & Miner Ditch Company against the Pioneer Water Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Alfred Daggett and George G. Murry (Thomas, Gerstle & Frick, of counsel), for appellant. Charles G. Lamberson, for respondent.

BEATTY, C. J. The parties to this action are California corporations organized for the

purpose, among others, of acquiring water rights, and distributing water for irrigation, manufacturing, and other beneficial uses, and the controversy arises out of their conflicting claims to priority in the appropriation of the waters of Tule river, a stream arising in the Sierra Nevada Mountains and flowing in a southwesterly direction, through Tulare county, to Tulare Lake. The defendant was incorporated in January, 1888, and the plaintiff in November, 1894. The original complaint, filed in April, 1897, was entirely superseded by an amended complaint filed in November, 1897. A supplemental complaint was filed in November, 1900, and on October 30, 1900, the case came on for a second trial upon the issues made by the amended and supplemental complaints and the answers thereto. The trial was by the court, and upon very full findings as to the facts (filed August 30, 1901) a decree was rendered by which the relative priorities of the parties were determined in the manner hereinafter stated. From that decree the defendant appealed within 60 days after the findings were filed, and in support of its appeal contends that the evidence set forth in its bill of exceptions is insufficient to justify the findings and decision of the court. It also alleges errors in the rulings of the court at the trial upon objections to evidence, and contends that the findings are at variance with the pleadings, and the conclusions of law and decree inconsistent with the findings, as well as with the facts admitted by the pleadings. It asks that the judgment be reversed and the cause remanded, with directions to the superior court to enter a decree in its favor, adjudging that it has the prior right as against the plaintiff to divert from Tule river 50 cubic feet of water per second, or at least that it has such prior right to divert 25 cubic feet per second. But, if the court should not deem it entitled to a decree upon the findings and pleadings as they stand, it asks that the judgment be reversed for errors committed at the trial, and for insufficiency of the evidence to sustain the findings and that the cause be remanded for a new trial. In view of these various contentions, it will be necessary, in the first place, to state the substance of the pleadings and of the findings and conclusions of the court.

It is alleged in the amended complaint that in the year 1862 the grantors and predecessors of the plaintiff constructed a ditch capable of carrying 15 cubic feet of water per second, by which they did actually divert that quantity of water from Tule river for the purpose of irrigating their lands, watering their stock, and for other domestic uses, and that said ditch from the date of its construction up to the year 1869 did continuously carry that quantity of water for said uses and purposes. It is alleged that a similar appropriation of 30 cubic feet of water per second was made in 1863 by means of a ditch heading in the river above the head of the

first ditch, and that it continuously carried to the lands of plaintiff's grantors and predecessors that quantity of water for the uses and purposes aforesaid from the date of its construction until the year 1868. It is alleged that in 1806 the two ditches were connected, and the first ditch enlarged below the point of junction so as to carry all the water diverted by both ditches. It is alleged that in 1869 another ditch was constructed by plaintiff's grantors and predecessors heading in the river at a point between the heads of the first two ditches (of 1862 and 1863), and capable of carrying 45 cubic feet of water per second, and which was at the date of its construction connected with the first two ditches, and thereafter, until the year 1893, supplied them with water. It is then alleged that in 1893 plaintiff's grantors and predecessors constructed a new ditch heading in the river at a point about six miles above the head of the ditch of 1869, by which they diverted the 45 cubic feet of water per second previously appropriated by them, and conducted it to their lands, where it has ever since been continuously used for the purposes aforesaid, except during such times as its diversion has been prevented by the unlawful acts of defendant. It is alleged that in the year 1888 the defendant entered upon the channel of the river at a point above the head of the plaintiff's ditch of 1893 and constructed a dam by which it diverted into a ditch theretofore constructed 25 cubic feet of water, which was used by defendant for supplying power to a mill near the town of Porterville; that in 1896 the defendant enlarged this ditch to a capacity of 100 cubic feet of water per second, and thereafter, during the irrigating season of 1896, diverted that quantity of water from the stream; and, finally, that the diversion of said last-mentioned quantity of water interfered with the appropriation by plaintiff of the quantity of water which the plaintiff had been accustomed to divert by means of its said ditch from said river," etc. Upon these and other allegations, not material to the questions arising upon this appeal, the plaintiff prays the judgment of the court enjoining the maintenance of defendant's dam, enjoining any diversion of water by it and for general relief.

The defendant, by its answer to the amended complaint, denies all of the alleged acts of appropriation by plaintiff's grantors prior to the year 1888; denies that it diverted only 25 cubic feet per second in that year and alleges that ever since, and including the year 1888, it has diverted 72 cubic feet of water per second by means of its dam and the ditch connected therewith, and that it has applied the same to the use of a flouring mill and to the irrigation of agricultural lands and the watering of stock and to domestic purposes. It denies any enlargement of the ditch in 1896, or at any time, to a capacity of 100 cubic feet, or at all, and denies that it has ever, at any time, diverted

any water in excess of 72 cubic feet per second, which amount it admits it is diverting, and will continue to divert, if not restrained. For a further answer and defense to the action the defendant alleges that upon its incorporation in January, 1888, it received a conveyance of the canal and water rights of a corporation formed in the year 1866, and known as the "Tule River Pioneer Water Ditch Company," which in the year 1866 had commenced, and in 1867 completed, a ditch by means of which it diverted from the Tule river, at a point several miles above the head of any of the plaintiff's ditches, the full quantity of 72 cubic feet of water per second, which said water was appropriated and distributed for the purposes of running a flouring mill, for irrigation, and watering stock; that the dam in the river was constructed at the same time and ever afterwards maintained peaceably, continuously, and uninterruptedly under claim of right adversely to plaintiff, its predecessors, and grantors from the year 1867 up to the time of its sale and transfer to the defendant in January, 1888; and that during the whole period from 1867 to 1888 the Tule River Pioneer Water Ditch Company diverted and carried away from the channel of said river, by means of said ditch and dam, 72 cubic feet of water per second, which was used for the purposes aforesaid, all of which was done openly, peaceably, continuously, and uninterruptedly, under claim of right adversely to the plaintiff, its predecessors, and grantors, and to the whole world, with the knowledge and acquiescence of the plaintiff, its grantors, and predecessors for more than five years prior to January, 1888. For further and separate answers defendant pleads various clauses of the statute of limitations, and prays for a decree establishing its prior right to 72 cubic feet of water per second, and for general relief.

No reference is necessary to the supplemental complaint and answer, which relate exclusively to changes in the course and connections of some of plaintiff's ditches made since the action was commenced. The material issues, so far at least as concerns the present appeal, are made by the amended complaint and the answer thereto. The substance of these pleadings has been fully stated in order that it may clearly appear what the points of the controversy before the superior court were. And it will be seen that the plaintiff, claiming under appropriations of 45 cubic feet of water, dating back to 1863 and earlier, makes no complaint of any act of the defendant committed prior to the year 1896, when, as alleged, it increased a diversion of 25 feet per second commenced in 1888, and thereafter continued to a diversion of 100 cubic feet per second. The diversion of this last-mentioned quantity of water—i. e., the 75 cubic feet in excess of the 25 cubic feet diverted ever since 1888—is the only injury alleged, for by that means

alone was plaintiff's appropriation of the quantity of water it had been accustomed to divert interfered with. Upon the amended complaint taken pro confesso we cannot see how the court could have gone further than to enjoin the defendant from diverting more than 25 feet per second, for there is nothing in the complaint to show that the diversion of that, or twice that, quantity of water by defendant ever had deprived, or ever would deprive, the plaintiff of any part of the 45 cubic feet claimed by it. The court, however, made findings and adopted conclusions upon which it based a decree more favorable to the plaintiff than its complaint warranted. It was adjudged by the decree that the defendant is the owner and has the prior right to divert from the channel of Tule river at the head of the Pioneer ditch 15 cubic feet of water per second at all times before said plaintiff has the right to divert any water from said river; that after defendant has taken and diverted 15 cubic feet of water per second the plaintiff is entitled to take and divert 12 cubic feet of water per second from said river; that after plaintiff has diverted and taken said 12 cubic feet of water per second the defendant has the right to take and divert 10 cubic feet per second in addition to its first 15; that after this additional diversion by defendant plaintiff has the right to 3 more cubic feet in preference to defendant, and thereafter defendant has the right to divert as much altogether as 60 cubic feet. A perpetual injunction conforming to the terms of the decree follows.

The defendant's appeal is from those parts of the decree which are inconsistent with its claim of prior right to 72 cubic feet per second over any right in the plaintiff to divert any water from said river. The findings of the superior court were against the plaintiff upon its allegations as to diversions and appropriations of water prior to the year 1869. On the other hand, it was found that in 1866 the Tule River Pioneer Water Ditch Company commenced, and that in 1867 it completed, a ditch known as the "Pioneer Ditch," from a point on the river entirely above the head of any of plaintiff's ditches to the vicinity of Porterville, by means of which that company diverted 25 cubic feet of water per second from that year up to the year 1888, and distributed the same for the purpose of running a flouring mill and for the irrigation of lands along the line of the ditch for watering live stock, etc. This finding was, however, qualified as follows: "That of the quantity of water diverted by said Pioneer ditch up to the year 1888 about 15 cubic feet thereof constantly flowing day and night was used for the purpose of running the said flouring mill; and was distributed for the purpose of irrigation, for watering live stock and for domestic purposes at points along the line of said ditch, and said quantity of 15 feet per second was all that was reasonably necessary for all of said purposes." It is next

found that the dam at the head of the Pioneer ditch was constructed in the fall of 1868, immediately below the point where the channel of the ditch connects with the channel of the stream, and has been maintained at the head of said ditch continuously ever since under claim of right adversely to plaintiff and its predecessors, and during all of said time its maintenance has not been interrupted or disturbed by plaintiff or its predecessors, though its existence and maintenance by defendant and its predecessor, the Tule River Pioneer Water Ditch Company, was at all times well known to plaintiff and its predecessors and grantors. It is found that the first appropriation of the waters of Tule river by the predecessors of plaintiff was made in 1869 by means of a small irrigation ditch through which they diverted about six cubic feet of water per second at first; that subsequently the area of land irrigated from this ditch was increased, and the ditch enlarged so that in 1875 12 cubic feet per second were diverted and used for irrigation, etc., during that season of the year when water flowed down the channel of Tule river to the head of the Hubbs & Miner ditch; that said river from the time the Pioneer ditch was constructed down to the commencement of this action carried no water in its channel to the head of the Hubbs & Miner ditch from and after the 1st day of August of each year until the 15th of November following, but carried water the year round down to and past the head of the Pioneer ditch; that said Hubbs & Miner ditch never had a capacity in excess of 6 cubic feet of water per second prior to 1875, and never was connected with the ditches alleged to have been constructed in 1862 and 1863. It is next found that the defendant was incorporated January 8, 1888, and that on the 13th of the same month the Tule River Pioneer Water Ditch Company sold and conveyed to it in fee simple absolute said Pioneer ditch and all the water rights, easements, etc., thereto appertaining; and thereupon defendant entered into possession of said ditch, water rights, etc.; that thereafter it increased its diversion of water until in the year 1893 it was taking from the channel of the river 50 cubic feet per second, and this increase continued until 1897, so that at the commencement of the action it was diverting 60 cubic feet per second, all of which has been used by defendant in irrigating about 3,500 acres of land and for other beneficial purposes. It is next found that after the incorporation of the plaintiff in 1894 it acquired the title to the Hubbs & Miner ditch constructed in 1869, together with all of the water rights and easements appertaining thereto; that in the year 1888 said ditch, when there was sufficient water in the channel of the river at its head, carried away 15 cubic feet per second, which was used for irrigation of 640 acres of vineyards, orchards, grain, and alfalfa. The eleventh finding is somewhat ambiguous in its terms,

but I construe it to mean that the defendant never, after it became the owner of the Pioneer ditch, made any enlargement thereof prior to the fall of 1888, and that it has never at any time diverted from the river more than 60 cubic feet of water per second. The twelfth finding relates to the plea of the statute of limitations, and is as follows: "That the said Tule River Pioneer Water Ditch Company, from and including the year 1867 up to the time said Pioneer ditch was sold and conveyed to the defendant, as hereinafter stated, diverted and carried away from the channel of said Tule river, by means of said Pioneer ditch and said dam constructed at the head thereof, 25 cubic feet of water per second, which said water was diverted and used in the manner stated in the fourth paragraph of these findings, but no more than 15 cubic feet of water per second was necessarily used in said manner for said purposes, and that the diversion of said water, to the quantity of 15 cubic feet per second, and the maintenance of said dam, was done by said Tule River Pioneer Water Ditch Company, peaceably, continuously, uninterruptedly, under a claim of right adversely to said plaintiff, its predecessors, and grantors, and to the whole world, with the knowledge and acquiescence of the plaintiff, for more than five years immediately prior to the 13th day of January, 1888, and thereafter until the commencement of this action, and the said Tule River Pioneer Water Ditch Company during all of said times paid all state and county and other taxes, which were levied and assessed upon said Pioneer ditch and said dam and the water right appertaining to said Pioneer ditch and belonging thereto." Other findings of the court relate to matters immaterial to this discussion.

The argument of appellant opens with a discussion of certain alleged errors of the superior court in ruling upon objections to evidence offered at the trial by respondent. But since these rulings, if erroneous, could have had no effect, except to render the findings somewhat less favorable to appellant than otherwise they would have been, it will be wholly unnecessary to consider them, if upon the facts found and admitted it shall be held that appellant is entitled to a decree awarding it the prior right to not less than 25 cubic feet of water per second. For, as above stated, we understand the position of counsel to be that a retrial of the issues is desired only in case such a modification of the decree cannot be made upon the record as it stands. We shall, therefore, first consider the question of modification. The claim of defendant to a prior right to 50 cubic feet per second cannot be sustained. Both plaintiff and defendant are mere appropriators of the waters of a natural stream for use on nonriparian lands, and since it is found that plaintiff made a valid appropriation of at least 12 cubic feet per second before defendant ever diverted more than 25

cubic feet per second, it is clear that defendant cannot, as an appropriator, claim a prior right to more than 25 cubic feet on any theory of the law of appropriation. Nor can he claim a superior title to a greater quantity by prescription. Five years adverse user is the period of prescription in such cases, and there is no finding that defendant diverted 50 cubic feet per second, or any definite quantity in excess of 25 cubic feet, prior to the season of 1893, which was less than five years before the commencement of the action. It is not inconsistent with the findings to suppose that defendant, as early as 1892, diverted more than 25 cubic feet per second through the Pioneer ditch, but this is a mere conjecture upon which no order can be based. All that clearly appears is that from the year 1888, down to the year 1893, defendant continually diverted and applied to beneficial uses 25 cubic feet per second. In 1893 it was using 50 feet, and thereafter increased its appropriation to 60 feet.

The claim of prior or prescriptive right to 25 cubic feet per second rests upon firmer ground. It is by no means clear that the failure of defendant's predecessors to use the entire quantity of water by them diverted in 1868, down to the year 1888, would cut their appropriation down to the quantity used. There are cases which hold that the diversion of a large quantity of water is a good appropriation of the whole ab initio, although it is not all used at first, if the design is to gradually extend the use, and that design is carried out before an adverse appropriation of the surplus below the point where it is returned to the stream. But this is a point which has not been argued, and we merely allude to it in passing. For, irrespective of any claim to priority as an appropriator, we think the findings sustain the conclusion that defendant has a perfect prescriptive title to 25 cubic feet per second. The twelfth finding above quoted does not sustain this claim, for in terms it deals only with the rights acquired by defendant's predecessor, the Tule River Pioneer Water Ditch Company, to the use of 15 cubic feet per second. But in the fourth, sixth, seventh, and other findings facts are found which include all the elements of a prescriptive title in defendant to the use of 25 cubic feet per second, superior to any right in plaintiff to any water at all. It is there found that from the year 1868 to the beginning of the action the dam by which water is diverted from the stream through the Pioneer ditch has been maintained continuously, and uninterruptedly, under a claim of right, and adversely to the plaintiff and its predecessors and grantors, and that during all of said time the maintenance of said dam was not disturbed by the plaintiff, or any of its grantors or predecessors in interest, and that its existence and maintenance by defendant and its predecessors was during all said time well known to plaintiff and its predecessors. It

is found that in 1888 defendant succeeded to the title and rights of the Tule River Pioneer Water Ditch Company in and to said dam and ditch, and during that season, and ever since, has continuously diverted and applied to beneficial uses 25 cubic feet of water per second, which, by 1898, was increased to 50 cubic feet, and since that time to 60 feet. Necessarily the use of this water has been adverse to the right asserted by plaintiff and its predecessors, and actionable at all times when such use deprived them of the full quantity by them appropriated, and this, according to the findings, has happened every year between August and November, when defendant was diverting 25 feet per second through the Pioneer ditch, and no water flowed to the point of plaintiff's diversion. The authorities which support this view are numerous and uniform. We cite the following: *Coonrad v. Hill*, 79 Cal. 587, 21 Pac. 1099; *Smith v. Hawkins*, 110 Cal. 122, 42 Pac. 453; *Gallagher v. Montecito V. W. Co.*, 101 Cal. 242, 35 Pac. 770; *Spargur v. Heard*, 90 Cal. 222, 27 Pac. 198; *Hellbron v. Last Chance Co.*, 75 Cal. 117, 17 Pac. 65; *Alhambra Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379.

The judgment of the superior court is reversed, and the cause remanded, with directions to the superior court to enter a modified decree upon the findings, awarding to the defendant, as against the plaintiff, the prior right to divert from the Tule river 25 cubic feet of water per second, after which the plaintiff will be entitled as against the defendant to the next 15 cubic feet of water per second, and the defendant against the plaintiff to the next 35 cubic feet of water per second.

We concur: MCFARLAND, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.

1 Cal. App. 509

KESSLER v. KESSLER et al.

(Court of Appeal, Second District, California.
Dec. 20, 1905.)

1. DIVORCE—WIFE LIVING APART FROM HUSBAND—JUSTIFICATION.

The fact that a husband deposited in the name of his daughter an amount of money which constituted a small share of his estate, and that both the husband and wife were ill and nervous, and that in a quarrel he had said to her that what she would get out of his property she would have to earn, did not, in a suit by her for divorce, warrant a finding that the wife was justified in leaving the husband.

2. HUSBAND AND WIFE — HUSBAND'S DUTY TO SUPPORT—ABANDONMENT.

Civ. Code, § 156, makes the husband the head of the family, and provides that he may choose any reasonable place or mode of living, to which the wife must conform. By section 175 a husband, abandoned by his wife, is not liable for her support until she offers to return, unless she was justified by his misconduct in abandoning him. *Held* that, where a wife abandoned her husband without justification, he was not required to solicit her return,

it being her duty to return; and until she did so he was under no obligation to support her.

3. SAME—CONVEYANCE IN FRAUD OF WIFE'S RIGHT.

A wife's right of maintenance is within the protection of Civ. Code, § 3439, making transfers to delay or defraud creditors void as against them.

4. SAME—IMPAIRMENT OF RIGHT—EVIDENCE.

Inasmuch as, under Civ. Code, § 157, neither spouse has any interest in the property of the other, a conveyance of land by a husband did not affect his power to perform his obligation to maintain his wife, so as to give her any rights under section 3439, making transfers to hinder or delay creditors void as against them, where the husband had ability to earn wages and carry on business.

5. DIVORCE—GROUNDS FOR RELIEF.

In an action for divorce and alimony and to declare a trust in land conveyed by the husband, the fact that defendant owned property which he represented to be worth a certain amount, and upon the faith of which the wife married him, afforded no grounds for relief.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 37.]

6. SAME—JUDGMENT FOR ALIMONY—APPEALABILITY.

A judgment for alimony pendente lite is a final one, and appealable.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 764.]

7. SAME—APPEAL—DISPOSITION.

Judgments for alimony pendente lite fell with the main judgment, though their existence was recited therein; it appearing on appeal that no final judgment for alimony or maintenance was warranted under the facts.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Suit by Cella E. Kessler against William J. Kessler and others for divorce, alimony, and to declare a trust. From a judgment for defendant denying a divorce, and for plaintiff for maintenance, and declaring a trust, all the defendants appeal. Reversed.

Rehearing denied by Supreme Court February 15, 1906.

Edwin A. Meserve and Luther G. Brown, for appellants. J. L. Murphey, for respondent.

ALLEN, J. Upon a reconsideration of this case on a rehearing we are of opinion that the judgment and order of the trial court should be reversed to the extent and on the grounds stated in the opinion originally filed, which is as follows:

Action for divorce, alimony, and to declare a trust. Judgment for defendant Kessler denying a divorce, and for plaintiff for \$50 per month maintenance during her natural life, with decree that defendant Minor holds property described in complaint in trust for defendant Kessler, from which judgment of maintenance and decree declaring trust all the defendants appeal.

The court finds that plaintiff and defendant Kessler were married in 1901, and are husband and wife; that at the date of the marriage defendant was the owner of certain real property of the value of \$15,000, sub-

ject to an incumbrance of \$3,000; that, in addition, he was possessed of money to the amount of \$1,300, and some other personal property of small value; that he had two daughters by a former marriage, one of whom is defendant Anita Minor, the other a daughter of 17 years; that shortly after the marriage the husband, preparatory to a trip to Mexico, placed the \$1,300 in bank in the name of his daughter Anita, who, the court found, held the same in trust for the father. This the wife objected to, and quarrels were precipitated on account thereof; that afterwards, on or about September 12, 1902, plaintiff left defendant's home and has never since lived with him as his wife; that afterwards, on October 8, 1902, Kessler made a conveyance of all his separate estate, being the premises described in this action, to his daughter Anita Minor; that at said date he was of the age of 46 years, and had ability to earn wages and carry on business; that after the plaintiff left her home the husband invited her to return, but such invitation was not in good faith and was not accepted. She never offered at any time to return to him. In June, 1903, she commenced this action, and in her complaint specifies acts of the grossest cruelty on the part of her husband, on account of which she justified her living apart from him. The court, upon the final hearing, found none of the material allegations to be true, but, on the contrary, "that it is not true that the actions of the defendant Kessler were sufficient to constitute extreme cruelty towards plaintiff," and, further, that the following part of paragraph 7 was untrue: "That her condition became so intolerable by reason of his actions that she was forced to leave him." The only facts of any materiality found by the court in plaintiff's favor were that before the separation both parties were nervous and irritable, caused by ill health, and that upon one occasion, during a controversy over the payment to the daughter of a sum of money, defendant Kessler said to plaintiff that she would get only what she helped to earn, and nothing more. But the court further finds that at this time, or shortly after this quarrel, a reconciliation took place, and each mutually forgave their unkindness toward each other. From these facts the trial court, as a conclusion of law, determined that the wife was justified in leaving her husband, and, while it denied the divorce, rendered a judgment in plaintiff's favor for \$50 per month as for her separate maintenance, and in such judgment found that certain other judgments, aggregating \$1,250, for alimony pendente lite, were unpaid, all of which sums were made a charge upon the premises conveyed to Mrs. Anita Minor, and the deed to her was declared to be in fraud of plaintiff's rights, and as to plaintiff Mrs. Minor held only the legal title in trust for her father, and directed a sale of the premises upon default of payment.

The first contention of appellants is that

the conclusion of law and judgment that plaintiff was justified in leaving her husband have no support in the findings. With this we quite agree. The fact that the husband would deposit in his daughter's name an amount of money then constituting but a small share of his estate, and that both husband and wife were sick and nervous, and that in a quarrel he had said to her that what she would get out of his property she would have to earn, were in themselves no justification for the wife's abandonment, were we even to disregard the subsequent forgiveness and reconciliation. The judgment for separate maintenance was unwarranted. By section 156, Civ. Code, the husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto. Section 175, Civ. Code, provides: "A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified by his misconduct in abandoning him." There is nothing in the record to indicate that the place or mode of living provided by the husband was not all that could be desired, and it does appear that she abandoned him and his home without justification. The wife having so abandoned the husband, he was not required to solicit her return, and that he did so, either in good or bad faith, is not material. Under our Civil Code it was the duty of the erring one to offer to return, and until she did so no obligation of support rested upon the husband, and no violation of duty arose warranting a judgment against him.

Appellant Minor next contends that, there being no violation of the obligation of support, plaintiff was not a creditor and not interested in the husband's separate estate, and thereupon the decree against her and her property was without authority. With this we also agree. Section 155 of the Civil Code provides: "Husband and wife contract toward each other obligations of mutual respect, fidelity and support." This support, contracted by the husband, is a duty to be performed subject to the provisions of sections 156 and 175, heretofore cited. Until that obligation is violated no cause of action arises in favor of either. While it is true, as stated in *Murray v. Murray*, 115 Cal. 273, 47 Pac. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97, that the right of maintenance is so far within the protection of section 3439, Civ. Code, that it avoids transfers made with intent to defeat that right, yet it must follow as a natural consequence that, in order to maintain an action in equity to enforce such right, the plaintiff should show, and the court should find, that her conduct had been such as to entitle her to the right of separate maintenance. Respondent, however, claims that by the conveyance of his property the husband placed it without his power to perform the obligation of maintenance. This cannot be truthfully said of one able to earn wages and carry on business. To

hold otherwise would be to say that every man without property violates his marriage obligation as soon as it is taken, and the wife may leave him upon the theory that he has no ability to perform his obligation of support. The everyday observation of life teaches us that the indulgent husband and father, who is diligent in caring for his wife and family is more frequently found among those whose only revenue is derived from their hands or brains, than among those possessed of means, curtailing every expense that they may add more to a present sufficiency. In this state, under section 157 of our Civil Code, "neither spouse has any interest in the property of the other." Hence it follows that, if the obligation of support was not affected by this transfer to the daughter, the plaintiff had no interest which could be affected. We do not regard with favor the contention of respondent that the fact that Kessler owned property which he represented to be worth \$15,000, and upon the faith of which plaintiff married him, affords ground of relief. Purely mercenary marriages may be, and undoubtedly are, frequently contracted; but, when these unnatural alliances are sought, the law wisely provides for a marriage settlement, or antenuptial contract, out of which rights may be established, and in the absence of such agreement the general property laws of the state control. Where the right of support has not been affected by the transfer of property in which she has no other interest, no cause of action lies in the wife to disturb conveyances thereof. *Greer v. Greer*, 135 Cal. 121, 67 Pac. 20. Nor can any rule suggested in *Volkmar v. Volkmar* (Cal. Sup.) 81 Pac. 413, have application in this action.

Nor, in our opinion, did the judgments for alimony pendente lite entitle the plaintiff to a decree as against defendant Minor. These orders were final judgments and appealable. *Sharon v. Sharon*, 67 Cal. 198, 7 Pac. 456, 635, 8 Pac. 709. When granted, they have nothing to do with the final judgment in the case, and will not be affected by it. *Baker v. Baker*, 136 Cal. 304, 68 Pac. 971. The mere recital in the final judgment and decree in this case of the existence of such former judgments did not give to them any additional vitality or force. Had the findings and judgment been correctly rendered in favor of the plaintiff, these previous judgments rendered in the same action might very properly have been included in the order directing the application of the proceeds of the sale made in the event of default of the payment of the final judgment for maintenance; but, there being no final judgment for alimony or maintenance possible under the facts, as a consequence no decree or order affecting the real property of the defendant Minor could be made. These previous judgments and any orders in relation thereto were but incidents of a final judgment, and the orders in relation thereto must fall when the main judgment falls.

We are further of the opinion that it could not be said in any event, under the facts of this case, that the conveyance was made to defeat these judgments pendente lite. For, as before shown, the wife was not a creditor, and had no cause of action against her husband, either at the date of the filing of the complaint or the final decree, and how can one be said to have made a conveyance to defeat a claim not in existence, or to defeat the collection of a judgment given as expense money in an unsuccessful attempt to establish such claim? In our opinion, plaintiff had no claim or interest in the real estate standing in the name of Mrs. Minor at the date of the final decree, and had no right to question the conveyance to her, and the decree and judgment of the court in that behalf have no support in the findings.

Judgment reversed, with directions to enter a judgment upon the findings in favor of defendant Minor; also, judgment in favor of defendant Kessler in conformity with this decision.

I concur: GRAY, P. J.

SMITH, J. I concur in the judgment, and, generally, in what is said in the opinion as to the judgment of the lower court for maintenance. I concur, also, in the conclusion of the majority of the court as to attorney's fees and alimony pendente lite on the grounds stated in the opinion.

2 Cal. App. 329

McCONNELL v. FOX et al.

(Court of Appeal, Second District, California.
Dec. 2, 1903.)

CONTINUANCE—ABSENCE OF PARTY—SHOWING
—SUFFICIENCY.

On a motion for a continuance by defendant in a suit to quiet title, it appeared that, though the case had been at issue for nine months, he left the state after it was set for trial and about 20 days prior to the trial, his reason for absenting himself being that he desired to sell certain bonds for a city; but there was no showing that it could not have been attended to by some other person, or that his efforts in in such direction could not have preceded or followed the date of the trial. Defendant's claim to the land did not appear from the answer, and the showing for continuance consisted of an affidavit of defendant's attorney and a telegram from defendant. *Held*, that there was no abuse of discretion in denying the motion.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Lee A. McConnell against Edwin R. Fox and others. Judgment for plaintiff. From an order denying defendant Fox a new trial, he appeals. Affirmed.

Cole & Cole, for appellant. F. C. Austin and D. M. McDonald, for respondent.

GRAY, P. J. This is an action to quiet title. The plaintiff had judgment, and defendant Fox appeals from an order denying him a new trial.

The sole ground urged for reversal is that the court erred in denying defendant's motion for a continuance. We think the matter of continuance was in the discretion of the trial judge, and that he did not abuse such discretion. The showing was that, though the case had been at issue for nine months, the defendant voluntarily went to New York after the case was set for trial and some 20 days prior to said trial. His reason for absenting himself is stated to have been that he desired to negotiate and sell certain bonds for the city of Los Angeles in the money centers of the East. There is no showing that this could not have been attended to for the city to its greater advantage by some other person, nor does it appear to what extent the defendant's presence in New York would promote the sale of the bonds or was necessary thereto. Nor is it shown that his necessary presence in New York could not have preceded or followed the date of this trial without injury to himself or the city of Los Angeles. The showing made is weak, much weaker than in the case of *Wilkinson v. Parrott*, 32 Cal. 102; and there the action of the trial court was upheld upon the ground that the refusal of the court to postpone the trial upon such a showing did not amount to an abuse of discretion. Besides, there are several features of the case that naturally make us hesitate to interfere with the action of the court in denying a new trial. The suit is to quiet title. What the defendant's claim to the land consists in nowhere appears. He contents himself in the answer with denying that he "has no estate, right, title, or interest in said land and premises, or in any part thereof." This is the only hint we have that he is in any way interested in the result of the suit. The showing for continuance consisted of an affidavit of defendant's attorney and a brief telegram from defendant, and the affidavits of plaintiff in rebuttal; and, though these had proven insufficient to secure the favorable action of the court in the first instance, yet nothing was added to them on the motion for a new trial made some nine months later. No affidavit of the defendant himself was at any time presented to the court, and, of course, the material parts of his attorney's affidavit must of necessity have been based upon hearsay. Of course, if the defendant's only purpose was delay, most anything would do, but, to invoke successfully the favorable discretion of the court, a stronger showing should have been made.

The appeal is without merit. The order is affirmed.

I concur: ALLEN, J.

SMITH, J. I concur in the judgment. I am not prepared to say that on the showing made by the appellant the case should not have been continued, or that the denial of a continuance by the court was not an abuse of discretion. But in the absence of the evi-

dence, or of any showing to the contrary on the motion for new trial, either by the affidavit of the defendant or otherwise, I think it must be presumed, in support of the order of the trial court, that the case was fairly tried, and the appellant in no wise injured by his absence, and that there was no error or abuse of discretion in the denial of the motion for new trial.

2 Cal. App. 195

DAVIS v. BAKERSFIELD OIL & STOCK EXCH.

(Court of Appeal, Second District, California.
Nov. 16, 1905.)

SET-OFF AND COUNTERCLAIM — ADVANCES — PARTIES.

Certain associates doing business under the same name and style afterwards adopted by a corporation organized by them, and keeping a bank account under the same name, agreed to advance to Y. \$50 per month, and accept in payment stock of a corporation thereafter to be organized at par. Y. executed receipts for such monthly advances, which were paid by the bank in which the association kept its funds. The corporation, after its organization, opened an account in the same bank, under the same name, and Y., for eleven months thereafter, continued to present vouchers for \$50 each month for such advances, which the bank paid. Held, that such advances were not available by the corporation as a counterclaim in an action against it on a claim for Y.'s unpaid salary, which had been assigned to plaintiff.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by George J. Davis against the Bakersfield Oil & Stock Exchange. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Smith & Allen, for appellant. Emmons & Irwin and C. E. Young, for respondent.

ALLEN, J. Action by plaintiff, as assignee of one Young, to recover salary due Young from defendant. Judgment for plaintiff, from which, and an order denying a new trial, defendant appeals.

The only question presented upon this appeal which is urged by counsel is as to the sufficiency of the evidence to support the finding that "It is untrue that the defendant advanced to C. E. Young the sum of \$1,457.56, or any other sum." The evidence discloses that a number of persons, prior to May, 1901, were engaged in business under the same name and style afterwards adopted by a corporation organized by them; that these persons kept a bank account under such name, and entered into an agreement with Young that they would advance him \$50 per month, and accept in payment therefor stock of the corporation thereafter to be organized at its par value; and that upon the faith of this agreement Young executed receipts for such monthly advances, and the same were paid by the bank in which the association kept its funds. The corporation, after its organization, opened an account in the same

bank under the same name, and Young, for 11 months thereafter, continued to present his vouchers for \$50 during each month on account of such agreed advances, and the same were paid by the bank, but out of which fund it does not with certainty appear. It is not denied that a subsequent agreed salary of \$150 per month to Young was unpaid to the extent of \$375, and that the same, for value, was assigned to plaintiff, for which judgment was awarded.

Appellant's contention, however, is that these advances of \$50 per month were made in fact by the corporation, through its president, and constituted a valid counterclaim against plaintiff's demand for unpaid salary. This proposition is untenable. The court was justified in finding, as it did, that the corporation did not make the advancements and had nothing to do with the contract in relation thereto. If the fact were conceded that the bank made the payments out of the wrong account, and charged up the vouchers to the corporation when they should have been charged to the association, still it would not form the basis of an action in favor of the corporation and against Young, and especially against one who, in good faith, for value, had purchased the salary claim. But, as before stated, it is not clear that the bank even paid the money out of the corporate fund. Some surmises of the president of the bank to that effect are not convincing.

There is no prejudicial error in the record, and the judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

7 Cal. Unrep. 245

Ex parte OATES.

(Court of Appeal, Third District, California.
Nov. 10, 1905.)

HABEAS CORPUS—INABILITY OF JUSTICES TO AGREE ON JUDGMENT—DISMISSAL.

Rule 33 (78 Pac. xiii), providing that when the judges of a District Court of Appeal fail to agree on a judgment in any cause, and their opinions have been forwarded to the Supreme Court, that court will order such cause to be transferred to the Supreme Court or to another District Court of Appeal, to be there heard and determined, does not apply to habeas corpus proceedings; and where three of the justices fail to agree in such proceeding, as required by Const. art. 6, § 4, the writ must be dismissed.

Application of W. W. Oates for a writ of habeas corpus. Writ dismissed.

W. W. Middenoff, for petitioner. E. J. Williams, for respondent.

CHIPMAN, P. J. The petition for the writ was ordered to be heard by the court. Under the provisions of the Constitution the concurrence of three justices shall be necessary to pronounce a judgment. Article 6, § 4, Const. Rule 33 (78 Pac. xiii), provides that when the judges of a District Court of Appeal fail to agree on a judgment in any

cause, and their opinions have been forwarded to the Supreme Court, that court will order such cause to be transferred to the Supreme Court or to another District Court of Appeal, to be there heard and determined. We do not think this rule applies to habeas corpus proceedings. In the matter now before us the three justices constituting the court are unable to agree upon the question as to whether or not the court before which the contempt proceedings were brought had jurisdiction.

The writ is therefore dismissed, and the petitioner remanded to the custody of the sheriff of San Joaquin county.

We concur: BUCKLES, J.; McLAUGHLIN, J.

2 Cal. App. 141

KING v. ELTON et al.

(Court of Appeal, Second District, California.
Nov. 9, 1905.)

NEW TRIAL—VERDICT—IMPEACHMENT—AFFIDAVITS—SUFFICIENCY.

The affidavits of two credible jurors in behalf of one moving for a new trial to the effect that there had been a quotient verdict, as against seven jurors making affidavits for the other party, was sufficient to sustain an order granting a new trial, especially where the statements contained in the affidavits of the two were not expressly denied or met by any inconsistent statement.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Mortimer A. King against Charles Elton and others. From an order granting defendants a new trial, plaintiff appeals. Affirmed.

Stephens, Sherer & Neighbours, Burrell D. Neighbours, and Albert Lee Stephens, for appellant. W. B. Matthews, Leslie Hewitt, and Hartley Shaw, for respondents.

SMITH, J. This is an appeal from an order made after a judgment for the plaintiff granting the defendants a new trial. The motion was granted solely on the ground of misconduct of the jury, "in that the jurors were induced to assent to said verdict by a resort to the determination of chance."

The verdict was given by 9 jurors out of 12, and the order was based on the affidavits of two of the nonconcurring jurors, which were to the following effect: That after all nine jurors had agreed upon a verdict "it was thereupon moved by one of said nine jurors that each juror should put down privately on a slip of paper the amount which he favored for the verdict; that these several amounts should be added together and their sum divided by twelve, and that the quotient so obtained should be the amount of the verdict; that said motion was agreed to and carried by the votes of nine jurors"; that this plan was carried into effect, resulting in the adoption of the amount of the verdict, "which amount was then at once,

without further discussion and consideration, in pursuance to said previous agreement, accepted by said nine jurors as to the amount of the verdict, and entered in the form of verdict provided by the court." To rebut these affidavits, the affidavits of 7 of the concurring jurors were filed, and it is claimed that these contradict the affidavits filed by defendants, and that the preponderance of the evidence was so great that it was an abuse of discretion in the court to grant the motion. But we think neither point can be sustained. The statement of two credible witnesses against 7 would have been quite sufficient to sustain the decision of the court; and in this case the statements are not expressly denied, nor is there anything inconsistent with them in the statements of defendants' witnesses.

The order appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

2 Cal. App. 146

BANK OF PASO ROBLES v. BLACKBURN.
(Court of Appeal, Second District, California.
Nov. 9, 1905.)

BILLS AND NOTES—PLEADING—COMPLAINT—DEFENSIVE MATTER.

In a suit on a note secured by mortgage, which mortgage had been extinguished by agreement between the parties, it was not necessary for plaintiff to allege the execution of the mortgage or its extinction; Code Civ. Proc. § 437, providing that defendant's answer shall contain any new matter constituting a defense.

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by the Bank of Paso Robles against Frank J. Blackburn. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Bishop, Wheeler & Hoefler, Louis Lamy, and R. W. Putnam, for appellant. W. H. Spencer, for respondent.

SMITH, J. The suit was brought on the promissory note of date March 12, 1900, set out in the complaint, which is in the ordinary form. One of the defenses set up in the answer is that the note was secured by a mortgage on certain growing crops, and that plaintiff took possession of the mortgaged property and sold the same. The court finds that the mortgage was executed to secure the note in suit, "and also to secure to plaintiff the payment of such other moneys as might thereafter be advanced," etc.; that prior to November, 1900, plaintiff advanced to defendant, under the provisions of the mortgage, the sum of \$400, of which \$356.80 has been repaid and no more; and "that more than 2½ years prior to the commencement of this action all the security given by defendant to plaintiff to secure the payment of said note and said advances had, without any act of the plaintiff, become valueless," etc. From the evidence it appears that

by an agreement between the defendant and the plaintiff's agent the mortgaged crop was transferred by the former to the latter in satisfaction of the amount due for advances.

The only point made by appellant is in effect that it was incumbent upon the plaintiff to allege the execution of the mortgage and its subsequent extinction, and that the complaint was fatally defective on this account. But the point is obviously untenable for two reasons: The facts referred to constituted no part of the plaintiff's cause of action, and come clearly within the definition of "new matter" (Code Civ. Proc. [Revisers' Ed.] § 437, and authorities cited in note on page 370 et seq.); and, were it otherwise, the error would be immaterial.

The judgment is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

2 Cal. App. 181

COUSON v. WILSON.

(Court of Appeal, First District, California.
Nov. 16, 1905.)

1. EASEMENTS—INJURIES TO WAYS—PURCHASER OF DOMINANT ESTATE—DAMAGES.

A person injuring a way appurtenant to land is liable to a subsequent purchaser of the land only for the damage sustained by him since his purchase.

2. SAME—EVIDENCE—ADMISSIBILITY.

Where, in a suit by a purchaser of land to which a road was appurtenant for injury to the road resulting from the removal of culverts, it was shown that the culverts were removed in November, 1900, and that the purchaser purchased the land in September, 1901, the court erred in overruling an objection to a question asked the purchaser as to what the damage had been to the road since the removal of the culverts, as against the objection that it did not limit the damage done to the road since the purchaser became the owner of the land.

3. APPEAL—HARMLESS ERROR.

That the effect of the question could have been obviated by cross-examination did not cure the error.

4. EASEMENT—INJURIES TO WAYS—FINDING OF DAMAGES—EVIDENCE—SUFFICIENCY.

In a suit by a purchaser of land to which a road was appurtenant, for injury to the road by reason of the removal of culverts therein, the evidence showed that the culverts were removed in November, 1900, and that the purchaser became the owner of the land in September, 1901. He testified that the road had been damaged \$300. A witness testified that it would take \$150 to replace the culverts. There was no evidence of any damage to the road after the purchaser became the owner of the land. *Held*, that a finding that the road of the purchaser was damaged \$150 was not supported by the evidence.

5. SAME—FINDINGS—CONSTRUCTION—MATURITY.

A finding, in a suit by a purchaser of land to which a road was appurtenant for injury thereto by reason of the removal of culverts therein, that the road of the purchaser had been damaged a specified sum, if construed as a finding of the damage to the road by the removal of the culverts, was irrelevant, unless it showed that the damage occurred while the purchaser was the owner of the road.

6. APPEAL—RECORD—BILL OF EXCEPTIONS—PRESUMPTIONS.

A bill of exceptions is presumed to contain all the evidence material to errors specified, and, in case there is any evidence which will overcome that in the bill, it is the duty of the respondent to cause it to be incorporated therein.

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by W. B. Couson against John William Wilson. From a judgment for defendant, plaintiff appeals. Reversed.

J. E. Gardner, for appellant. Hugh R. Osborn and Benj. K. Knight, for respondent.

HARRISON, P. J. The plaintiff is the owner of a tract of land in Santa Cruz county bordering upon the county road leading from Watsonville to Santa Cruz, upon which there is a right of way appurtenant to an adjacent tract of land known as the "Wilson Ranch," and extending therefrom to the county road. For the purpose of enjoying this right of way, the owners of the Wilson ranch constructed a roadway about 18 years ago across the plaintiff's land, with several culverts therein, for the purpose of carrying below the road the surface water that would otherwise accumulate upon the upper or higher slopes of the land. In November, 1900, the plaintiff destroyed these culverts, with the result that thereafter the water flowed along the road, washing it out and making it almost impassable for vehicles, and carrying much debris down upon the lower portion of the land. The defendant became a part owner of the Wilson ranch in September, 1901, and thereupon entered into possession thereof, and thereafter used the said roadway in passing back and forth between his ranch and the county road. After he went into possession of the ranch the plaintiff demanded of him that he repair the roadway and fill it in and grade it in such a manner that the surface water would not be cast upon the lands below the road; and upon his refusal to do so brought this action to have the road declared a nuisance, and to recover damages sustained by him by reason of its defective condition. The defendant, in his answer to the complaint, and also by way of cross-complaint against the plaintiff, set forth many of the above facts, and alleged that by reason of the acts of the plaintiff in destroying the said culverts and making the road impassable he had sustained damage by being delayed in marketing his produce and in the enjoyment of his right to pass along the road, and that the road belonging to him had also been damaged in the sum of \$300. The cause was tried by the court, and, in addition to finding the facts above set forth, it also found that the plaintiff had not been damaged by any of the acts of the defendant, and that defendant had not sustained any damage by being delayed in marketing his produce or in the enjoyment of his right to pass over the road, but that he had been damaged in the sum

of \$150 by reason of the wrongful removal of the culverts by the plaintiff. Judgment was thereupon rendered in favor of the defendant and against the plaintiff for the sum of \$150, with a perpetual injunction against the plaintiff from in any way interfering with the defendant's free use and enjoyment of the road. A motion for a new trial was made by the plaintiff and denied, and from this order the present appeal has been taken.

At the trial of the cause the defendant was called as a witness in his own behalf, and, after testifying that the plaintiff had removed the culverts in November, 1900, and that he had become the owner of the Wilson ranch in September, 1901, was asked: "What has been your damage, if any, Mr. Wilson, to the road since the tearing out of these culverts one year ago last November?" To this question the plaintiff objected on the ground that it was incompetent, irrelevant, and immaterial, and that the question was not limited to the damage done to the road since the defendant became one of its owners. The objection was overruled, and an exception taken by the plaintiff to the ruling of the court. The objection to this question should have been sustained. The plaintiff is not liable to the defendant for any injury done to the road while it was the property of another, nor is the defendant entitled to any damages which he had not himself sustained. He was a stranger to the property when the culverts were destroyed, and could recover from the plaintiff only such damage as the plaintiff had caused him after he became the owner, and when this objection was pointed out the court should have directed the defendant to limit the inquiry as suggested by the objection. The contention of the respondent that the effect of the question could have been obviated by cross-examination does not cure the error. If no objection had been made to the question, the appellant would have had the right to show in his defense that the damage was caused at a time when he would not be liable therefor, but he had also the right to insist that the respondent should show that it was caused at a time when he would have been liable. The burden was upon the respondent to establish his right of recovery by competent and relevant evidence. He was not entitled to introduce irrelevant evidence and throw upon his adversary the burden of overcoming its effect by showing its irrelevancy.

Although the defendant was thus asked, "What has been your damage to the road since the tearing out of the culverts?" he only testified in reply that "the road has been damaged to the extent of \$300." No other evidence was given of any damage sustained by him, and the court accordingly found against such allegations of individual damage. He further testified that within a week after the culverts were taken out there were heavy rains, and that that was

when most of the damage was done to the road; that he based his testimony of \$300 damages on the cost of repairing the road and fixing it up again as it was; that it had not been repaired at all. Another witness testified that it would cost \$150 to replace the culverts. There was no evidence of any damage done to the road by the plaintiff, or that the road had been in any respect damaged after the defendant became an owner of the Wilson ranch, and it must be held that the evidence was insufficient to sustain the finding of the court that "the defendant has been damaged in the sum of \$150 by the wrongful removal of the culverts by the plaintiff," or its other finding that, by reason of the wrongful removal of the culverts by the plaintiff, "the road of the defendant" has been damaged in the sum of \$150. There was no "road of the defendant" when the culverts were removed; but, if this latter finding is to be construed as simply declaring the damage done to the road by the removal of the culverts, then it is irrelevant to any right of the defendant, unless shown to have been caused while he was the owner of the road.

The respondent is in error in suggesting that this finding is to be sustained upon the ground that there may have been other evidence in its support than such as is set forth in the bill of exceptions. It is to be presumed that the bill of exceptions contains all the evidence given at the trial which is material to the points specified as error. *Abbey Homestead Ass'n v. Willard*, 48 Cal. 614; *Judson v. Lyford*, 84 Cal. 505, 24 Pac. 286. If there was any evidence which would explain or overcome that set forth in the bill, it was the duty of the respondent to cause it to be incorporated therein.

Certain other findings are objected to as not sustained by the evidence—for instance, the finding that the defendant is the "sole owner" of the Wilson ranch, or that he was an owner at any time prior to September, 1901, or that the defendant is the owner of a private road, instead of a right of way over the lands of the plaintiff, or that he is entitled to have the same left free and unobstructed by the plaintiff; but, as the order denying a new trial must be reversed, and these objections may not exist when another trial shall be had, it is unnecessary to give them further consideration.

The order denying a new trial is reversed.

We concur: HALL, J.; COOPER, J.

2 Cal. App. 142

KIPP v. O'MELVENY et al.

(Court of Appeal, Second District, California. Nov. 9, 1905.)

1. TRUSTS—POWERS OF TRUSTEES—MORTGAGE OF PROPERTY.

Where property subject to a trust deed was incumbered with tax sales and administration expenses, and the deed authorized the

trustee to borrow a sum sufficient to pay the incumbrances, and to execute promissory notes and such mortgages as might be necessary to obtain money to pay off such incumbrances, and to redeem from tax sales, and to make one or more mortgages for the payment of the sums necessary to pay off the charges upon the property, the trustee was authorized to mortgage any part of the property, and was not required, in executing the mortgage, to include the whole of the property therein, and was further authorized to pay off the claims on an incumbrancer by executing the mortgage directly to him to secure the amount thereof.

2. SAME—IMPLIED POWERS OF TRUSTEE.

Where a trustee conforms with the provisions of a trust in their true spirit and meaning, he may adopt measures and do acts which, though not specified in the trust instrument, are implied in its general directions and are reasonable and proper means for making them effectual.

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Sylvester Kipp against H. W. O'Melveny and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Rehearing denied by Court of Appeal, December 9, 1905; by Supreme Court, January 8, 1906.

Withington & Carter, McNutt & Hannon, H. W. O'Melveny, and Works, Lee & Works, for appellants. Stearns & Sweet, for respondent.

CONREY, Special Judge. In this action, a decree was entered in favor of respondent, Kipp, foreclosing a certain mortgage. This mortgage had been executed to Kipp by Carlos Olvera, as trustee under a certain deed of trust. The mortgage was given to secure a promissory note made by the trustee to the mortgagee. Some time before the execution of said note and mortgage, the appellants Smith and others, together with certain other owners—all of them being tenants in common—had executed to said Olvera a deed granting to him, as trustee, certain real property, of which said mortgaged premises are a part. The plaintiff claims that the mortgage was made in the course of the trustee's performance of his duties as such trustee, and in conformity with the powers conferred upon him by the trust deed. The appellants, as owners of interests in said property and beneficiaries of said trust deed, appeal from the decree; and they contend here that said mortgage was not executed for a purpose named by the trust deed, and was not within the scope of the powers conferred upon the trustee, and that, therefore, said instrument is void.

From the trust deed it appears that at its date the real property described therein was subject to various incumbrances, such as tax sales and administration expenses of an estate; that the trustee was authorized "to borrow upon said real property a sum sufficient to pay the incumbrances existing thereon," and to execute "such promissory

note or notes and such indenture or indentures of mortgage as may be necessary * * * for the purpose of obtaining money to pay off and discharge the charges existing against said lands." He is further authorized to redeem from such tax sales as can be redeemed from, and he is made the sole judge of the advisability of contesting any of such tax sales. It is further provided that he "shall have power to make one or more mortgages for the payment of the sums necessary to pay off the charges upon said property." The plaintiff, Kipp, at the time of the execution of the mortgage, was the owner of certain certificates of tax sales against 4,277 acres of said land. The trustee and Kipp agreed upon the amount of the incumbrances against the land by reason of said tax sales. Pursuant to an agreement thereupon made between them, the trustee paid the amount of Kipp's claims against the property by executing the note and mortgage which are the subject of this action; and, thereupon, and in consideration thereof, the plaintiff released all of his said former claims. The amount of land covered by the mortgage is 600 acres. On behalf of the appellants it is argued that the trustee in executing said mortgage exceeded his powers in that he mortgaged a part of the premises described in the trust deed, when he was only authorized to mortgage the whole; and also in that he mortgaged in consideration of the surrender and cancellation of tax certificates, whereas he was only authorized to mortgage as security for money that he might receive as a direct cash loan.

We are of the opinion that, by virtue of said trust deed, the trustee was empowered to mortgage any part of said lands, when, in the course of performance of his duty to get rid of the incumbrances thereon, he should find it expedient to make such mortgage. The trust deed does not contain apt words to indicate an intention that any mortgage made by the trustee must necessarily include all of the trust property. We are further of the opinion that the trustee was authorized to pay off plaintiff's claims by executing this mortgage to secure the amount thereof. There is no substantial difference between that transaction and the transaction of borrowing the same amount of money from a third party in order to pay such money over into the hands of Kipp. Where a trustee conforms with the provisions of the trust in their true spirit and meaning, he has authority "to adopt measures and to do acts which, though not specified in the instrument, are implied in its general directions, and are reasonable and proper means for making them effectual." 2 Pomeroy's Equity, § 1062; Gilbert v. Penfield, 124 Cal. 234, 56 Pac. 1107. Appellants do not dispute this proposition. They simply contend that the mortgage made by Olivera was not such a mortgage as should be held to be within the scope of the power to mortgage, as limited

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by the terms of the trust deed. And as we do not agree with the appellants on this question concerning the scope of that power, there is no further ground for discussion of the case. In their final brief, appellants repeatedly urge that the trustee was plainly violating the provisions of the trust, because he was mortgaging more than four-fifths of the property in order to release only a part of the incumbrances. It is sufficient to reply, that the mortgage covers less than one-eighth of the land described in the trust deed. So far as appears from the record, this mortgage may have been the very best or the only measure then available to the trustee, in meeting his obligation to save the whole property ultimately for the owners, whose interests he represented.

The judgment appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

2 Cal. App. 173

BRAUNTON & ROBERTSON v. SOUTHERN PAC. CO.

(Court of Appeal, Third District, California, Nov. 11, 1905. On Rehearing, Dec. 11, 1905.)

1. CARRIERS—LOSS OF GOODS—NEGLIGENCE—TRIAL—QUESTIONS OF LAW.

Where the facts in relation to the loss by fire at a depot of goods entrusted to a railroad are undisputed, the question of negligence on the part of the railroad is one of law for the court.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 596.]

2. SAME—ARRIVAL OF GOODS—NOTICE TO CONSIGNEE—SUFFICIENCY.

Where the consignee of goods is not present to receive verbal notice of their arrival, a notice sent through the mail is sufficient.

3. SAME—NEGLIGENCE OF CARRIER.

A railroad was not negligent in not notifying the consignee of the arrival of the goods so as to enable him to have removed them between their arrival and their destruction by fire, where the consignee left town early in the morning of the day the goods arrived, and did not return until the afternoon of that day, when the goods were burning or had been consumed.

4. SAME—ACTIONS—PLEADING—VARIANCE.

A variance between a complaint to enforce the common-law liability of a carrier for the loss of goods and evidence showing a special contract between plaintiffs and the carrier is such as to justify a nonsuit.

On Rehearing.

5. TRIAL—NONSUIT—WHEN PROPER.

A nonsuit can only be granted when there is no evidence whatever to support plaintiff's cause of action.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Brauntun & Robertson against the Southern Pacific Company. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Rehearing denied by Court of Appeal, December 11, 1905; by Supreme Court, January 10, 1906.

W. A. Gett, for appellants. Devlin & Devlin, for respondent.

BUCKLES, J. This is an appeal by the plaintiffs from a judgment dismissing their action upon motion of defendant for nonsuit and motion granted.

The complaint is for damages in the sum of \$387.18 against the defendant for failure, as a common carrier, to carry from Sacramento and deliver at Wheatland to the consignee certain moldings and other building material, said defendant having undertaken and agreed to do so; alleging as follows: "That defendant did not safely carry and deliver the said goods pursuant to said agreement, but, on the contrary, defendant so negligently and carelessly carried and hauled the same in his calling as common carrier, that the said goods were wholly destroyed and lost to the plaintiffs."

Defendant's answer denies all the material allegations of the complaint, and alleges that the goods were received by it under a special contract, which contained the following: "Delivery: Freight carried by this line must be removed from the station immediately on its arrival, being at owner's risk thereafter, and if not taken within 24 hours after arrival it may be stored at the owner's risk. Responsibility: The responsibility of this company and each succeeding carrier for loss or damage does not extend beyond its own line. None of said carriers is to be liable for any loss or damage of any kind, except such as may be proximately caused by its negligence." There is still another clause in the agreement referred to in the answer, which reads as follows: "* * * We hereby agree that none of the said carriers is to be liable for any loss or damage of any kind except such as may be caused by its gross negligence. * * *"

There seems to have been a failure of plaintiffs to execute this release claim, and therefore it could have no binding effect.

The execution of this written contract was admitted, and went in evidence without objection on cross-examination of plaintiffs' witnesses and as a part of plaintiffs' case, and the bill of exceptions contains the following stipulation relating thereto: "It is hereby stipulated that at the time of the making of the aforesaid shipping order, the said Southern Pacific Company made and delivered to the said Braunton & Robertson a shipping receipt signed by it which was and is in the words and figures the same as the foregoing shipping order, and on the back of said shipping receipt was and is the same words and figures as those contained on the back of the foregoing shipping order, and the said shipping order and shipping receipt constituted the contract between the aforesaid parties, as plead in the answer." Plaintiffs also admit in their brief that defendant could limit its liability as a common carrier. Civ. Code, § 2174.

On July 3, 1903, plaintiffs delivered to the defendant at Sacramento the goods mentioned, to be shipped to Wheatland and there to

be delivered free on board cars to one J. A. Swanton; the plaintiffs signing the shipping order, and defendant executing and delivering to plaintiffs the said shipping receipt, in relation to which the above stipulation was made. On July 4, 1903, about 1 or 1:30 o'clock p. m., the car in which the said goods were contained arrived at Wheatland and was set out on a siding in front of defendant's warehouse ready to be unloaded. Wheatland is a town of 600 or 700 inhabitants, and at 8 o'clock a. m. of July 4th the consignee, with many citizens, had gone to Lincoln to a celebration, and did not return until about 3:30 o'clock p. m. of that day. About 2:30 o'clock the same afternoon a fire started in a dwelling situated about 125 or 150 yards from the depot, and where the said car was standing and spread rapidly in that direction, burning and consuming several buildings before reaching the depot. The car containing said goods, three other cars, the depot, warehouse, and freight shed all caught from this fire and were burned. There was no switch engine at the station; the trains doing their own switching. The assistant station agent and a warehouseman, defendant's employes, were present and assisted with buckets and a hose to put out the fire, but the fire reached the car in 30 minutes after starting, and said car could not be saved, and the said car and its contents were consumed. There was no claim to that effect and no evidence that the fire was started by this defendant or through any negligence of any of its agents or servants. There was no evidence on the part of plaintiffs tending to show negligence on the part of defendant. Plaintiffs proved the delivery of the goods to defendant to be carried to Wheatland, that they were so carried, the value, and nondelivery, because being destroyed by fire after their arrival at Wheatland and while still in the car. At the close of plaintiffs' testimony defendant moved for a nonsuit, which was granted.

The contention of plaintiffs is that, having proved the shipment, value, nondelivery, and the destruction of the goods, the burden of proving the loss to have been from causes other than the negligence of the defendant, was upon defendant, and therefore a nonsuit should not have been granted. All the facts in relation to the loss and the cause thereof, the conditions at the depot, and what was done by defendant's agents, servants, and employes toward extinguishing the fire and to preserve the said goods, was fully gone into in plaintiffs' case, in the direct and cross-examination, the defendant showing by the cross-examination all that apparently could be shown in relation to no negligence on the railroad's part, and, the facts being undisputed, the question of negligence becomes one of law, and the mere deduction as to whether there was negligence on the part of the defendant which proximately or at all contributed to the loss or not

is a conclusion of law for the court to reach in passing upon the motion for a nonsuit. *Flemming v. W. P. R. R. Co.*, 49 Cal. 253; *Fagundes v. Central P. R. R. Co.*, 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824; *Overacre v. Blake*, 82 Cal. 77, 22 Pac. 979.

It seems to me, under the authority of *Wilson v. Cal. C. R. R. Co.*, 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685, and the authorities there cited, that where a common carrier undertakes to carry goods, and the undertaking is under a special contract exempting such carrier from liability for loss or damage, excepting for negligence, and the goods are burned while in the possession of the carrier, and, when sued to recover for the property, he sets up the fire and that destruction of the goods was by no negligence of his, the burden of proof will be upon him to show that the loss did not occur by reason of any negligence of his. A contrary rule exists, I know, in some other states, notably in Indiana and New York, as shown by authorities from those states, presented by defendant in its brief.

But to my mind it is immaterial what the rule may be in this state, so far as this case is concerned, for the whole question of the fire, so far as defendant was concerned, was fully gone into by plaintiffs in their examination in chief of the witnesses and by the defendant in its cross-examination of plaintiffs' witnesses. And this testimony showed clearly that the defendant was not guilty of negligence or want of proper care. True it might be said defendant should have notified the consignee immediately of the arrival of the goods, so that he might have removed them between the hour of their arrival and the time when the fire occurred. In this respect all that would be required would be that notice be sent through the mail, where the consignee was not present to receive any verbal notice. But the testimony, undisputed, shows that the consignee left town at 8 o'clock a. m. of the day the goods arrived and did not return until 3:30 o'clock p. m., when the goods were burning or had been consumed. Under the circumstances of the fire it becomes immaterial whether there was any notice attempted to be given the consignee, or that freight was not delivered on July 4th or other holidays, or that the goods were not unloaded on arrival and put in the warehouse. The consignee could not have been notified to take the goods away before their destruction by the fire. Upon these grounds we think the nonsuit was properly granted.

Another cause for the nonsuit argued by the defendant is that the complaint proceeds upon the theory that the liability of defendant for the loss of the goods was the common-law liability of a common carrier, and that it was responsible unless it could show that the loss was the result of some inherent defect, the act of a public enemy, the act of law, or the act of God, and that, when it

comes to the proof, it was shown that the liability, if any, must be determined by the special contract under which the goods were received and carried to Wheatland. The special contract was set up and pleaded in the answer, and the admission of plaintiffs that it constituted the contract between themselves and the carrier, seems to me, shows such a variance between the complaint and plaintiffs' proof as would justify a nonsuit on motion of defendant.

As the nonsuit was properly granted upon other grounds herein stated, we do not deem it necessary to decide the question as to who has the right to sue—the consignor or consignee.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

On Rehearing.

BUCKLES, J. This is a petition for rehearing. Petitioner insists that his authorities all unite in showing that a nonsuit can only be granted when there is no evidence whatever in supporting plaintiffs' cause of action. We agree with this contention. In the opinion in the case we rehearsed the evidence very fully, and there is absolutely no evidence of negligence on the part of the railroad company. As we are still of the opinion that the nonsuit was properly granted, we see no reason for granting a rehearing.

The petition for rehearing is denied.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

2 Cal. App. 185

MAHONEY v. AMERICAN LAND & WATER CO.

(Court of Appeal, First District, California.
Nov. 16, 1905.)

1. APPEAL — PRESUMPTIONS — EVIDENCE NOT IN RECORD.

Where the judgment of the lower court was fully sustained by its findings of fact, it must be assumed, in the absence of a bill of exceptions, that those findings were supported by relevant and competent evidence, free from any objection on the part of appellant.

2. WATERS AND WATER COURSES—ACTION TO COMPEL WATER COMPANY TO FURNISH WATER—PETITION.

A petition for a writ of mandate to compel a water company to furnish plaintiff with a supply of water, averring that one of the purposes for which defendant was incorporated and in which it has been since its incorporation and is now engaged is to distribute water for compensation to the residents of L., that the petitioner is and has been for more than 10 years a resident of L. and a freeholder thereof and during that time defendant has supplied him with water upon his premises, and that it has a sufficient quantity of water to supply him, sufficiently shows that defendant is in the control of a public use, within Const. art. 14, providing that "the use of all water now appropriated or that may hereafter be appropriated

for sale, rental or distribution, is hereby declared to be a public use," and that plaintiff is a beneficiary of that use.

3. SAME—DEFECTS IN PETITION SUPPLIED BY ANSWER.

If there was any defect in such petition, it was supplied by defendant's answer, setting forth that it was organized for the purpose of constructing, owning, and operating waterworks to supply the inhabitants of L. with pure fresh water, and that it undertook to supply persons who live or might live therein with pure fresh water, and to that end caused to be dug wells, tunnels, and reservoirs, with mains and pipe lines leading therefrom to the houses within said townsite.

4. SAME—JUDGMENT.

The petition, in an action to compel a water company to furnish plaintiff with water, alleged facts showing that he was a resident of the town and was entitled to a supply of water from defendant's waterworks and that he had paid defendant the amount demanded by it as an advance payment for water to be delivered during a certain month, and prayed for a writ commanding defendant to furnish him a supply of water during said month and thereafter as long as he should comply with its rules and regulations. *Held*, that such petition authorized the court to direct in its judgment that defendant should continue such supply, not only during the month specified, but thereafter so long as plaintiff should comply with the conditions upon which defendant's obligation depended.

Appeal from Superior Court, Marin County; Thomas J. Lennon, Judge.

Action by W. H. Mahoney against the American Land & Water Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Edgar C. Chapman and James W. Keyes, for appellant. W. H. Mahoney, in pro per.

HARRISON, P. J. The defendant is a corporation, organized as such under the laws of this state, for the purpose, among others, of distributing water for compensation to the residents of the town site of Larkspur, in Marin county. The plaintiff is a resident of that township, and on the 1st day of November, 1903, paid to the defendant the amount demanded by it as an advance payment for water to be delivered to him upon his premises during the said month of November, and made demand that it supply him with water thereon. The pipes of the defendant were at that time connected with the pipes upon the plaintiff's premises, and in a condition to carry water thereto, and the appellant had supplied him with water upon said premises for more than 10 years prior thereto, and had at that time a sufficient quantity of water with which to comply with his demand. It refused, however, to deliver any water to him upon his said premises, and he thereupon applied to the superior court of Marin county for a writ of mandate, commanding it to furnish him with a continuous supply of water during said month of November, and thereafter as long as he should comply with its rules and regulations. The defendant demurred to the petition of the plaintiff, and, its demurrer having been overruled, answered the

same. Upon the hearing the court granted the petition, and the defendant has appealed therefrom upon the judgment roll without any bill of exceptions.

The judgment of the court is fully sustained by its findings of fact, and, in the absence of a bill of exceptions, it must be assumed that those findings and each of them were supported by relevant and competent evidence, free from any objection on the part of the defendant. The appellant, however, contends in support of its appeal that the petition of plaintiff does not state facts sufficient to entitle him to the relief demanded, and that its demurrer on that ground should have been sustained. The point urged in support of this contention is that there is no averment in the petition that the defendant is in control of a public use, or that the plaintiff is a beneficiary thereof. While it is true that the petition does not make these averments in direct language, yet the facts which are set forth therein show, not only that the appellant is in fact in control of a public use, but also that the respondent is a beneficiary of that use. The Constitution (article 14) recites that "the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use." In *Merrill v. South Side Irrigation Co.*, 112 Cal. 426, 44 Pac. 720, it was held that "when water is designated, set apart, and devoted to the purpose of sale, rental, or distribution, it is appropriated to these uses or some of them, and becomes subject to the public use declared by the Constitution without reference to the mode of its acquisition." The averments in the petition herein that one of the purposes for which the appellant was incorporated, and in which it has been since its incorporation and is now engaged, is to distribute water for compensation to the residents of Larkspur; that the petitioner is and has been for more than 10 years a resident of Larkspur and a freeholder therein; that during that time the appellant has supplied him with water upon his premises, and that it has a sufficient quantity of water to supply him, sufficiently show that it is in the control of a public use, and that the respondent is a beneficiary of that use.

The case of *Hildreth v. Montecito C. W. Co.*, 139 Cal. 23, 72 Pac. 395, upon which the appellant relies, is inapplicable to the facts thus alleged. In that case the court held that a person claiming to be a beneficiary of a public use of water, and seeking to enforce such claim against one claimed by him to be in charge of such use, must show in his complaint that the latter has the ownership or control of water which is the subject of the use, and said that the complaint therein was "carefully and skillfully drawn so as to avoid the statement of this fact." It alleged that the defendant

was the owner of a "system of waterworks and water pipes" constructed for the distribution of the waters of the creek, by means of which waterworks and pipes the said waters had been appropriated to public use; but there was no averment that the defendant had appropriated the waters of the creek, or owned or controlled or had the right to control the said waters, or that the waters still remained subject to the use for which they had been originally appropriated. The court said: "For all that appears in the complaint, some other person may at all times have been the owner and in control of the water, and may have made the dedication to public use, using the defendant's waterworks as the means, and defendant as the agent, for the distribution." A comparison of the petition herein with these averments shows that the above facts, said to be essential to a cause of action, are fully set forth in the petition. That the plaintiff is a beneficiary of the public use which is under the control of the appellant is also shown by the following extract from the opinion in the *Hildreth* Case: "The right of an individual to a public use of water is in the nature of a public right possessed by reason of his status as a person of the class for whose benefit the water is appropriated or dedicated." As one of the residents of Larkspur for whose benefit the appellant had appropriated the water owned by it, he was a beneficiary of that public use. If there was any defect in the complaint in its averment that the defendant was in charge of a public use, it was sufficiently supplied by the answer of the defendant. In its answer the defendant sets forth that it was organized for the purpose of constructing, owning, and operating waterworks to supply the inhabitants of Larkspur with pure, fresh water, and that it undertook to supply persons who live, or who might live, therein with pure, fresh water, and to that end caused to be dug and constructed wells, tunnels, and reservoirs, with mains and pipe lines leading therefrom to the houses within said townsite, and the court finds that at all times during said month of November the defendant had under its control a sufficient supply of water to supply the plaintiff in addition to its other consumers. See *Cohen v. Knox*, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711.

The objection that, as the plaintiff does not aver in his petition that he is entitled to the water beyond the month of November, the court was not authorized to render a judgment which compels the defendant to furnish it after that month, is without merit. The judgment in this respect corresponds with the prayer of the plaintiff's petition. The defendant, while in the control of a public use, is under the obligation to supply water to the beneficiaries of that use so long as they comply with the conditions upon which the use is administered. In its answer it did not set up any act to be per-

formed by the plaintiff as a condition requisite for its discharge of this obligation, other than the payment of its rates; and when the plaintiff had shown his compliance with this condition, and thereby established his right to a supply of the water during the month of November, it was proper for the court to direct in its judgment that the defendant should continue such supply so long as the plaintiff should comply with the conditions upon which its obligation depended.

The judgment is affirmed.

We concur: HALL, J.; COOPER, J.

2 Cal. App. 211

DELMONTE v. SOUTHERN PAC. CO.

(Court of Appeal, First District, California.
Nov. 17, 1905.)

1. CARRIERS—CARRIAGE OF PASSENGERS—RELIANCE ON CARRIER'S CUSTOM.

A passenger, though required to see to it that the train he boards will carry him by virtue of his ticket, may rely on the custom of the carrier to carry passengers on like tickets, in the absence of information to the contrary.

2. SAME—EJECTION OF PASSENGERS—ACTIONS—NATURE AND FORM.

A passenger wrongfully ejected from a train may sue on the contract of carriage or in tort at his election.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1463.]

3. SAME—EXCESSIVE DAMAGES.

In an action for wrongfully ejecting a passenger from a train, the evidence showed that the conductor, on the passenger's refusal to leave the train, put him off, and that the passenger then walked to his home three miles away, getting wet in so doing, catching cold, which developed into pneumonia. Held, that a verdict for \$500 would not be set aside as excessive.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1490.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by F. Delmonte against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Naphtaly, Freidenrich & Ackerman, for appellant. A. T. Roche and Sullivan & Sullivan, for respondent.

HALL, J. Appeal from order denying defendant's motion for a new trial.

The action was for damages alleged to have resulted to plaintiff from being ejected from a train of defendant on the evening of November 25, 1896, which was the day before Thanksgiving Day. It was shown that plaintiff was, on the 25th of November, 1896, and for several years prior thereto had been, a government employé at Mare Island, and that ever since May 21, 1893, his family had resided at a small station on the railroad of defendant known as Rodeo. Defendant testified that it had always been his custom on Saturdays and days immediately preced-

ing a government holiday to go to his home at Rodeo, taking a boat operated by defendant from Vallejo to Vallejo Junction, and thence by train to Rodeo. On the day in question he bought a ticket from the agent of the defendant at Vallejo to Rodeo, went onto the boat, where his ticket was punched, was conveyed by the boat to Vallejo Junction, but on entering the train at Vallejo Junction he was told by the conductor that the train did not and would not stop at Rodeo, and on his refusal to get off the train he was put off by the conductor. He then walked to his home at Rodeo, some three miles away, getting wet in so doing, and thus catching cold, which finally developed into pneumonia. The train that plaintiff attempted to take passage on was an overland through train bound for San Francisco, known as No. 2, and was not scheduled to stop either at Vallejo Junction or Rodeo. The boat was not regularly run by defendant from Vallejo to Vallejo Junction after 4:20 p. m., except that on Saturdays and days immediately preceding a holiday it was run, and had been so run for a long time, at 6 o'clock p. m. from Vallejo, connecting at Vallejo Junction with a train for San Francisco for the accommodation of the government employes at Mare Island. On this date, however, it did not leave at 6 o'clock, but left Vallejo at about 7 o'clock p. m., of which due notice had been given by the agent of defendant. Evidence was given (and on this point there was no dispute) that the said late boat on Saturdays and on days immediately preceding holidays connected with a train at Vallejo Junction for San Francisco, and Mr. Wilder, trainmaster for defendant, testified: "It was the general custom for train No. 2 to stop at Vallejo Junction on every day next preceding a holiday prior to November 25, 1896, to take in the employes from Mare Island Navy Yard." There was a conflict of evidence, however, as to whether or not it was the custom for this train to stop for the purpose of discharging passengers at any of the stations between Vallejo Junction and Oakland on such days. It was the last train on that day from Vallejo Junction going toward San Francisco.

The defendant requested the court to give several instructions which were by the court refused as requested, but were by the court modified and given as modified. The following are two of such instructions, which are types of the others, the modifications being in italics: "It is the duty of a passenger before he takes a train to see to it that his ticket will carry him on that train, *but he may depend on custom, or until he gets express notice of a change from any source.* If the train is what is called a through train, namely, one which does not stop at all stations and does not stop at the station called for by the ticket, then such passenger is not *ordinarily* entitled to ride on that train, and it is his duty, when requested by the con-

ductor to alight, to comply with that request, unless the car is then running at such a high rate of speed as to make it dangerous for him to attempt to alight, and if the passenger refuses to comply with the request, the conductor and those in charge of the train have the right to eject him, using such force, and no more, as is requisite for that purpose, provided, of course, that the train is not then moving at such a high rate of speed as would make it dangerous for a person to alight." And "the defendant, as a common carrier of passengers, has the right to regulate the operation of its trains over its track, and to fix the various stopping places of such trains, and if you find from the evidence that the boat that left North Vallejo on the evening of November 25, 1896, was a special excursion boat connecting with the train at Vallejo Junction, then I charge you that it was the duty of the plaintiff, before taking passage on such boat, to ascertain if said connecting train would stop at Rodeo, *unless a prior custom to stop had rendered that unnecessary.*" The court also, at the request of plaintiff, gave instructions to the jury embodying similar principles as to the rights of plaintiff under prior custom.

It is now insisted by appellant that the court erred in thus modifying the instructions requested by defendant, and in giving those requested by plaintiff. The law, however, seems to be as given by the trial court. In *St. Louis, I. M. & S. Ry. Co. v. Adcock*, 12 S. W. 874, 52 Ark. 406, it is said: "If the plaintiff, without fault of his, was misled by the company's custom into believing that the place was a flag station for night passenger trains, then his right to recover was the same as though he had been misdirected by its authorized agent. It would be otherwise if he was not informed of, or had not relied upon, the custom, or if the stoppage of the train was only casual and not habitual." In *Hull v. E. Line R. Co.*, 2 S. W. 831, 66 Tex. 619, it is said: "If it be true, as the great weight of evidence tends to show, that the trains of appellee frequently stopped at 'Veal's Switch,' and there received and discharged passengers, it is unimportant that conductors may have had no authority from the company to do so. What they frequently did in the course of their employment in the conduct of the business of the principal, in so far as the traveling public are concerned, must be deemed to have been done in the exercise of power conferred by the principal, though, in fact, the principal may have forbidden the act." In *Humphries v. Ill. Cent. Ry. Co.* (Miss.) 12 South. 155, the plaintiff had a ticket for Crystal Springs purchased outside the state, and was on a train not scheduled to stop at that place. His action had been by the trial court dismissed, and in reversing the judgment the appellate court said: "We think the jury should have been permitted to say whether appellant had a

special contract to be carried on the particular train to Crystal Springs, and whether there was a custom—a fixed habit—known to the travelling public to stop for the debarkation of foreign passengers." To the same effect is Illinois Cent. Ry. Co. v. Sidons, 53 Ill. App. 607, where it was held that "where a railroad company has been for a long time in the habit of stopping trains at a station on signal, such a course of dealing with the public imposed the duty on the company to stop such train on being signaled. A failure of the servants to perform such duty, when a ticket has been purchased on the faith that they would do so, creates as clear a liability as that of a train which has been advertised to stop at a station and fails to do so." In another case from the same state this language is used: "It then follows that where a passenger purchases a ticket he only acquires the right to be carried according to the custom of the road. When he obtains a ticket he has a right to go to the place for which it calls on any train that usually carries passengers to that place." C. & A. R. R. Co. v. Randolph, 53 Ill. 510, 5 Am. Rep. 60.

From the foregoing authorities it is seen that a passenger has a right to rely on the custom of the common carrier, at least in the absence of information to the contrary. In none of the cases cited by appellant was the question of a custom involved. In the case of Ames v. S. P. Co., 141 Cal. 728, 75 Pac. 310, 99 Am. St. Rep. 98, relied on by appellant, it was shown by parol testimony that when the plaintiff purchased his ticket he was informed that it would not be good on the "Owl" train unless he also secured a ticket for a sleeping berth. He procured no such ticket, and therefore had no right on the train. The question upon which the case was decided was as to the admissibility of the parol testimony; the ticket itself making no reference to the requirement to procure a sleeping berth. The right to rely on a custom was not involved.

Appellant also insists that plaintiff's only redress is an action on the contract, and not an action in tort. It has been decided otherwise in this state. Sheldon v. The Uncle Sam, 18 Cal. 526, 79 Am. Dec. 193; Jones v. Steamship Cortes, 17 Cal. 487, 79 Am. Dec. 142; Sloane v. S. Cal. R. R. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

We do not think the amount of damages awarded, \$500, was excessive. The court fairly submitted to the jury the question as to whether the plaintiff had aggravated his injuries or sickness by his own negligence, and the determination of the jury on that question in the state of the evidence in this case is conclusive on this court.

The order denying the motion for a new trial is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

2 Cal. App. 190

WILE v. LOS ANGELES ICE & COLD STORAGE CO.

(Court of Appeal, Second District, California. Nov. 16, 1905.)

1. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALK—INJURIES—PRESUMPTIONS.

In an action for injuries to one who tripped on a nail projecting from planks placed upon a sidewalk to admit the approach of teams to defendant's building, there was a presumption that it was defendant's driveway, his board, and his nail, maintained by him and with his knowledge.

2. SAME—QUESTION FOR JURY.

The testimony of defendant's manager and two or three agents and employees that they did not place the boards there and did not know who placed them there raised a question for the court as to whether such evidence rebutted the presumption.

3. SAME—NUISANCE.

The maintenance of a spike two inches high in a sidewalk is a nuisance.

4. SAME—ORDINANCE AS PROTECTION.

A city ordinance authorizing planks to be placed across a sidewalk, in order to create a driveway giving access to a building in process of construction, is no defense to an action for injuries sustained by one who tripped over a spike protruding from a plank.

5. SAME—NEGLIGENCE OF INDEPENDENT CONTRACTOR—KNOWLEDGE.

Where an independent contractor placed planks across a sidewalk, so as to make a driveway to a building in process of construction, the owner of the building was liable for the dangerous condition of the planks, if his manager or agents knew, or as careful and prudent men they should have known, thereof.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1689.]

6. SAME—INJURIES—QUESTION FOR JURY.

In an action for injuries to one who tripped over a spike projecting from planks placed across a sidewalk by defendant, held, that the question as to what was ordinary care under the circumstances was one for the jury.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Z. E. Wile against the Los Angeles Ice & Cold Storage Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Rehearing denied by Supreme Court, January 15, 1906.

Sidney J. Parsons, for appellant. Powers & Holland, for respondent.

GRAY, P. J. Action for damages incurred by plaintiff in tripping on a large nail projecting from one of a number of planks placed upon the cement sidewalk to admit of the approach of teams temporarily to defendant's building while the same was in course of construction. The plaintiff had a verdict and judgment in his favor. The appeal is by the defendant from the judgment and from an order denying it a new trial.

The main contention of appellant is that the evidence is insufficient to support the verdict as a matter of law, but we think this contention cannot be upheld. The board

which contained the offending nail was part of a driveway to defendant's property, constructed for a temporary use in connection with said property. From this a presumption arises that it was defendant's driveway, defendant's board, and defendant's nail, all maintained there by defendant and with defendant's knowledge. The duty was cast, in the first instance at least, upon the trial court to determine whether the testimony of the manager and two or three other agents and employés of the defendant, to the effect that they did not place the boards there and did not know who placed them there, was sufficient to rebut the presumption arising from the other facts. "At least in such a case the injured party ought not to be compelled to show affirmatively that there was no intervention of a third person which contributed to the result." *Barry v. Terkildsen*, 72 Cal. 254, 13 Pac. 657, 1 Am. St. Rep. 55; *McKune v. Santa Clara*, etc., 110 Cal. 480, 42 Pac. 980. The manager said the defendant was in occupation and possession of the premises as a whole and had authority there, and the fact that this manager did not know who placed these boards there might have led the jury to infer that he did not want to know. At all events, the question of who placed the planks there was one of fact, and after a careful examination of all the evidence we are thoroughly persuaded that the jury in its verdict, as well as the judge in denying the new trial, made no mistake in the solution of that question of fact. The same thing may properly be said as to the other questions of fact involved in the case. There can be no question that the maintenance of a spike two inches high in a sidewalk is, to put it mildly, a nuisance. It seems to have been dangerous "to life and limb." The jury were fully warranted in declining to excuse the defendant for maintaining the same on any such ground as that "the spike was hard to see." This, too, was a question of fact, and we find nothing in the record to transform it into a question of law. A city ordinance authorizing the planks does not necessarily include the protruding spike. It was the spike that caused the plaintiff's downfall, and not the plank.

If it be conceded that there is evidence showing that the planks were placed there by an independent contractor, yet the defendant is liable if its manager or agents knew of their dangerous condition, or if, as careful and prudent men, they should have known it. *Frassi v. McDonald*, 122 Cal. 400, 55 Pac. 139. The instructions recognizing this rule were properly given. Said instructions were also within the issues as presented to the jury. There was much evidence elicited by defendant to the effect that the nail was of the same color as the board and difficult to see. There was also evidence that others saw this nail, and it is not improbable that if the agents of defendant had exercised

ordinary care they would have discovered this nail. What was ordinary care, under the circumstances of the case here presented, was again a question for the jury.

Appellant's briefs are somewhat extended, but we think it will be seen upon a close analysis of the same that the foregoing disposes, either directly or indirectly, of every point contained in said briefs. The appeal seems to be without merit.

The judgment and order are affirmed.

We concur: ALLEN, J.; SMITH, J.

2 Cal. App. 193
FOX v. TOWNSEND et al.

(Court of Appeal, Second District, California.
Nov. 6, 1905.)

JUDGMENT — SETTING ASIDE — FAILURE TO SERVE DEFENDANT—TIME FOR MOTION.

Code Civ. Proc. § 473, provides that the court may, in furtherance of justice, when from any cause the summons in an action has not been personally served on defendant, allow on such terms as may be just, at any time within one year after judgment, an answer to the merits. Section 939 provided that an appeal might be taken within one year, but by amendment in 1897 the time was shortened to six months. Section 1049 provides that an action is deemed to be pending from the time of its commencement until its final determination on appeal, or until the time for appeal has passed. *Held*, that the amendment shortening the time of appeal did not shorten the time within which an order might be made under section 473.

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Edwin R. Fox against W. H. Townsend and others. From an order setting aside as to certain defendants a decree quieting title, plaintiff appeals. Affirmed.

Rehearing denied by Supreme Court, January 15, 1906.

Cole & Cole, for appellant. O. B. Carter, for respondent.

GRAY, P. J. This is an appeal by plaintiff from an order, made December 18, 1903, setting aside, as to defendants Green and Harris, a decree quieting title, which decree bears date December 22, 1902, and permitting an answer to the merits of the action. The order was granted in pursuance of the provisions of section 473 of the Code of Civil Procedure on the ground that the summons was not personally served upon the said defendants Green and Harris.

Appellant's contention is that by the provisions of section 939 of the Code of Civil Procedure the time for appeal is limited to six months, and that section 1049 of the same Code provides that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied," and that the amendment of said section 939 in 1897, shortening the time of appeal from one

year to six months, must be taken as nullifying the provision of section 473, giving a year's time after the judgment in which to move to set aside the same, where personal service of summons has not been had. We can see no good reason why the amendment of 1897, relating to appeals only, should be treated as an amendment or "nullification" of another section of the Code relating to another remedy independent of an appeal and having no necessary connection therewith. We know that repeals and amendments to the law have sometimes been implied. But repeals by implication are not favored in the law. We know of no case, and are cited to none, wherein the shortening of the time of one remedy given by the statute has been held by implication to shorten the time of another existing and independent remedy. The fact that the case is no longer "pending" in no way interferes with any attack on the judgment based upon any reason for which the judgment should be held absolutely void; and the statute having expressly given the defendant a remedy against the judgment, which he may take advantage of at any time within a year, it will not be presumed that it was intended to curtail this right by any other statute which makes no reference to such remedy, but the other statute will be permitted to operate only on the remedy to which it expressly refers. No contention is made that the court abused its discretion in setting aside the judgment. The only point urged by appellant is the above, and is to the effect that, the judgment having become final, the court had lost jurisdiction to proceed, as it did, under section 473, Code Civ. Proc.

The order appealed from is affirmed.

We concur: SMITH, J.; ALLEN, J.

2 Cal. App. 227

MIXER v. MIXER.

(Court of Appeal, First District, California.
Nov. 21, 1905.)

1. SET-OFF AND COUNTERCLAIM—SUBJECT OF ACTION—"TRANSACTION."

Where, in a suit to compel defendant to leave complainant's house, he alleged that she had been employed as his servant at \$20 per month and, though she had been discharged and paid, she refused to leave the house and claimed the right to remain there, a cross-complaint, in which defendant alleged that she had been fraudulently induced to believe that she was complainant's lawful wife and that her services were reasonably worth \$50 per month, and demanding judgment for the difference, was properly filed as relating to the "transaction" which was the subject of the action.

2. MASTER AND SERVANT—ACTION FOR SERVICES—ILLEGAL CONSIDERATION—FINDINGS.

Where, on a cross-complaint for services, the court found that defendant assumed the position of mistress of plaintiff's house and remained there in such capacity until the commencement of the suit under the belief that she was complainant's wife, such finding negated an intent to find that defendant was complain-

ant's paramour, or that her services were rendered on consideration that she should be his illicit mistress.

3. SAME—DEFENSES—FRAUD.

Where, on a cross-complaint for services, the court found that complainant had fraudulently induced defendant to render the services on the belief that she was complainant's wife, complainant could not avail himself of his own fraud in inducing such belief, by pleading that her services were rendered as his illicit mistress and that the contract was therefore illegal.

4. SAME—ACCRUAL OF WAGES—TIME OF PAYMENT.

Where services were not rendered under a contract specifying the amount of wages or the time of payment, the wages did not accrue monthly.

5. JUDGMENT—CONSTRUCTION—INTEREST.

A judgment awarding defendant a certain sum of money, "with interest thereon," on a cross-complaint, should be construed as allowing legal interest only from the date of its rendition.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Suit by George H. Mixer against Nettie A. Mixer. From a judgment in favor of defendant on a cross-complaint, plaintiff appeals. Affirmed.

Robert Ash, for appellant. J. L. Boone, for respondent.

HARRISON, P. J. In this action, brought by the plaintiff to procure an injunction against the defendant, the latter filed a cross-complaint against the plaintiff, under which she sought to recover for services rendered him by her. It is recited in the bill of exceptions that before the trial of the case the court had granted the injunction prayed for, and that the only questions for trial were the issues raised by the cross-complaint as to wages. Judgment upon these issues was rendered in favor of the defendant, giving her \$360, the value of her services. The plaintiff has appealed.

The plaintiff alleges in his complaint that in July, 1901, he employed the defendant as a servant in his house at the wages of \$20 per month, and that she continued to work for him until May, 1902, and that about that date he had discharged her from his employment, but that she refused to leave the house and claimed a right to remain there; and by so doing she deprived him of the free use of his property, and he therefore asked that she be enjoined from further remaining in the house. In her answer the defendant denied these allegations, and also denied that she ever had been employed by him as a servant, and by way of cross-complaint against him alleged that they had once been husband and wife, but had been divorced in 1898, and that a few months thereafter, upon the plaintiff's request, they had agreed to remarry, and that such marriage should take place in the state of Nevada; that in pursuance thereof they started for that state, and at Sacramento took pas-

sage upon a train which the plaintiff informed her would take them to Reno, and went to a place which she believed to be Reno; that while they were at that place she became unconscious, and upon recovering consciousness was told by the plaintiff that the marriage had taken place and that they were again husband and wife; that they then returned to San Francisco and assumed marital relations at her place of residence; that at that time the plaintiff was the proprietor of a lodging house in another part of the city, and that subsequently, at his request, she went with him to that place as his wife, and in connection with him assumed its management and control, and so continued until May 24, 1902, during all of which time she believed that she had been legally married to him and was his wife; and that in so doing she had rendered him services which were worth \$50 per month. These allegations of the defendant were denied by the plaintiff in his answer to the cross-complaint, but the court found them to be true. The court also found that no marriage ceremony had taken place between them, and that the defendant is not the wife of the plaintiff, but that she believed during all of said time that she was his wife; that her unconscious condition, upon recovering from which he told her that the marriage had taken place, was produced by him by administering drugs to her; that he never employed her in his house in the capacity of a servant, but that she performed all the duties of a servant for him from May, 1901, until May, 1902; and that her services were worth \$50 a month, of which he had paid her \$20 a month. These findings are fully sustained by the evidence set forth in the bill of exceptions.

1. The court did not err in refusing to strike out the cross-complaint or in overruling the demurrer thereto. The "transaction" upon which the action was brought embraced the relations between the plaintiff and the defendant under which the latter rendered the services alleged by him, and the affirmative relief sought by her under her cross-complaint related to and depended upon those relations. The plaintiff could not, by alleging that the services were rendered under an employment, deprive her of the right of showing the facts under which they were rendered or of obtaining whatever relief she was entitled to upon the ascertainment of those facts by the court. *Story & Isham Co. v. Story*, 100 Cal. 30, 34 Pac. 671.

2. The facts set forth in the cross-complaint sufficiently state a cause of action entitling the defendant to relief against the plaintiff. The averments therein of the relation which she sustained to him, and of the circumstances under which she rendered services to him, are inconsistent with the construction contended for by the appellant that the services were of an immoral nature or rendered upon an illegal consideration; and the finding of the court that she "assumed the

position of mistress in plaintiff's house and remained there in such capacity until the commencement of this suit," under the belief that she was his wife, negatives any idea that the court intended to find that she was his paramour, or that the services were rendered upon the consideration that she would be his illicit mistress. If the plaintiff fraudulently induced her to render the services found by the court, he cannot avail himself of his own fraud in so doing in order to escape liability for their value.

3. In its conclusions of law the court finds that the plaintiff is indebted to the defendant in the sum of \$30 per month, "with interest thereon from the several dates at which it accrued." The court does not specify these dates, and as the services were not rendered under any contract specifying the amount or the time for payment, the wages cannot be held to have accrued monthly. The court was, therefore, in error in this respect. The judgment, however, awards the defendant the sum of \$360, "with interest thereon," which is to be construed as legal interest from the date of its rendition.

The judgment and order are affirmed.

We concur: COOPER, J.; HALL, J.

2 Cal. App. 216

PROVIDENT MUT. BLDG. LOAN ASS'N
v. SHAFFER et al.

(Court of Appeal, Second District, California.
Nov. 17, 1905.)

1. MORTGAGES — DEBTS SECURED — FUTURE ADVANCES.

In order that a payment by a mortgagee on the mortgagor's account shall constitute an advancement within the meaning of a clause of the mortgage securing "further advances" by the mortgagee, such payment must involve a contract relation, express or implied, and a payment made without the knowledge of the mortgagor cannot constitute such an advancement.

2. SAME—INCUMBRANCES.

A claim of a lumber company for lumber used in constructing a house on mortgaged premises cannot be deemed an incumbrance, within the meaning of the clause of the mortgage authorizing the mortgagee to pay incumbrances, in the absence of anything to show when the lumber was purchased, or by whom, or when the house was completed, or that any steps were taken or contemplated by the lumber company to assert a lien.

3. SAME—MECHANICS' LIENS—TIME FOR ESTABLISHMENT—EFFECT OF DELAY.

The inchoate right of lien which arises by furnishing lumber used in the construction of a house ceases to exist after the expiration of 60 days from the completion of the house.

4. SAME — RIGHTS OF MORTGAGEE — PAYMENT OF INCUMBRANCES—BURDEN OF PROOF.

A mortgagee, seeking to charge a mortgagor with a sum paid in discharge of a materialman's claim against a house erected on the mortgaged premises, has the burden of establishing that the claim was a lien at the date of payment, and therefore an incumbrance within the meaning of a clause of the mortgage authorizing the mortgagee to pay incumbrances.

5. SAME—DEBTS SECURED—GENERAL OBLIGATIONS OF MORTGAGOR.

A clause of a mortgage securing further advances by the mortgagee and all other indebtedness of the mortgagors to the mortgagee, and authorizing the mortgagee to pay incumbrances on the premises, does not authorize the mortgagee to buy up obligations of the mortgagor disconnected from the mortgage or the premises and to hold the same as secured by the mortgage.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Provident Mutual Building Loan Association against Susan E. Shaffer and another. From the judgment rendered, plaintiff appeals. Affirmed.

O. B. Carter, for appellant. E. B. Coll, for respondents.

ALLEN, J. Action to foreclose mortgage. Finding of the court that one note alleged to be secured thereby was never executed. Judgment and decree for amount of one note only, and for defendant upon the second note, from which judgment plaintiff appeals.

It appears from the record that defendant Susan E. Shaffer was a married woman, the wife of her codefendant, J. W. Shaffer, that she owned as her separate estate the premises described in the complaint; that on July 18, 1899, she and her husband executed to the plaintiff a mortgage on said premises to secure a note for \$1,600 and any further advances by the mortgagee, and all other indebtedness of the mortgagors to the mortgagee existing or thereafter arising, or to be contracted for before satisfaction of the mortgage, not exceeding \$1,599, with a covenant to pay all incumbrances on said premises, and, upon default, authorizing the mortgagee to pay the same. Before the execution of the mortgage defendant Mrs. Shaffer had commenced the construction of a house on said premises. In September, 1899, plaintiff, ascertaining that a lumber company had a bill amounting to \$300 for lumber used in constructing such house, paid the same without the knowledge of Mrs. Shaffer. Afterwards the husband signed a note for such amount, and some one, without authority, signed the wife's name to such note. She never had knowledge of the payment of the money or the execution of the note, until the time of the trial of this action.

It is insisted by appellant that, regardless of the note, her property was liable on account of such payment under the terms of the mortgage, upon the theory that it was either an advancement for her use and benefit, or paid in order to relieve her property from an incumbrance, or was a debt which arose between the parties after the mortgage. That it should be an advancement as contemplated by the mortgage would, of necessity, involve a contract relation, express or implied. No such relation is shown by the record, and the court finds against the plaintiff upon such issue. It does not appear that the husband knew of the payment to the lum-

ber company, but, if he did have such knowledge, it appears that he was acting as agent for plaintiff during the whole time within which the house was being constructed, and was not acting for the wife at any time except in supervising the construction of the house. Neither were there any facts alleged or found from which it may be inferred that the claim of the lumber company was an incumbrance upon the premises; it is not shown when the lumber was purchased, by whom, when the house was completed, or that any steps had been taken, or even contemplated, by the lumber company to assert a lien on account of such debt. The lumber company, at most, was but a creditor of the wife, if she authorized or knew of the purchase. The inchoate right of lien existed in virtue of the admitted furnishing of lumber actually used in the house. If, however, 60 days had elapsed between its completion and the payment by plaintiff, such lien no longer existed. *Morris v. Wilson*, 97 Cal. 646, 32 Pac. 801; *Weithoff v. Murray*, 76 Cal. 508, 18 Pac. 435. If the fact was that the house had not been completed 60 days before payment by plaintiff, we should have no hesitancy in saying that a lien existed under the Constitution of this state, and that plaintiff possessed the right under the mortgage to extinguish the same; but the burden of establishing the existence of such a lien at the date of the payment was upon the plaintiff. We are not of opinion that from the record any debt or obligation in favor of the lumber company is shown by reason of the furnishing of the lumber to be used in Mrs. Shaffer's house. For aught appearing therein, the circumstances might have been such as to have precluded a personal liability upon her part. In addition to this, even were she a general debtor of the lumber company, we do not think that by a fair construction of the mortgage the plaintiff can go out and buy up obligations of the mortgagor disconnected from the mortgage or the premises, and hold the same secured by such mortgage. This, we think, is warranted by the decision in *Moran v. Gardemeyer*, 82 Cal. 101, 23 Pac. 6. There is nothing in the record showing any agency of the husband, nor that he even contracted for the lumber on behalf of the wife, or assumed any authority in relation thereto.

Judgment affirmed.

We concur: GRAY, P. J.; SMITH, J.

FAY v. COSTA.

2 Cal. App. 241

(Court of Appeal, First District, California, Nov. 23, 1905. On Rehearing, Dec. 21, 1905.)

1. EXECUTORS AND ADMINISTRATORS—ESTATES OF PERSONS NOT DEAD.

Probate proceedings on the estate of a person who is not dead are void.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 15.]

2. LIMITATION OF ACTIONS—IGNORANCE OF CAUSE OF ACTION.

Under Code Civ. Proc. § 338, prescribing a three-year limitation in actions for detention of goods or chattels, including recovery of personal property, and providing the action shall not accrue until discovery of the facts by the aggrieved party, where probate proceedings were had on plaintiff's estate on the supposition that he was dead, his action against the administrator, who took possession of his property, which was commenced three years after he learned the facts, was barred.

3. SAME—COMMENCEMENT OF ACTION—REVERSAL—FILING NEW SUIT.

Under Code Civ. Proc. § 355, providing that, if an action is commenced within the time prescribed therefor and a judgment for plaintiff is reversed on "appeal," the plaintiff may commence a new action within a year after reversal, the commencement of a suit and the bringing of an action within a year from the annulling of a decree therein on a "writ of review" does not prevent the bar of limitations.

On Rehearing.

4. PLEADING—DEMURRER—GROUNDS—LIMITATION OF ACTIONS.

Where a petition is demurred to on the ground that the action is barred by limitations, reference need not be made to the particular section relied on; it being sufficient to specify the statute as ground of demurrer.

5. SAME.

Where defendant demurs on the ground that plaintiff's cause of action accrued more than four years before the action was commenced, the demurrer must be sustained, if it appears from the complaint that the action accrued more than four years before it was brought and is of such a nature that it would be barred under the law in four years, or in any less period.

Appeal from Superior Court, Santa Clara County; S. F. Leib, Judge.

Action by George W. Fay against James A. Costa. From a judgment for plaintiff, defendant appeals. Reversed.

Rehearing denied by Supreme Court, January 22, 1906.

H. A. Gabriel and C. D. Wright, for appellant. E. E. Cothran, for respondent.

HALL, J. This is an appeal from a judgment in favor of plaintiff and against defendant for the sum of \$1,518.68, and comes before us on the judgment roll.

The facts necessary to an understanding of the points involved are as follows: This action was brought August 27, 1902. The complaint, among other things, alleges in substance: That on the 29th day of November, 1897, defendant petitioned the superior court of Santa Clara county for letters of administration on the estate of plaintiff, alleging that he had died on or about the 1st day of January, 1897. That thereafter defendant was in form appointed administrator of said estate, and on the 3d day of January, 1898, took into his possession \$1,543.68 belonging to plaintiff and previously distributed to plaintiff from another estate. In May, 1898, a decree of distribution was in form made and recorded in said estate; that is to say, the estate of plaintiff. Plaintiff learned of his

rights in March, 1899, and came to San José, Cal., and defendant paid him \$25, but refused to pay the balance of plaintiff's money. On the 10th day of April, 1899, plaintiff filed and presented his petition before said court (superior court of Santa Clara county), upon which a citation was issued to defendant, Costa, to show cause why all the proceedings had in the matter of the estate of plaintiff should not be set aside and annulled, and why all property received by said Costa as such alleged administrator should not be returned to said court free from all charges and claims of every nature. That thereafter, on the 3d day of May, 1899, the court made its decree that all said proceedings be set aside and annulled, and that all property received by defendant, \$1,543.68, less \$25, be returned to plaintiff, and that defendant pay to plaintiff the sum of \$1,518.68 and costs, and that the clerk issue execution in favor of plaintiff. From this order defendant took an appeal, but the same was dismissed for want of proper bond. Estate of Fay, 126 Cal. 457, 58 Pac. 936. Subsequently, on July 23, 1902, the Supreme Court, on application of defendant, granted a writ of review, and set aside and annulled so much of said decree as directs the payment by defendant Costa to plaintiff of \$1,518.68 and the issuance by the clerk of execution. 137 Cal. 79, 69 Pac. 840. It is also alleged in an amendment to the complaint, filed before demurrer or answer, that in the petition presented April 10, 1899, plaintiff set forth the same cause of action against Costa that is set forth in the complaint in this action, and sought to recover the same identical property. Defendant demurred to the amended complaint upon the ground that the action was barred by sections 338, 339, and 343 of the Code of Civil Procedure; each section being separately pleaded. The demurrer was overruled, and defendant answered, and again pleaded the same sections in bar of the action; but the court found that the action was not barred, and rendered judgment for plaintiff.

The correctness of the ruling of the court as to the plea of the statute of limitations is the question to be determined on this appeal. It will be observed from the foregoing statement of facts that this action was commenced more than four years after the day upon which defendant took possession of plaintiff's money, and more than three years after plaintiff learned of the facts of the case and the probate court had vacated the proceedings upon the estate of plaintiff. Inasmuch as plaintiff is not dead, the probate proceedings on his estate were void. Costa v. Superior Court, 137 Cal. 82, 69 Pac. 840; Stevenson v. Superior Court, 62 Cal. 60. In a concurring opinion by one of the justices in Stevenson v. Superior Court, it is said: "Administration of the estate of a living person is void ab initio and throughout." In the leading opinion it is said: "It is true

that the court of probate, before issuing letters of administration, must first determine affirmatively the question of death. But notwithstanding such determination, the fact that the supposed intestate is alive may still be shown, and when shown establishes the nullity of the entire proceedings." Among the cases cited in the prevailing opinion in support of the doctrine there declared is *Jochumsen v. Suffolk Savings Bank*, 3 Allen (Mass.) 87, where it is held that the plaintiff was entitled to recover money by him deposited in a bank which had been paid by the bank to a person appointed administrator of the estate of plaintiff, upon the supposition that plaintiff was dead. To the same effect is the similar case of *Lavin v. Emigrant Ind. Savings Bank* (C. C.) 1 Fed. 641, 18 Blatchf. 1. In neither case had any steps been taken to annul the probate proceedings, but such proceedings were held to be absolutely void. In accordance with the law as laid down in the foregoing authorities, it is alleged in plaintiff's complaint "that said superior court never had or acquired jurisdiction to administer upon plaintiff's said estate by reason of the fact that plaintiff is still alive and resident in the flesh." In *Elliott v. Peirsol*, 26 U. S. 328, 7 L. Ed. 164, in speaking of a case where a court acts without jurisdiction, it is said: "But, if it act without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought even prior to a reversal in opposition to them."

The probate proceedings upon the estate of plaintiff being void and a nullity, plaintiff had a right of action against defendant as soon as defendant took possession of plaintiff's money; and even if it be said that the statute did not begin to run until plaintiff learned of the facts under section 338, still three years elapsed after that time before this action was commenced. We are obliged, therefore, to hold that this action was barred before commenced, unless the filing of the petition in the probate proceedings and the bringing of this action within one year from the annulling, on a writ of review, of the decree obtained by plaintiff on said petition prevents the bar of the statute. And this seems to be the real contention of respondent, and the theory upon which his complaint is framed. Section 355 of the Code of Civil Procedure is as follows: "If an action is commenced within the time prescribed therefor, and a judgment thereon for the plaintiff be reversed on appeal, the plaintiff * * * may commence a new action within one year after the reversal." The judgment in question here was not "reversed on appeal," but was annulled and set aside on a writ of review, and in order to uphold the action of the trial court we are asked to hold that a reversal on appeal includes an annulling on a writ of review.

We are cited to *McOmber v. Chapman*,

42 Mich. 117, 3 N. W. 288, as sufficient authority for such construction. It was held in the above-entitled case that a reversal on a writ of certiorari was sufficient to authorize a new suit under a statute which authorized a new suit where the first judgment was reversed on a writ of error. The Michigan statute, however, had other provisions which seemed to indicate a general intent to save the right to bring a new suit where the first suit had abated or failed without fault of the plaintiff. Furthermore, in *McOmber v. Chapman* the judgment that had been reversed was one rendered by a justice of the peace, and in Michigan a writ of certiorari is used to review errors of law committed during the trial of a cause in a justice's court, and is not confined, as in this state, to setting aside proceedings for want of jurisdiction. How. Ann. St. Mich. § 7031 et seq. Even the evidence may be reviewed where there is a total lack of evidence to support the judgment, or some material fact necessary to support a recovery. *Welch v. Bagg*, 12 Mich. 43; *McGraw v. Schwab*, 28 Mich. 13; *Brown v. Blanchard*, 39 Mich. 790; *L. S. Building Co. v. Thompson*, 32 Mich. 293. So, generally, in Michigan both writs of certiorari and writs of error are used to correct errors of law occurring in the trial court; writs of error to review judgments of courts of law and of record, in proceedings had according to the course of the common law (*Holbrook v. Cook*, 5 Mich. 225), or proceedings substantially analogous thereto (*Fletcher v. Clark*, 39 Mich. 374), and writs of certiorari to correct errors of law in proceedings that are not according to the course of the common law (How. Ann. St. Mich. § 8691, and cases cited in note). The time within which either may issue is the same. Id. § 8693. It is thus seen that the Michigan court had good grounds for holding that a reversal under a writ of certiorari was in substance a reversal under a writ of error, within the meaning of the statute allowing a new action to be brought within a year from such reversal. Both writs are used in that state for procuring a reversal of the action of the trial court for errors of law committed in the trial of the action. Our Code lays down the rule for its own construction in these words: "Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar or appropriate meaning or definition." The word "appeal" in the law of this state refers to the proceedings that are provided for in title 13, part 2, of the Code of Civil Procedure, where the time and method of taking an "appeal" are minutely set forth. A writ of review (certiorari) is provided for in chapter 1, title 1, of part 3 of the Code of Civil Procedure.

ture, and may be granted in certain prescribed cases, where there is no appeal (section 1068, Code Civ. Proc.), and only where jurisdiction has been exceeded. Our Code, in the section just cited, uses the word "appeal" as indicating something different from a writ of review. While to some minds it may be difficult to suggest a reason why the Legislature, in the case of a reversal on appeal, should provide that a new action may be brought, and not when the same result is secured by a writ of review, it seems to be so written. It may be suggested, in this connection, however, that limitations exist as to appeals that do not exist as to writs of review. Thus appeals must be taken within a very limited time (the longest being six months from the judgment to be reviewed), while no such limitation exists with regard to the right to a writ of review. This difference may well be said to justify a rule allowing the right to bring a new action in the one case and not in the other. We do not think that we are justified in construing the word "appeal," as used in section 355 of the Code of Civil Procedure, as including a writ of review. For the reasons above set forth, the demurrer should have been sustained.

Appellant also urges that the filing of the petition by plaintiff in the probate court was not the bringing of an action such as would interrupt the running of the statute of limitations, for the reason that such court had no jurisdiction in such a proceeding to enter a judgment that defendant pay the money obtained by him to plaintiff; but, in view of the conclusion we have reached on the question last discussed, it is not necessary to determine the sufficiency of this point. Suffice it to say that in some states it is held that the bringing of an action in a court without jurisdiction of such action is not sufficient to interrupt the running of the statute (*Gray v. Hodge*, 50 Ga. 262; *Edwards v. Ross*, 58 Ga. 147; *Sweet v. Electric Light Co.*, 97 Tenn. 252, 36 S. W. 1090; *Donnel v. Gatchell*, 38 Me. 217); while the contrary doctrine is held elsewhere (*Smith v. McNeal*, 109 U. S. 426, 3 Sup. Ct. 319, 27 L. Ed. 986; *L. R. M. R. & T. Ry. v. Mances*, 40 Ark. 248, 4 S. W. 778, 4 Am. St. Rep. 45; *Ball v. Biggam*, 6 Kan. App. 42, 49 Pac. 678; *Blume v. City of New Orleans*, 104 La. Ann. 345, 29 South. 106; *Woods v. Houghton*, 67 Mass. 580).

The judgment is reversed.

We concur: HARRISON, P. J.; COOPER, J.

On Rehearing.

HALL, J. The petition for a rehearing is denied, but for the purpose of more clearly presenting the point decided, the opinion heretofore filed is amended as follows: The following portion is struck out, to wit: "Defendant demurred to the amended complaint

upon the ground that the action was barred by sections 338, 339, and 343 of the Code of Civil Procedure, each section being separately pleaded. The demurrer was overruled and the defendant answered, and again pleaded the same sections in bar of the action, but the court found that the action was not barred, and rendered judgment for plaintiff. The correctness of the ruling of the court as to the plea of the statute of limitations is the question to be determined on this appeal;" and in lieu thereof the following is inserted, to wit:

"Defendant demurred to the amended complaint upon the ground that the action was barred by sections 338, subd. 4, 339, subd. 1, and 343, Code Civ. Proc., each section being separately pleaded; and also upon the ground that the cause of action had accrued to plaintiff more than four years before the commencement thereof, and did not accrue within four years before the commencement thereof. The demurrer was overruled and the defendant answered, and again pleaded the same sections, and that the cause of action accrued to plaintiff more than four years before the commencement thereof. The correctness of the ruling of the court as to the plea by demurrer of the statute of limitations is the question to be determined on this appeal.

"In presenting the question of the bar of the statute of limitations by demurrer it is not necessary to refer to the particular section relied on. In such a case it is sufficient to specify the statute as one of the grounds of the demurrer. *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877; *Brennan v. Ford*, 46 Cal. 7. The defendant having demurred upon the ground that the cause of action accrued to plaintiff more than four years before the action was commenced was entitled to have his demurrer sustained if it appeared upon the face of the complaint that the action did accrue more than four years before it was brought, and was of such a nature that it would be barred under the law in four years or in any less period. *Boyd v. Blankman*, 29 Cal. 20, 87 Am. Dec. 146."

We concur: HARRISON, P. J.; COOPER, J.

2 Cal. App. 249

MURPHY v. BONDSBU, County Auditor.
(Court of Appeal, Third District, California.
Nov. 23, 1905.)

1. COUNTIES — BOARD OF SUPERVISORS — ALLOWANCE OF CLAIM — LIMITATIONS.

Pol. Code, § 3804, provides that all taxes, penalties, or costs, paid more than once or illegally collected, may by order of the board of supervisors be refunded by the county treasurer; and County Government Act 1897 (St. 1897, p. 470, c. 277) § 40, provides that the board must not allow any claim, unless presented within a year after the last item of the claim or the account accrued. *Held*, that the board of supervisors has no power to allow a claim, under section 3804, not filed with the board for more than a year after it accrued.

2. MANDAMUS—SCOPE OF REMEDY—MISTAKE.

Where, by a mistake in the amount necessary to redeem land sold for taxes, plaintiff paid a sum in excess of that required by law to redeem, and the mistake was not discovered until his claim for a refund was barred, whereupon he procured an allowance from the county board, and upon refusal of the auditor to draw a warrant brought mandamus, he was not entitled to relief under Code Civ. Proc. § 338, providing for granting relief in certain cases on the ground of mistake.

3. STATUTES—CONSTITUTIONAL PROVISIONS—SUBJECTS AND TITLES.

Const. art. 4, § 24, declares that every act shall embrace but one subject, which shall be embraced in the title. *Held*, that St. 1901, p. 647, c. 215, entitled "An act" to add certain sections to the Political Code, to re-enact others, to amend others, and to repeal others, "all relating to the revenue and taxes of the state," and all the sections embraced in the act in fact pertaining to the revenue and tax system of the state, is not unconstitutional.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 127, 173, 174.]

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Mandamus by Charles H. Murphy to compel F. A. Bondshu, as auditor of the county of Mariposa, to pay certain warrants. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

Rehearing denied by Supreme Court, January 22, 1906.

J. S. Larew, for appellant. J. A. Adair, for respondent.

CHIPMAN, P. J. Mandate. The petition avers: That defendant is auditor of the county of Mariposa, and that on December 27, 1900, he, "by errors and mistakes * * * made in the estimate of the amount necessary to redeem a certain piece of real estate assessed to * * * plaintiff herein, * * * and sold to the state of California for delinquent taxes, the plaintiff paid to the county treasurer of Mariposa county on said date the sum of \$3.61 in penalties for delinquencies in excess of what was due upon the redemption of said real estate; that at the time of said payment the said plaintiff herein, and all persons on his behalf, did not know of said errors or said mistakes in the auditor's said estimate," and that by reason of said errors said payment was made; that said errors and mistakes, and the fact that payment in excess of what was due had been made by the plaintiff, were not discovered by plaintiff, and he had no knowledge thereof prior to the month of February, 1903; that immediately on discovery of said errors and mistakes plaintiff employed counsel to collect his said claim, and on July 1, 1903, filed an itemized statement with the board of supervisors, "accompanied by an affidavit showing that the said sum of \$3.61 belonged to and was due to the plaintiff herein"; that said board, on September 23, 1903, made an order that said sum be paid to plaintiff, and directed the auditor (defendant) to draw his warrant for the same; that on September 24,

1903, plaintiff made demand on defendant to draw his warrant for said sum as so directed, but he refused and still refuses so to do. Defendant interposed a general demurrer; also pleaded by demurrer that the action is barred by section 3804 of the Political Code; also that it is barred by section 4072 of the same Code; also that it is barred by section 40 of the county government act of 1897. St. 1897, p. 470, c. 277. Defendant also demurred specially on several grounds, which need not be stated, in view of the conclusion we have reached. The court sustained the demurrer without leave to amend, and gave judgment for defendant, from which plaintiff appeals.

So far as we can discover, the case at bar is similar in all respects to *Perrin v. Honeycutt*, 144 Cal. 87, 77 Pac. 776. It was there held that the board of supervisors had no jurisdiction to allow the claim, because (1) presented for allowance more than one year after the payment was made and the claim therefor accrued (County Government Act 1897, § 40 [St. 1897, p. 470, c. 277]); (2) that the auditor was justified in refusing to draw his warrant for the amount if the board had no power to allow the claim; (3) the writ of mandate cannot be used to obtain relief on the ground of fraud or mistake, the court saying: "When it is applied for, there must be a clear case to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." It was also held that the action is not one for relief on the ground of mistake, and does not come within section 338 of the Code of Civil Procedure, but is an action brought for relief under section 3804 of the Political Code. The court declined to consider the question then and now raised as to the constitutionality of section 3804, because the board of supervisors was prohibited from allowing the claim by the county government act, and hence the six months' limitation provided by section 3804 need not be passed upon. The court said: "If the section is unconstitutional, it would seem that the plaintiff could not in any case recover upon his claim." We think the petition shows on its face facts sufficient to raise the question of the statutory bar by demurrer.

The contention that the act is unconstitutional as violative of section 24 of article 4 of the Constitution, because, as is alleged, "two subjects of legislation are embraced in the act of 1901 (St. 1901, p. 647, c. 215), viz., 'Revenue and Taxation,' " cannot be maintained. The act is entitled "An act" to add certain sections to the Political Code, to re-enact others, to amend others (among them section 3804), and to repeal others, "all relating to the revenue and taxes of this state, and fixing the time within which claims for refunds of taxes must be made." It was held in *San Francisco, etc., R. R. v. State Board*, 60 Cal. 12, that a title expressing the object of the act to be "to amend section * * *" of a named Code, "relating" to the

particular object treated of in the body of the act, is valid. All the sections embraced in the act of 1901 pertain to the revenue and tax system of the state. The Constitution reads: "Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title. * * *" Here the subject was embraced in the act, and, by reference to the number of the Code section (3804), was also expressed in the title. Furthermore it has been held that numerous provisions having one general object fairly indicated by the title may be united. *Ex parte Liddell*, 98 Cal. 633, 29 Pac. 251; *People v. Parks*, 58 Cal. 624; *Ex parte Kohler*, 74 Cal. 38, 15 Pac. 436.

Some doubt of the authority of *Perrin v. Honeycutt* seems to be entertained by counsel for appellant, because the petition for rehearing was not considered; the reason being that it was received too late for action. Non constat but that, had a rehearing been granted, the department decision would have been affirmed. The decision stands unimpaired, and must rule this case.

The judgment is affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

1 Cal. App. 233

CALKINS v. HOWARD et al.

(Court of Appeal, Third District, California.
Nov. 21, 1905.)

1. APPEAL—TIME—DISMISSAL.

An appeal from a judgment, not taken within six months after its rendition, will be dismissed.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1926.]

2. FRAUDULENT CONVEYANCES—CREDITORS.

Civ. Code, § 3429, defines a debtor to be one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability be certain or contingent; and section 3430 provides that a creditor is one in whose favor the obligation exists by reason of which he is or may become entitled to the payment of money. *Held*, that a mortgagee is a "creditor" of the mortgagor before the docketing of a deficiency judgment, within section 3440, providing that the sale or transfer of a stock in trade outside of the ordinary course of business will be conclusively presumed to be fraudulent and void as against existing creditors of the vendor unless a certain notice is recorded five days before consummation of the sale.

3. SAME—FRAUD IN FACT.

Under Civ. Code, § 3440, providing that a sale of a stock of goods outside the ordinary course of business will be "conclusively presumed to be fraudulent and void as against existing creditors," etc., a finding that there was no fraud in fact in a transfer within the statute cannot control the conclusive presumption raised thereby.

4. SAME—INSOLVENCY—PROOF.

Where, on an issue of fraud in the transfer of personal property, it was proved that

an execution had been issued and returned nulla bona and that the sheriff had been unable to find other property, such proof was prima facie sufficient to show the debtor's insolvency.

5. EXECUTION—CLAIMS OF THIRD PERSON—TRANSFER OF PROPERTY—INSOLVENCY OF SELLER.

Where certain property levied on had been transferred by the debtor in violation of Civ. Code, § 3440, making such transfers fraudulent and void as against existing creditors, and was claimed by the transferee, the sheriff was not bound either to allege or prove the insolvency of the debtor in order to maintain his claim to the property.

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by William Calkins against Charles B. Howard and others. From a judgment in favor of plaintiff, and from an order denying defendants' motion for a new trial, they appeal. Reversed.

Coburn & Collier, for appellants. James F. Lodge, and R. S. Taylor, for respondent.

McLAUGHLIN, J. This is an action against defendant Howard, and the sureties on his official bond as sheriff of Siskiyou county, to recover certain personal property or the value thereof. The plaintiff had judgment, and from such judgment and the order denying their motion for a new trial, defendants appeal. The appeal from the judgment was not taken within six months, and hence it must be dismissed. *Michaelson v. Fish* (Cal.) 81 Pac. 661. The defendant sheriff holds the property by virtue of an execution issued in a case entitled "G. W. Small v. W. H. Hubbard." In that case Small recovered a judgment foreclosing a mortgage, the amount found due being \$453.50. The mortgaged property was sold pursuant to this judgment, and on August 10, 1903, a deficiency judgment for the sum of \$242.62 was docketed. Two weeks later an execution was issued on said deficiency judgment, and the defendant sheriff levied the same by seizing the property here in dispute. This property comprised the stock in trade and fixtures of a saloon conducted by Hubbard, who sold it to plaintiff in bulk on July 15, 1903. Plaintiff took possession of the same, and while he was so in possession the property was seized by the sheriff. Plaintiff gave due notice of his claim to the property, and demanded its return, but the sheriff refused to comply with such demand, and thereupon this action was brought. No notice of the sale by Hubbard to plaintiff was recorded, as required by the provisions of section 3440 of the Civil Code, and the principal question presented for decision involves the construction of that portion of said section, which provides that the sale or transfer of a stock in trade in bulk, or in any manner otherwise than in the ordinary course of trade, and in the regular and usual method of the vendor, will be conclusively presumed to be fraudulent and void, as against existing creditors of the vendor, unless the notice therein provided for is

recorded at least five days before the consummation of the sale.

It is contended by respondent that Small was not an existing creditor within the meaning of the section cited, because at the time of the sale, no deficiency judgment had been docketed. We cannot concur in this view. A debtor is one who, by reason of an existing obligation is, or may become, liable to pay money to another, whether such liability be certain or contingent. Civ. Code, § 3429. A creditor is one in whose favor an obligation exists by reason of which he is, or may become entitled to the payment of money. Civ. Code, § 3430. A mortgagee is none the less a creditor because the payment of the debt due him is secured by a lien on specific property. As to this property, he is a preferred creditor; but, if a balance remains after the security is exhausted, his right to have recourse against the general assets of his debtor is unquestionable. "The taking of the security operated to suspend the right of proceeding against the property fraudulently conveyed, or any other property of the debtor, until the mortgaged property should be exhausted and a deficiency judgment docketed; but we cannot perceive any principle upon which suspension of the remedy, without more, could operate more favorably upon property fraudulently conveyed than upon other property of the debtor, all being alike, subject to the process of law in favor of existing creditors." *First National Bank, etc. v. Maxwell*, 123 Cal. 369, 55 Pac. 980, 69 Am. St. Rep. 64. The word "creditor" is given very broad significance in determining the right to assail a fraudulent transfer of property. *Murray v. Murray*, 115 Cal. 273, 7 Pac. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97; *Chalmers v. Sheehy*, 132 Cal. 465, 64 Pac. 709, 84 Am. St. Rep. 62. If persons having a claim for a tort, or for maintenance, can be considered creditors. If those whose rights are inchoate, indefinite, uncertain, and contingent upon judicial award, can assail fraudulent transfers, surely a mortgage creditor, pursuing his special remedy and security, is not robbed of the legal status which attaches the moment the obligation is created and continues until the debt is paid. It is argued that the contrary conclusion follows because, if notice had been given, this mortgage creditor would have been remediless, and hence no harm or disadvantage resulted to Small by reason of the failure to record the statutory notice. Waiving the thought that this is a false quantity in determining the status of a creditor in the absence of such notice, we think that the law affords preventive or protective remedies to all whose rights require conservation.

It is next urged that the finding as to absence of fraudulent intent neutralizes the effect of failure to record the notice. We do not think any finding of fact, however strong in its demonstration of good faith, can avail to validate the sale of a stock in trade in bulk without the statutory notice, as against

existing creditors of the vendor. The clause of section 3440, under consideration, is plain and unambiguous, and when it is shown that such a sale was made without the required notice, it is "conclusively presumed to be fraudulent and void as against the existing creditors of the vendor." This presumption is incontrovertible. "Where the law makes a certain fact a conclusive presumption, evidence will not be received to the contrary." *Estate of Mills*, 137 Cal. 303, 70 Pac. 91, 92 Am. St. Rep. 175; *Filipini v. Trobeck*, 134 Cal. 444, 66 Pac. 567. Under the undisputed facts in this case, therefore, the finding in question must fall before the conclusive presumption raised by the statute. The court found that there was no proof of the insolvency of Hubbard, "nor any proof that he did not have sufficient property out of which said execution issued on said deficiency judgment could have been satisfied." This finding is relied upon to support the judgment regardless of the fraudulent nature of the transfer. But the finding is contrary to the only evidence bearing on the facts found. An execution had been issued and returned nulla bona, and certainly the return of the sheriff that he was unable to find other property, is sufficient, *prima facie*, to show that no other property is available to satisfy the judgment. 14 Am. & Eng. Ency. of Law (2d Ed.) p. 331; *Herrlich v. Kaufmann*, 99 Cal. 277, 33 Pac. 857, 37 Am. St. Rep. 50. In any event, however, the transfer being absolutely void as to Small, the sheriff was not required to plead or prove the insolvency of Hubbard. *First National Bank v. Maxwell*, *supra*; *Mason v. Vestal*, 88 Cal. 397, 26 Pac. 213, 22 Am. St. Rep. 310; *Banning v. Marleau*, 121 Cal. 242, 53 Pac. 692.

The order is reversed, and the cause remanded for a new trial.

We concur: CHIPMAN, P. J.; BUCKLES, J.

2 Cal. App. 225

PEOPLE v. SOLANI.

(Court of Appeal, Third District, California.
Nov. 20, 1905.)

1. HOMICIDE—INSTRUCTIONS—SELF-DEFENSE.

Where, on a trial for homicide, defendant testified that he fired the fatal shot because he thought his life was in danger; that he was down and two men were over him, striking at him; and that he did not know which one he shot—an instruction that the law presumed that defendant intended to kill decedent, and, unless it was shown that his intention was other than his acts indicated, the law would not hold him guiltless, was erroneous, for one might intend to kill and yet be guiltless.

2. CRIMINAL LAW—ERRORS IN INSTRUCTIONS—CURED BY OTHER INSTRUCTIONS.

The error in an instruction on a trial for homicide, defended on the ground of self-defense, that the law presumed, on the proof of the killing, that defendant intended to kill, and that, unless it was shown that his intention was other than his acts indicated, the law would not hold him guiltless, in ignoring the fact that one might intend to kill and yet be guilt-

less, was not cured by other instructions to the effect that intent is manifested by the circumstances connected with the offense, which intent must be proved, and that, when an unlawful act is proved, the law presumes it to have been intended unless otherwise shown, and that it is not necessary to prove an unlawful intent by direct evidence.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

John Solani was convicted of manslaughter, and he appeals. Reversed.

W. F. Cowan and James P. Berry, for appellant. U. S. Webb, Atty. Gen., for the People.

BUCKLES, J. The defendant was charged with the murder of one John Guidotti, and was convicted of manslaughter. He appeals from the judgment and from an order denying his motion for a new trial.

The appellant bases his contention for a reversal upon the grounds: (1) Insufficiency of the evidence to justify the verdict; (2) misconduct of the jury; and, (3) errors committed by the court in its instructions to the jury. As a new trial must be granted on the last assignment of error, it is not necessary to notice the others. The instruction complained of is as follows: "Intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. The intent must be proved; but, when an unlawful act is proved, the law presumes it to have been intended, unless otherwise shown by the evidence. It is never required by the prosecution to prove an unlawful intent by positive and direct evidence. In many cases such proof could not be made; and it is deemed sufficient to prove the unlawful act and from such proof the law presumes the unlawful intent. And, if the defendant in this case shot John Guidotti, and killed him, the law presumes the defendant intended to kill the deceased, and, unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless." The defendant testified that he fired the shot because he thought his life was in danger, and that he was down and two men were over him striking at him, but he did not know which one he shot. The vice of this instruction is found in the last paragraph: "And, unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless." This same language was used in the instruction given in *People v. Newcomer*, 118 Cal. 263, 50 Pac. 405, which was a case in which the defense of self-defense was involved, and the Supreme Court held the words to be error, and directed a new trial. The shooting with a pistol would naturally indicate intent to kill, and would be sufficient proof of such intent, if there was no other proof tending to show that he did not intend to kill. One might intend to kill, however, and yet be entirely guiltless.

The Attorney General maintains that all the instructions must be viewed together; and this is correct. *People v. Armstrong*, 114 Cal. 570, 46 Pac. 611. The court had told the jury that intent is manifested by the circumstances connected with the offense; that this intent must be proved, but, when an unlawful act is proved, the law presumes it to have been intended, unless otherwise shown by the evidence; and that it is never required by the prosecution to prove an unlawful intent by positive and direct evidence—following this up by telling the jury that, if defendant shot and killed the deceased, the law presumes he intended to kill him, "and, unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless." Taking the whole instruction together, it is difficult to see how it can be said to be free from error. The inference is too readily drawn by the jury from the words "the law will not hold him guiltless" that, the killing being shown and the intent to kill being presumed, the mere killing would make the one killing guilty of some crime. With these considerations, we think that the error was prejudicial.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

2 Cal. App. 220

FITZHUGH v. MASON et al.

(Court of Appeal, Second District, California.
Nov. 20, 1905.)

1. APPEAL—FINDINGS—SUFFICIENCY — SPECIFICATIONS.

Where, in an action for architect's services, plaintiff appealed from a judgment awarding him \$700, and claimed that under the evidence he was entitled to \$13,580, but the finding as to damage was not attacked in plaintiff's specifications of insufficiency, the point was not reviewable.

2. JUDGMENT—CONFORMITY TO VERDICT.

Where, in an action for breach of a contract for architect's services, there was no finding as to the earnings of plaintiff and his probable expenses in carrying out the contract, he was not entitled to judgment for a percentage of the actual cost of the building erected by defendants, less his earnings and estimated expenses.

3. DISMISSAL AND NONSUIT — DISCRETION — FINDINGS—JUDGMENT—FAILURE TO ENTER—TIME.

Under Code Civ. Proc. § 581, subd. 6, providing that an action may be dismissed or a judgment of nonsuit entered by the court, when, after verdict or final submission, the party entitled to judgment neglects to demand or have the same entered for more than six months, it is within the discretion of the court to dismiss the action for such cause or not at its election.

4. CONTRACTS—ARCHITECT'S SERVICES—RIGHT TO PRACTICE.

Failure of an architect to obtain a certificate entitling him to practice architecture within the state, as required by Act March 23, 1901 (St. 1901, p. 641, c. 212), prior to the

making of a contract for his services in the erection of a building, did not invalidate the contract, though he could not legally perform the same without procuring such certificate.

5. SAME—CONSTRUCTION OF CONTRACT.

An architect, in the last of his correspondence with reference to his employment in the construction of a building, stated certain conditions on which he would accept employment, followed by the clause: "You are doubtless posted on regular fees for architectural services. Full services, 5 per cent. Drawings and specifications, 3 per cent."—and added that he could not accept employment except on conditions specified. There was no express acceptance of the terms named or agreement with reference thereto, but defendants sent plaintiff a draft for certain expenses, and at the same time requested him to make certain investigations as to buildings in other cities. *Held*, that the allusion to fees in plaintiff's letter did not constitute one of the terms of the contract, and that defendants were therefore only bound under an implied provision to pay the regular fees.

6. SAME—TERMINATION OF CONTRACT.

Where defendants employed plaintiff to perform certain services as an architect, defendants were entitled to discontinue the work at their option, in the absence of a contract to the contrary, on paying plaintiff for services and expenses incurred.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1009.]

7. APPEAL—HARMLESS ERROR.

Where, in an action for architect's services, the decision in favor of plaintiff did not rest on an erroneous finding as to the contract for the services, but on the finding as to damage which plaintiff had sustained, which finding was not attacked in defendants' specifications of error, such erroneous finding was not prejudicial to defendants.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Thornton Fitzhugh against John A. Mason and another, copartners. From a judgment in favor of plaintiff for less than the relief demanded, and from an order denying his motion for a new trial, plaintiff and defendant John A. Mason appeal. Affirmed.

Johnstone Jones, for appellant Mason. G. P. Adams, for respondent.

SMITH, J. The plaintiff is an architect, and brings this suit for the breach of an alleged contract of employment by the defendants. On May 5, 1903, the court made the following order: "Findings ordered in favor of the plaintiff. Damages will be fixed at the sum of \$700." The findings and judgment were filed February 2, 1904, and judgment thereon entered for plaintiff in the sum of \$700; from which, and an order denying his motion for a new trial, he and the defendant Mason each appeal.

The allegations of the complaint as to the contract are, in effect: That during the month of October, 1901, the defendants entered into negotiations with plaintiff, which continued until about the 18th day of November, 1901, and resulted in a contract, whereby "the defendants employed plaintiff to act as architect for them in the erection and construction by them, in the city of Los

Angeles," etc., "of an opera house and an eight or ten story building, and agreed to pay him five per cent. on the cost price thereof and his traveling expenses for his services as such architect"; that the cost of said buildings as contemplated by said defendants at the time of said agreement would be not less than \$300,000; that plaintiff performed certain services under the contract, and was not only ready and willing to carry it out, but offered to do so to the defendants, who refused to carry out the terms of the agreement, or to pay the plaintiff therefor; and that plaintiff's compensation as architect under the said agreement would amount to \$15,000, and his damages, by reason of the breach, to the like sum. The court finds the contract as set out in the complaint; but further finds "*that the cost of said building, as contemplated by said defendants at the time of said agreement, was not definitely determined, and defendants did not agree that the building should cost any certain sum.*" It is further found: That the plaintiff offered to perform; that at that time he had not obtained a certificate from the state board of architecture under the act of March 23, 1901 (St. 1901, p. 641, c. 212); that the defendants refused to carry out the agreement; that the opera house, as contemplated by the defendants and subsequently modified by them, was constructed by the defendant Mason, after the commencement of this action, "at a cost of more than \$130,000"; and that the plaintiff was damaged in the sum of \$700. The only specification made by the plaintiff is that the evidence is insufficient to justify the finding italicized. But we think this finding is fully supported by the evidence.

Other points urged by the plaintiff appellant are: That, on the evidence, he was entitled to damages in the sum of \$13,580—being the amount claimed by him in the complaint (\$15,000), less his earnings and estimated expenses, as shown by his testimony; and that upon the findings he was entitled at least to 5 per cent. on the actual cost of the building put up by Mason, \$130,000, less his earnings and estimated expenses. But with reference to the former point it is sufficient to say that the finding as to damage is not attacked in the plaintiff's specifications of insufficiency. The second point is also untenable: First, because there is no finding as to the earnings of plaintiff, or his probable expenses, in carrying out the contract (*Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625); and also because we are of the opinion—for reasons that will be given in the sequel—that under the contract proven and found he was not entitled to the sum claimed.

The points urged by the defendant appellant are: (1) That the demurrer to the complaint should have been sustained; (2) that the finding as to the contract was not justified by the evidence; (3) that the contract, if any, was illegal and void; and (4) that the

suit should have been dismissed for failure of plaintiff to demand judgment within six months after the order for findings. The last point is obviously untenable. It was in the discretion of the court to dismiss the action, or not to do so. Code Civ. Proc. § 581, subd. 6. The third point is also untenable. By the act of March 23, 1901, "to regulate the practice of architecture," it is made a misdemeanor "for any person to practice architecture without a certificate in this state"; and hence, in order to carry out the contract, it would have been necessary for the plaintiff to take out his certificate. But we can see no reason why it should be held that a contract made in advance of the issue of a certificate should be void.

As to the other points of the appellant defendant, which will be considered together, we are of the opinion that the evidence was sufficient to justify the finding that the plaintiff was employed by the defendants. But we are also of the opinion that the evidence did not establish the allegation of the complaint that defendants agreed to pay plaintiff 5 per cent. on the contemplated cost of the building, or justify the finding of the court to that effect. In the plaintiff's letter of November 2, 1901, to the defendant Eaton—the last from him in the correspondence—he states certain conditions upon which he would accept employment, and in this letter occurs the following clause: "You are doubtless posted on regular fees for architectural services. Full services, 5 per cent. Drawings and specifications, 3 per cent."—and it is added: "I will await your answer anxiously and act promptly, if you can give me the work on the conditions named, which, as I am situated, are the only conditions I can accept." There was no express acceptance of the terms named, or agreement with reference thereto; but on November 18th, in response apparently to a telegram from the plaintiff, a draft for \$375, for certain expenses, was forwarded to him by the defendants, and at the same time a letter written requesting him to start for Los Angeles as soon as possible, and on his way to make certain investigations as to buildings, etc., in Chicago; which closed the correspondence. We do not regard the allusion to fees in the letter of plaintiff as constituting one of the terms of the contract, but simply as stating the regular fees charged by architects for services, which were doubtless already known to the defendants. From this, an agreement might be inferred that the defendants would pay the regular fees. But there is no evidence in the case as to when, according to the custom of trade, such fees should become due, and, in the absence of such evidence, it is reasonable to suppose that the employer would be liable for them only upon completed work; and that, in the absence of an explicit contract to the contrary, he would be at liberty to discontinue the work at his option, paying the architect for services ren-

dered and expenses incurred. Civ. Code, §§ 1643, 1655-1656. We are of the opinion, therefore, that the finding of the court upon this point was not sustained by the evidence. But as the decision of the court does not rest upon this finding, but on the finding as to damages in the sum of \$700—which is not attacked in the defendant appellant's specifications—we are also of the opinion that the error is immaterial.

For the reasons given, it is also clear that the facts alleged in the complaint are insufficient to show an indebtedness to plaintiff in the sum of \$15,000, or damages in that amount; but the complaint is sufficient to show an employment, and to justify the finding of the court that plaintiff was injured in the amount found.

For these reasons, the judgment and the order appealed from are affirmed.

We concur: GRAY, P. J.; ALLEN, J.

2 Cal. App. 219

**NOFZIGER BROS. LUMBER CO. v. SHA-
FER et al.**
(Court of Appeal, Second District, California.
Nov. 20, 1905.)

1. APPEAL—EVIDENCE—FINDINGS—REVIEW.

Where there is some evidence to support the findings of the trial court, they will not be disturbed on appeal.

2. MECHANICS' LIENS—NOTICE OF LIEN—REQUISITES.

Where a notice of a claim for a mechanic's lien did not correctly state and set out the terms of the contract under which the materials sued for were sold and delivered, it was insufficient to support the lien.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanic's Lien, §§ 168, 239.]

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Nofziger Bros. Lumber Company against W. H. Shafer and another. From a judgment in favor of defendant Webster Batcheler, and from an order denying a new trial, plaintiff appeals. Affirmed.

Scarborough & Bowen, for appellant. Sidney J. Parsons, for respondents.

ALLEN, J. Action to foreclose a mechanic's lien. Judgment in favor of defendant Batcheler, from which, and an order denying a new trial, plaintiff appeals.

The complaint alleges that the lumber, on account of the furnishing of which the lien was claimed, was received by defendant Shafer, who, as tenant of defendant Batcheler, was constructing a house upon the lands of and with knowledge of and with the consent of the latter. The claim of lien set out in the complaint asserts that the lumber was sold under a contract with Shafer that he was to pay therefor the then prevailing list price; that no terms for payment were specially agreed to. The court finds that said claim of lien "did not and does not correctly state and set out the terms of the contract

made between plaintiff and defendant W. H. Shafer for the lumber and materials sold and delivered, * * * nor does said claim of lien correctly state and set out the terms, time given, and conditions of said contract." The court further finds that there was no agreement to pay the list price, or any particular price; that the contract was that the lumber should be paid for upon completion of the house; that the house was not completed at the date of the filing of the lien; and that work had not been suspended thereon for 80 days, or at all. There was testimony offered tending to establish all of these facts so found. It was within the province of the trial court to determine these facts, and, where there is some evidence in support, they will not be disturbed. "The notice of lien must contain a correct statement of the facts required by the statute, and, unless so stated, no claim can be enforced." *Santa Monica, etc., Co. v. Hega*, 119 Cal. 380, 51 Pac. 555; *Malone v. Big Flat, etc., Co.*, 76 Cal. 578, 18 Pac. 772. "These facts, to be correctly stated, must embrace a statement of the terms, time given, and conditions of the contract. In all essential particulars, the statement of claims of lien must be true." *Wagner v. Hansen*, 103 Cal. 107, 37 Pac. 195. The court, finding that the claim of lien was untrue in essential particulars, and the evidence warranting such finding, the claim of lien could not be enforced. There being no basis for a decree in plaintiff's favor against defendant Batchelor under these findings, it is needless to discuss the other points involved.

The judgment and order are affirmed.

We concur: GRAY, P. J.; SMITH, J.

2 Cal. App. 253
ALVEY v. CONTINENTAL INS. CO. OF
CITY OF NEW YORK.
(Court of Appeal, First District, California.
Nov. 25, 1905.)

**INSURANCE — CONSTRUCTION OF CONTRACT —
MODIFICATIONS OF POLICY.**

Civ. Code, § 1647, provides that a contract may be explained with reference to extrinsic circumstances and the subject-matter. Section 1648 provides that a contract extends only to those things concerning which it appears that the parties intended to contract. Section 1651 provides that written parts of a contract control printed parts, and original parts control those copied from a form. An insurance policy covered, in separate items and for distinct amounts, a building and household furniture, and provided that the entire policy should be void if the building should become vacant or unoccupied. Subsequently the furniture covered by the policy was moved from the insured premises to another house, and the policy was accordingly modified by an attached slip, on which was written "the second item of this policy is hereby made to read and cover as follows." Following the writing, the form printed on the slip was filled out, so as to provide for insurance on household furniture. The form contained a clause permitting vacancy during a change of tenants. *Held*, that the attached slip modified the original policy only

so far as it related to the insurance on the furniture, and did not modify the provisions relating to insurance on the house, and there could be no recovery for the destruction of the house by fire while vacant and unoccupied, contrary to the stipulations of the original policy.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Hattie L. Alvey against the Continental Insurance Company of the City of New York. From an order denying a new trial, defendant appeals. Reversed.

F. H. Gould, for appellant. Riordan & Lande, for respondent.

HALL, J. This is an action to recover for loss occasioned by destruction by fire of a building insured by defendant. Plaintiff recovered judgment, and this appeal is from the order denying defendant's motion for a new trial.

The complaint alleges that defendant, on the 2d day of May, 1898, by its policy of insurance, in writing insured plaintiff for the term of three years, ending May 2, 1901, against loss or damage, not exceeding \$1,000, by fire to her one-story, shingle roof, frame building, No. 952 Park Way, East Oakland, Alameda county. The house was totally destroyed by fire March 8, 1901. Defendant in its answer set forth the entire policy as the same was executed May 2, 1898, and among other things pleaded a breach of one of the conditions of the policy, which condition is in these words: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the building herein described, whether intended to be occupied by owner or tenant, be or become vacant or unoccupied, and so remain for ten days." The policy as set forth in the answer provided for an insurance of \$1,000 on the house therein described, and \$400 on the furniture contained in the house. Upon the trial, plaintiff proved by her own testimony that the house was destroyed by fire on the 7th day of March, 1901, and at that time had been vacant and unoccupied for 80 days. The plaintiff offered in evidence the policy as the same was originally issued and dated May 2, 1898, together with a slip attached thereto January 23, 1901, and bearing the latter date. Defendant objected to the introduction of the slip dated January 23, 1901, upon the ground that it was incompetent, irrelevant, and immaterial; that it had no reference to the contract sued on, but is a subsequent contract, and refers to personal property after the same had been removed to San Francisco; and that no variation of the original contract was pleaded. The court overruled defendant's objection, and the slip, of date January 23, 1901, was admitted in evidence, and defendant reserved an exception. The same point was again presented on defendant's motion for a nonsuit, and also under

its objections as to certain findings of the court in regard to this slip.

Passing the objection that the contract sued on was alleged to have been executed May 2, 1898, and no subsequent modification thereof was pleaded, we will pass to a discussion of the point (that we think was fairly raised) that the slip of January 23, 1901, had reference to the personal property and not to the house, as the more vital question to be determined. The policy executed May 2, 1898, consisted of a main document and a slip attached thereto, and both executed and dated May 2, 1898, and which will hereafter in this opinion be referred to as the "original policy."

The terms of the original policy, so far as they throw light upon the question now under discussion, are as follows:

"No. 20,533. \$1,400 at 80 c.

"Organized, 1852.

"The Continental Insurance Co. of the City of New York.

"In consideration of the stipulations herein named, and of eleven $\frac{20}{100}$ dollars premium, does insure Mrs. Hattie L. Alvey for the term of three years from the 2d of May, 1901, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding fourteen hundred dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit:

"Dwelling and contents Policy Form.

"One thousand dollars on the ——— story shingle-roof frame building and its additions, including foundations and verandas [here follows an enumeration of various classes of fixtures], while occupied as a dwelling, situate No. 952 Park Way, being southeast corner East Ninth street, East Oakland, Cal.

"Four hundred dollars on household and kitchen furniture, useful and ornamental, including beds, bedding [here follows an enumeration of various classes of articles for domestic use], all while contained in above-described dwelling.

"[Here follows a clause concerning use of coal oil, electric lights, repairs, etc., a clause concerning loss by lightning, and a clause concerning use of gasoline stove, down to the ending of the slip that was executed May 2, 1898, as a part of the original policy. The body of the original policy continues with various provisions, among which are the following:]

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured * * * or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days."

The slip which was introduced in evidence, over the objection and exception of defendant, was dated January 23, 1901, and was duly signed by the agent of defendant. It is a printed form containing some written matter. So far as the same concerns the question under discussion, the slip is as follows, the written words of the slip being italicized herein:

"The second item of this policy is hereby made to read and cover as follows: Dwelling and Contents Policy Form.

"*Nil on the frame building and its additions * * * while occupied only as a dwelling situate No. 1117 Leavenworth street, between California and Sacramento streets, San Francisco, Cal.*

"\$400 on household and kitchen furniture, useful and ornamental, including beds, bedding [Here follows an enumeration of various articles of domestic use] all while contained in above-described dwelling. * * * Plumbing, gas, steam and electric fittings; alterations and repairs; and the use of gas and coal oil stoves and lamps and electric light, permitted without notice; also vacancy during change of tenants if the subject of insurance be a dwelling located in a town. [Here follows a clause concerning the use of gasoline stove.]

"This slip is attached to and made a part of Policy No. 20,533 of Continental Insurance Company of New York.

"Dated this 23d day of January, 1901."

The question to be determined is: Did the slip of date January 23, 1901, modify the contract dated May 2, 1898, so far as such contract related to the insurance on the house, or did it only modify such contract with regard to the insurance on the furniture? We are of the opinion that the latter is the correct construction of the terms of the slip. By the original policy two items were insured. The first was the house No. 952 Park Way, in the sum of \$1,000, and the second was the furniture then contained in said house, in the sum of \$400. By the terms of the original policy the furniture was insured only while contained in said house. Apparently the furniture was subsequently moved from the Oakland house to a house in San Francisco, and in order to prevent the lapsing of the policy in regard to the furniture it became necessary to modify the policy with regard to the furniture. This was done by attaching the slip dated January 23, 1901. Omitting some portions of the blank form (which we have not set forth in this opinion because they do not throw any light upon the question involved), the first contractual words are written and are: "The second item of this policy is hereby made to read and cover as follows," and then follow the various provisions of the slip in question. By the written words of the slip, as well as by the circumstances under which the slip was executed, it is evident that the parties were contracting with reference only

to the second item of the original policy, to wit, the furniture.

Section 1647 of the Civil Code provides: "A contract may be explained by reference to the circumstances under which it is made, and the matter to which it relates." The circumstances under which this slip was executed evidently were that the furniture had been moved to San Francisco, and it therefore became necessary to modify the original policy in regard to that item, and by the written words of the slip it related to the second item of the original policy; that is, the furniture. Section 1648 of the Civil Code provides that: "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." Section 1651 of the Civil Code provides that: "Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form. And, if the two are absolutely repugnant, the latter must be so far disregarded." Applying the principles of the two foregoing sections to the slip under discussion, it cannot be construed as modifying the original policy so far as it related to the insurance on the Oakland house. The presence of the clause in the slip of date January 23, 1901, permitting "vacancy during change of tenants, if the subject of insurance be a dwelling located in a town," is explained by the fact that a printed form was used, prepared to meet various conditions. But by the very words of the clause, it is only effective where the subject of insurance is a dwelling; and, as we have seen, the subject of the insurance treated of by this slip is, by the written words of the slip, limited to the second item of the original policy, which is the furniture. In considering this question we have not overlooked the rule that in construing insurance policies, uncertainties should be resolved against the insurer. We do not think there is any uncertainty as to the effect of this slip. By the terms of the original policy, the same was to be void if the house became and remained vacant and unoccupied for 10 days. Plaintiff testified that it had been vacant and unoccupied for 30 days before the fire, and was so vacant at the time of the fire.

It follows from the above views that the court erred in admitting in evidence the slip dated January 23, 1901, and in denying defendant's motion for a nonsuit. In view of the conclusion we have reached as to the effect of the slip in question, it is not

necessary to discuss any other question raised on this appeal.

The order denying the motion for a new trial is reversed.

We concur: HARRISON, P. J.; COOPER, J.

2 Cal. App. 267

MILLER v. QUEEN INS. CO. OF AMERICA.

(Court of Appeal, First District, California.
Nov. 25, 1905.)

1. NEW TRIAL—PROCEEDINGS—DELAY—DISMISSAL.

Defendant, moving for a new trial, gave notice that on June 28th it would present a bill of exceptions and amendments to the judge for settlement. On that day the judge was absent, and the bill and amendments were delivered to the clerk. Postponements were had, and no further steps were taken until the following May, when plaintiff moved for a dismissal of the motion for a new trial for lack of diligence in its prosecution. *Held*, that the burden was on defendant to show some excuse or explanation for such delay.

2. SAME—EXCUSES FOR DELAY.

Where the judge was absent on the day fixed for the presentation of a bill of exceptions, and the bill and amendments were delivered to the clerk, it was the duty of the party moving for a new trial to ascertain when the judge would return and to obtain an order fixing a day for settlement, and the moving party was not relieved from taking further steps until he should have received notice that the judge had fixed a day.

3. SAME—BILL OF EXCEPTIONS—DAY FOR SETTLEMENT—NOTICE—WAIVER.

Where, on the day fixed by a party moving for a new trial for presentation of the bill of exception and amendments to the judge for settlement, the judge was absent and the bill and amendments were delivered to the clerk, and subsequently, by agreement between the parties, there were meetings at the judge's chambers for the purpose of settling the bill, such meetings amounted to a waiver of any notice that the moving party might have been entitled to from the judge fixing a day for settlement.

4. SAME—DISMISSAL—MOTION—SUBSEQUENT PROSECUTION—EFFECT.

Where, after a motion to dismiss a motion for a new trial for lack of diligence in prosecution, the moving party gave notice fixing a day for settlement of the bill of exceptions, such notice did not obviate the moving party's previous negligence in failing to take the requisite steps to bring the motion to a hearing and to procure a settlement of the bill of exceptions.

5. SAME—EXCUSES FOR DELAY—BUSINESS OF COUNSEL.

On a motion to dismiss a motion for a new trial on the ground of lack of prosecution, the fact that there were other causes in which the moving party was interested, wherein the time of its attorney was occupied in settling bills of exceptions, was a circumstance proper to be considered by the judge in determining whether there had been negligence in the settlement of the bill in the case in question.

6. APPEAL—REVIEW—TRIAL COURT'S DISCRETION—NEW TRIAL.

The determination of the trial court upon such question was not open to review.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by John Miller against the Queen Insurance Company of America. From an order dismissing defendant's motion for a new trial, it appeals. Affirmed.

James Alva Watt, for appellant. Page, McCutchen, Harding & Knight, for respondent.

HARRISON, P. J. Appeal from an order dismissing the defendant's motion for a new trial. The defendant gave notice of its intention to move for a new trial April 4, 1902, and having thereafter served upon the plaintiff its proposed bill exceptions, to which the plaintiff had proposed certain amendments, gave the plaintiff notice of its rejection of the amendments, and that on June 28th it would present the bill and the amendments to the judge for settlement. On that day the judge was absent from San Francisco, and the defendant delivered the proposed bill and amendments to the clerk for the judge. It does not appear that the judge after his return was requested to fix any time for the settlement of the bill, or that any time was fixed by him, but in the early part of November the attorneys for the respective parties agreed to meet at his chambers at a designated time for the purpose of effecting its settlement, and in pursuance of said agreement had such meeting. At the request of the judge, the meeting was postponed until the next day, and thereafter, until December 24th, other postponements were had and meetings held at his chambers, at which the parties sought to effect a settlement of the bill. After December 24th no further steps were taken in the matter until May 20, 1903, on which day the plaintiff served a notice on the defendant of his intention to move the court for an order dismissing the defendant's motion for a new trial on the ground that the defendant had not prosecuted the same with due diligence. The motion was heard May 29th and succeeding days, and on June 30th was granted. From this order the defendant has appealed.

Upon the foregoing facts the burden was thrown upon the defendant to show some excuse or explanation for its delay in taking the steps requisite for enabling the court to hear and determine its motion for a new trial, including the settlement and filing of the bill of exceptions setting forth the matters upon which the motion was to be heard; otherwise, the court would be authorized to hold that it had not acted with due diligence and to grant the motion of the plaintiff. The defendant was the moving party in the proceeding for a new trial, and the burden was at all times upon it to take whatever steps were necessary to enable the court to hear its motion. *Kubli v. Hawzett*, 89 Cal. 638, 27 Pac. 57; *San José Land Co. v. Allen*, 129 Cal. 247, 61 Pac. 1083; *Mowry v. Welsenborn*, 137 Cal. 110, 69 Pac. 971; *Galbraith v. Lowe*, 142 Cal. 295, 75 Pac. 831. Its contention that, after delivering the proposed bill and amendments to the clerk for

the judge, it was not required to take any further steps towards procuring its settlement until it should receive notice that the judge had fixed a day therefor, is without support. It was its duty to ascertain when the judge should return to the city, and to obtain from him an order fixing a day for the settlement of the bill. The judge was not required to act in the premises until requested thereto by one of the parties to the suit; and, although it was competent for either party to obtain such order from him, the plaintiff was under no obligation to take any step in aid of the defendant for having its motion heard. But, even if the defendant had been entitled to any notice, the agreement between it and the plaintiff and their subsequent meetings at the judge's chambers for the purpose of settling the bill operated as a waiver of any objection to the absence of such notice. At the hearing of the plaintiff's motion the attorneys held different views upon the results of the last meeting at the judge's chambers on December 24th—the plaintiff claiming that at that time the bill was settled by the agreement between them as to its form and contents; the defendant, on the other hand, claiming that the form of certain proposed amendments had not been agreed upon. Neither the proposed bill nor the amendments thereto are set forth in the record herein, and it does not appear whether the judge made any decision upon this dispute, but, as the proceedings for its settlement had been taken before him, he was in a position to know whether at that meeting they had agreed upon the form of the bill or not; and, if necessary for sustaining the order appealed from, it may be assumed, from the fact that the judge granted the plaintiff's motion, that he held in accordance with his contention. If the parties had, in fact, agreed upon the form and contents of the bill, it was incumbent upon the defendant to cause it to be engrossed and present it to the judge for his signature without any unreasonable delay, and its unexplained neglect for five months to cause it to be engrossed was inexcusable.

We do not, however, deem it necessary to assume that the judge made any decision upon this disputed point. If it be assumed that the parties did not then agree and that the bill was not settled, the defendant was still required to be diligent in procuring its settlement. By his own statement of that result of that meeting the defendant's attorney "undertook to prepare a modified form subject to future agreement" of the matters then in dispute; but he did not, in fact, take any further step in reference thereto or for the purpose of procuring a settlement of the bill until after the plaintiff in May, 1903, had given him notice of his intention to make the motion under consideration. The notice given by the defendant, after receiving the above notice from the

plaintiff, that on a subsequent day it would proceed with the settlement of the bill, did not obviate or palliate its previous negligence.

The fact that there were other causes in which the defendant was interested, wherein the time of its attorney was occupied in settling bills of exceptions, was a circumstance proper to be considered by the judge in determining whether there had been undue negligence in the settlement of the bill in this case, but his determination upon that point is not open to review.

The order is affirmed.

We concur: HALL, J.; COOPER, J.

2 Cal. App. 271

MILLER v. AMERICAN CENTRAL INS. CO.

(Court of Appeal, First District, California. Nov. 25, 1905.)

1. NEW TRIAL—MOTION—DISMISSAL—BILL OF EXCEPTIONS—SIGNATURE—DELAY IN PROCURING.

A proposed bill of exceptions was settled by the judge, and on June 18th delivered to defendant's attorney, with a direction that it be engrossed within 10 days. The bill was engrossed, and on June 24th defendant's attorney, being informed that the judge was absent and would return in about two weeks, left the bill with a deputy clerk. The judge returned July 8th, and was absent between that date and August 5th, at different times, aggregating 15 days, and from August 5th to October 28th he was continuously at home, and was during some part of each day during that period, except holidays, in his chambers. Defendant failed to procure the judge's signature to the bill. *Held*, that the motion for a new trial was properly dismissed on account of delay in procuring the judge's signature to the bill.

2. SAME.

That the trial judge was absent at the time the engrossment of the bill of exceptions was completed, and for several days thereafter, did not relieve the party moving for a new trial from the necessity of diligence in ascertaining the date of the judge's return and in procuring his signature to the bill.

3. SAME.

Any unreasonable delay in procuring the judge's signature to the engrossed bill of exceptions is subject to the same rule that governs the case of unreasonable delay in failing to engross the bill.

4. SAME—FILING—RIGHT TO FILE BEFORE SIGNED BY JUDGE.

There is no law authorizing the filing of a bill of exceptions before it has received the signature of the judge.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, § 95.]

5. SAME—DUTY OF CLERK TO PROCURE JUDGE'S SIGNATURE.

It is not the duty of the clerk, with whom a bill of exceptions has been left before signed by the judge, to deliver the bill to the judge for his signature.

6. APPEAL—REVIEW—DISCRETION OF TRIAL COURT—DILIGENCE IN PERFECTING BILL OF EXCEPTIONS.

Whether a party has exercised due diligence in causing a bill of exceptions to be engrossed after it is settled, or in presenting it to the judge for his signature, is for the determination

of the judge, and in the absence of an abuse of discretion his ruling is conclusive on appeal.

7. SAME—DECISIONS REVIEWABLE—REFUSAL TO SETTLE BILL OF EXCEPTIONS.

An order refusing to settle a bill of exceptions is not appealable, but any error therein may be corrected by writ of mandate.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by John Miller against the American Central Insurance Company. From an order dismissing a motion for a new trial and refusing to settle a bill of exceptions after a verdict for plaintiff, defendant appeals. Affirmed.

James Alva Watt, for appellant. Page, McCutchen, Harding & Knight and Bledsoe & McGarvey, for respondent.

HARRISON, P. J. Appeal from an order dismissing a motion for a new trial and refusing to settle a bill of exceptions. The action was tried by a jury, and a verdict rendered in favor of the plaintiff, January 27, 1902. February 6th the defendant filed and served a notice of its intention to move for a new trial. The times for preparing and serving a bill of exceptions and amendments thereto having been extended, the proposed bill and amendments were settled by the judge before whom the cause was tried, and on June 18th delivered to the defendant's attorney with a direction that the bill be engrossed within 10 days from that date. The bill was thereupon engrossed, and on June 24th the defendant's attorney, being informed that the judge was absent from San Francisco and would return in the course of 10 days or 2 weeks, left the engrossed bill with a deputy clerk in the county clerk's office. The judge returned to San Francisco July 8th, and was again absent from the city between that date and August 5th, at different times, aggregating 15 days; but from August 5th to October 28th, when notice of the motion to dismiss the motion for a new trial was given, he was continuously in San Francisco, and, except upon holidays, was during some part of each day in his chambers at the city hall. After the engrossed bill had been left with the deputy clerk, as above stated, it was withdrawn by the defendant's attorney "for a brief period"; but at what date it was withdrawn or for how long a time it was retained by him, is not stated. October 28th the plaintiff gave notice to the defendant that he would move the court to dismiss the motion for a new trial, upon the ground that the defendant had not prosecuted the motion with due diligence. On the same day the defendant's attorney, after having been served with the notice of this motion, delivered to a clerk in the office of the plaintiff's attorney the engrossed bill, and informed him that he had withdrawn it from the possession of the deputy clerk with whom he had previously left it, and asked

the clerk to have it approved in order that it might be certified by the judge. The plaintiff's motion came on for hearing November 7th, and on November 11th was granted by the court. From this order the present appeal has been taken.

In *Galbraith v. Lowe*, 142 Cal. 295, 5 Pac. 831, the court said: "The motion for a new trial is an independent proceeding in an action, in which the burden of acting is at all times upon the moving party. * * * It is the moving party who is the actor in the proceeding, and who is seeking the settlement of the bill of exceptions and the determination of the motion for a new trial, and it devolves upon him to proceed with diligence." In that case the moving party did not cause the bill to be engrossed for 39 days after he had knowledge that it had been settled by the judge, and it was held that he thereby failed to exercise proper diligence; and upon that ground an order dismissing his motion for a new trial was affirmed. In the present case the bill was engrossed as early as June 24th; and in his affidavit, read at the hearing of the motion, the defendant's attorney states that the bill "is and has been since the 24th day of June, 1902, ready for the certificate of the judge"; but he does not show that he ever requested the judge to certify it, or that it was presented to the judge for his signature, nor does it appear that the judge was ever informed, prior to the time that the plaintiff's notice of motion was given, that the bill had been engrossed. The fact that the judge was absent from the city at the time the engrossment was completed, and for several days thereafter, did not relieve the defendant from the necessity of diligence in ascertaining the date of his return and in seeking to procure his authentication to the bill. Any unreasonable delay therein is subject to the same rule as in the case of failing to engross the bill. Although he states that, upon finding that the judge was absent from the city, he "left" the engrossed bill with a "deputy clerk" in the county clerk's office, it does not appear that he requested him to present it to the judge for his signature, or that he gave him any direction as to its disposition, except that about a month later he requested him to note upon it the fact that it was then "on file" in the county clerk's office. There is, however, no provision of law authorizing a bill of exceptions to be filed with the clerk before it has received the signature of the judge; nor is it made the duty of the clerk with whom it may be "left" to deliver the engrossed bill to the judge for his signature. The attorney, by this act, merely made the deputy clerk his depository of the document until he subsequently withdrew it from his custody.

Whether a party has exercised due diligence in causing a bill of exceptions to be

engrossed after it is settled, or in presenting it to the judge for his signature after it has been engrossed, is to be determined by the judge under the circumstances of each case; and his determination thereon is so largely a matter of discretion that, unless it is made to appear that he has abused his discretion, his determination will be accepted as correct and conclusive. *Galbraith v. Lowe*, supra. The refusal of the judge to settle the bill of exceptions is not an appealable order or the subject of an appeal. Any improper or unauthorized refusal to settle or to certify to a bill of exceptions is to be corrected by means of a writ of mandate. *Whipple v. Hopkins*, 119 Cal. 349, 51 Pac. 535; *Murphy v. Stelling*, 138 Cal. 641, 72 Pac. 176.

The order is affirmed.

We concur: HALL, J.; COOPER, J.

2 Cal. App. 248

COX v. SOUTHERN PAC. R. CO.

(Court of Appeal, Second District, California.
Nov. 23, 1905.)

APPEAL—TITLE TO LAND.

In an action against a railroad company for killing horses, where the gist of the action was defendant's negligence after the horses were on the track and the judgment was less than \$300, findings as to the title to the land adjacent to the railroad were immaterial, and the appeal was not within the jurisdiction of the appellate court.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Richard F. Cox against the Southern Pacific Railroad Company. From a judgment for plaintiff, defendant appeals. Dismissed.

Rehearing denied by Court of Appeal, December 22, 1905; by Supreme Court, January 22, 1906.

Maurice E. Power, for appellant. T. E. Clark, for respondent.

SMITH, J. The defendant appeals from a judgment against it for the sum of \$250, rendered on appeal from a justice's court. The judgment is for damages for the killing of a horse and mare of the respondent by the appellant's train; and, the amount involved being less than \$300, the respondent urges that the case is not within the jurisdiction of this court. There is no reply from the appellant on this point; but it seems that the point was urged by the defendant in the lower court on the ground that the case involved a question of title as to real property. There is, however, nothing in this contention. The first count of the complaint, indeed, alleges that the plaintiff's horse entered upon the track through a gap in defendant's fence, which was negligently and carelessly left open; and in the amended answer it is alleged, in effect, that the land adjacent to the fence, where the gap was, was at all the times mentioned in the complaint the proper-

ty of Kittle Colburn, and that plaintiff did not have any right or title thereto; and the court finds that this and all the other allegations and denials of defendant's answer are untrue, which is, in effect, to find on a question as to the title of the land. And it is also true that it appears from the evidence, without contradiction, that the land was the land of Kittle Colburn, and that it was expressly admitted by the plaintiff on the trial that he neither had nor claimed any interest therein. But, looking at the complaint, it will be seen that it is alleged that the death of the horse resulted from the negligence and recklessness of the defendant's employes after the horse was on the track; and this must be taken as the gist of the action. The allegation and finding as to the title of Kittle Colburn and the plaintiff, respectively, to the land adjacent to the railroad, are therefore immaterial.

The appeal must therefore be dismissed, and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

2 Cal. App. 231

LANGLEY v. FINNALL et al.

(Court of Appeal, Second District, California.
Nov. 21, 1905.)

EXEMPTIONS—HOUSEHOLD FURNITURE—INSURANCE FUNDS.

The proceeds of a policy of insurance covering household furniture, which is exempt from execution under Code Civ. Proc. § 690, are likewise exempt.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Exemptions, § 79.]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Georgia Langley, trustee, against the Glens Falls Insurance Company in which John E. Finnall and others were substituted as defendants. From the judgment rendered, certain defendants appeal. Affirmed.

Munson & Barclay and Trusten P. Dyer, for appellants. John R. Layng, for respondent.

SMITH, J. The suit was originally brought by the plaintiff, as trustee of her mother, Mrs. Mary E. Langley, against the Glens Falls Insurance Company to recover \$650, due to Mrs. Langley as beneficiary under a policy of insurance of certain household furniture and family wearing apparel belonging to her; but on affidavit of the original defendant, under section 386 of the Code of Civil Procedure, and payment of the amount claimed into court, the present defendants, who had garnished the amount due, were substituted in place of the original defendant. Judgment was afterwards rendered against the corporation defendant and the defendant Walker, who now appeal.

It is admitted that the insured property was exempt from execution under the provisions of section 690 of the Code of Civil Procedure, and the question involved is,

whether, under the circumstances of the case, the money received upon the policy of insurance is likewise exempt. On this question, the authorities of other states are somewhat conflicting, but the weight of authority seems to be for the affirmative of the question. Freeman on Executions, § 235; 12 Am. & Eng. Ency. of Law, 152; Puget Sound, etc., Co. v. Jeffs (Wash.) 39 Pac. 962, 27 L. R. A. 808, 48 Am. St. Rep. 885. This, we think, is the better opinion, and it is supported by the decision of the Supreme Court in Houghton v. Lee, 50 Cal. 101, where it was held, with regard to money received from insurance on the homestead and household furniture, "that the sum due from the insurance company was not subject to garnishment by a creditor of the husband," or, as otherwise expressed, "that money due from an insurance company for indemnity for loss of the homestead residence by fire, retains the character of the premises destroyed, and is not subject to execution." Freeman on Executions, § 235 ad fin. It is true, as pointed out by the appellants' counsel, that no distinction was made in the case cited by counsel, or by the court, between the money due for the loss of the building and that due for the loss of the furniture; and, hence, it is claimed the case is not a direct authority for the position that the same rule will apply to the case where the property insured was exempt furniture, and this we are inclined to concede, or, rather, we think it probable the court regarded the furniture as merely an accessory to the homestead. Freeman on Executions, § 236 ad fin. But no distinction in principle can be made between the proceeds of the sale of the homestead and those of other exempt property, and the decision must therefore be held to apply to the case before us. The principle of the decision seems to be—at least in the case where the conversion of exempt property is in invitum—that the conversion of the property does not affect its status. There may be, indeed, some qualifications to the principle thus established; such, e. g., as that the principle will apply only where the proceeds of the sale remain distinguishable, or even that it may not apply where the intention is manifestly not to reconvert the money into exempt property. But these questions are not involved in the present case. The judgment is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

2 Cal. App. 269

CLARK et al. v. RAUER.

(Court of Appeal, First District, California.
Nov. 25, 1905.)

1. APPEAL—PRESUMPTIONS—NEW TRIAL—GROUNDS FOR DECISION.

An order granting a new trial is presumed on appeal to have been made on a valid reason.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3775.]

2. NEW TRIAL — STATEMENT ON MOTION — AMENDMENT.

Where a statement on a motion for a new trial contained no specifications of error or particulars wherein the evidence was insufficient to justify the decision, it was proper for the court to allow an amendment by inserting them.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 269.]

3. SAME — SPECIFICATIONS OF ERROR—SUFFICIENCY.

A specification of error in a statement on a motion for a new trial that "there has been no evidence introduced at the trial tending to show that the plaintiffs were injured by any acts of the defendant, or that the plaintiff has sustained any loss by reason of any act of the defendant," was sufficient.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 257.]

4. APPEAL — REVIEW — FINDINGS — EVIDENCE POINTING OUT — EVIDENCE RELIED ON.

It is the duty of the appellant to point out the evidence to overthrow the ruling of the trial court on the sufficiency of the evidence to support a finding, and not the duty of the appellate court to look for it in the evidence.

Appeal from Superior Court, City and County of San Francisco; J. M. Troutt, Judge.

Action by Charles H. Clark and another against J. J. Rauer. From an order granting plaintiffs' motion for a new trial, defendant appeals. Affirmed.

I. F. Chapman, for appellant. Macks & Tomsky, for respondents.

COOPER, J. This appeal is from an order granting the motion of plaintiffs for a new trial. In such case all presumptions are in favor of the order, and, unless it is shown to the contrary, we will presume that the order was made upon some valid reason.

Appellant states that the motion for a new trial was argued in October, 1902, and his "contention there was that respondents' motion should be denied on the ground that the statement on motion for a new trial contained no specifications of error, or particulars wherein the evidence was insufficient to justify the decision." The court, however, permitted the respondents to amend their statement by inserting such specifications and particulars. The court did not abuse its discretion in allowing the statement to be so amended. It was proper and right for the court to allow the amendment, so that the motion might be presented on its merits. In re Lamb, 95 Cal. 408, 30 Pac. 568. The specifications as amended are sufficient under the liberal rule now allowed in this court. It is specified "that there has been no evidence introduced at the trial of this cause tending to show that the plaintiffs were injured by any acts of the defendant, or that the plaintiff has sustained any loss by reason of any act of the defendant." Appellant has not pointed out the evidence that tends to support the findings in this regard. It is not the duty of this court, when a finding is attacked and the court below has held it without support, to look

through a mass of evidence for the purpose of finding sufficient to overthrow the ruling of the trial court.

The complaint alleges two different causes of action. It is alleged in each that in April, 1899, the defendant, on a claim belonging to plaintiffs and assigned to defendant for collection only, obtained a judgment against James Roundtree and M. E. Roundtree for \$850.55, with interest from date of judgment. The first cause of action alleges that the defendant, without the consent of plaintiffs, compromised and settled said judgment and caused it to be satisfied of record; that plaintiffs have received no part of said judgment, and the same has been lost to them, to their damage in the sum of \$350.55. It is not alleged what amount was paid to defendant by way of compromise, if anything, nor that the judgment was of any value. Our attention is not called to any evidence as to these matters, or showing any damage to plaintiffs. The second cause of action alleges that defendant received the sum of \$350.55 on said judgment, and has not paid the same to plaintiffs, nor any part thereof. There is no claim that any evidence was introduced to sustain this latter cause of action.

It follows that the order must be affirmed, and it is so ordered.

We concur: HARRISON, P. J.; HALL, J.

2 Cal. App. 303

LOS ANGELES PRESSED BRICK CO. v. LOS ANGELES PACIFIC BOULEVARD & DEVELOPMENT CO. et al.

(Court of Appeal, Second District, California. Nov. 28, 1905.)

MECHANICS' LIENS—MATERIALMEN—SUBCONTRACTORS—APPEAL.

Where a complaint to foreclose a mechanic's lien for materials furnished a subcontractor showed the existence of an unpaid balance in the hands of the owner and that plaintiff had a claim against it which he was entitled to enforce by the foreclosure of a mechanic's lien, the complaint, in the absence of any claim on the fund by the contractor, was not demurrable for failure to allege that anything was due and unpaid from the contractors to the subcontractor at the time the notice was given.

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by the Los Angeles Pressed Brick Company against the Los Angeles Pacific Boulevard & Development Company and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Rehearing denied by Court of Appeal, December 23, 1905; by Supreme Court, January 24, 1906.

Munson & Barclay, for appellant. Chas. L. Batcheler, R. H. F. Variel, and Barstow & Variel, for respondents.

GRAY, P. J. The action is to foreclose a mechanic's lien. The defendants' demurrer

to the complaint was sustained, and from the judgment which followed the plaintiff appeals.

The complaint shows that plaintiff furnished materials to defendant Leonard, subcontractor under Brown & Alcorn, contractors, to be used, and which were used, in the construction of the building belonging to defendant corporation the Los Angeles Pacific Boulevard & Development Company. The complaint is in the usual form in such cases, and sets forth that at the time the statutory notice was given by the plaintiff to the owner \$4,600 was yet unpaid to the contractors, Brown & Alcorn, but contains no allegation that anything was due and unpaid from the contractors to the subcontractor at the time this notice was given; and it is claimed that for this reason alone the complaint is fatally defective, and that the demurrer was therefore properly sustained.

We do not think this contention can be upheld. The plaintiff is not asking for a personal judgment against the contractor. All he seeks is to enforce his claim upon and against a certain fund which he in effect alleges to be in the hands of the defendant, owner of the building. It is not necessary for plaintiff to allege or show that no one else has a claim upon that fund. If any other party also claims the same fund, it will be time enough to determine that claim when it is set up by the claimant in some appropriate manner. Without its being set up the court should not presume that it exists, nor is the court, upon a mere demurrer to the complaint, to act upon any theory that there may possibly be any such claim. The complaint shows the existence of this unpaid balance in the hands of the owner, and that plaintiff has a claim against it that he is entitled to enforce by the foreclosure of a lien given him by statute, and this is all that is necessary to constitute a cause of action. Nor can there be any possible reason for the claim of the contractor here made that the complaint is not as certain as it ought to be in this respect. Greater certainty in a complaint is required only where something necessary to constitute a cause of action cannot be thoroughly understood from the language used, and the defendant desires more accurate information. Does not the contractor defendant know whether he has a claim against the fund or not? And why does he demand more accurate information as to a matter which must from the nature of things be peculiarly within his own knowledge? Why, also, does he demand that a claim of his that he has never yet made should be negatived in the complaint of a party that presumptively knows nothing of its existence? There is no requirement that any notice shall be given the contractor, and hence no necessity to allege any such notice in the complaint. As the case is presented to us, the decision of any further question would be mere dictum, not binding in

this or any other case. We cannot properly determine the effect of the payment of the subcontractor by the contractor until we know that such payment has been made.

The judgment is reversed, with directions to overrule the demurrer and permit the defendants to answer.

We concur: SMITH, J.; ALLEN, J.

2 Cal. App. 204

SANGUINETTI v. PELLIGRINI.

(Court of Appeal, Third District, California. Nov. 27, 1905.)

1. EXECUTORS AND ADMINISTRATORS—ACTIONS—EVIDENCE.

In an action on a claim against a decedent's estate, a letter written by plaintiff to third persons in respect to the claim, in which he stated the amount owed by the decedent to him to be greater than the amount of the claim owed on, and endeavored to explain such amount, was properly admitted as evidence tending to discredit plaintiff's claim.

2. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Exclusion of evidence as to items of indebtedness is not reversible error, where immediately thereafter the witness is permitted to testify to the composition of the items.

3. SAME—REFUSAL TO STRIKE EVIDENCE.

The refusal to strike out hearsay evidence is harmless, where the facts shown by such evidence are otherwise proven.

4. EXECUTORS AND ADMINISTRATORS—ACTIONS ON CLAIMS—PAYMENT—SUFFICIENCY OF EVIDENCE.

In an action on a claim against the estate of a decedent, evidence held sufficient to support a finding that the claim had been fully paid and discharged prior to the decedent's death.

5. TRIAL—FINDINGS—SUFFICIENCY.

In an action on a claim against the estate of a decedent, where the court finds that the claim has been paid and that nothing is due, it is unnecessary to make a further finding on evidence of the usury law of the country in which the debt was contracted.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 940, 941.]

6. PAYMENT—EVIDENCE—BURDEN OF PROOF.

Where a complaint alleges a debt and the answer alleges payment, and plaintiff proves that the debt was contracted, the burden of proving payment is upon defendant.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payment, § 196.]

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by John Sanguinetti against Antonia Pelligrini, as administratrix of the estate of Louis T. Banche, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

Miller & Clark, for appellant. A. H. Ashley and J. Frank Brown, for respondent.

BUCKLES, J. This is an action against the administratrix to recover the amount claimed to be due upon the following instruments set out in a claim presented to the administratrix and rejected, to wit:

"Hunker Creek, November 16, 1900.

No. 10 Above.

"I, Thomas Banche, received this 16th day of November, A. D. 1900, the sum of \$300 hundred dollars from John Sanguinetti of this place, as a loan, for the purchase of a rooming house on Third St., and between Second and Third avenue, in the city of Dawson, Y. T., called Gandolpos House, at five per cent a month.

"Louis Thomas Banche, Debtor.

"Witness: L. Podesta."

"Hunker Creek, December 11, 1900.

"I, L. Thomas Banche, have this day received \$152.80 in gold dust, as a loan, from John Sanguinetti, to be paid in 6 months, at five per cent a month interest.

"L. Thomas Banche, of Dawson, Y. T.

"Witness: L. Podesta."

These two instruments were made into a claim, presented to the administratrix in due time, and the claim was rejected. The two instruments amounted to \$452.80 and the interest claimed thereon, \$636.84, making a total claim of \$1,089.64. The answer alleges payment. The court found nothing due, and judgment was rendered for defendant.

The appeal is from the judgment. The said Louis Banche died intestate on February 14, 1902, at Dawson City, Yukon Territory, and Antonia Pelligrini was duly appointed administratrix by the superior court of San Joaquin county, Cal., qualified, gave notice to creditors, and plaintiff presented his said claim and the same was rejected as aforesaid. The plaintiff was a witness, and testified that when Banche died he owed him the \$300 represented in Exhibit 1 and the \$152.80 represented in Exhibit 2. After Banche's death plaintiff made out a typewritten statement that Banche owed him \$700 and sent it to Cooper Bros., at Dawson, and, upon inquiry from the Cooper Bros. as to the claim that Banche owed plaintiff \$700, plaintiff sent the following letter to explain the matter: "Stockton, Cal., May 11th, 1902. Mess. Cooper Bros., Dawson.—Gentlemen: In regard to the \$700.00 I loaned to Thomas Banche, which you do not understand, will state that at one time I gave him \$300.00 and at another \$200.00 when he went into the lodging house business, for which I hold notes. And I paid to Mrs. George Cooper, of San Francisco, \$100.00, and Tom collected from Jack Collins \$100.00, which was due me. I remain, yours truly, John Sanguinetti." This letter was introduced in evidence by defendant over the objection of plaintiff. It bore directly upon the transaction about which the court was then inquiring, and was properly admitted as evidence tending to discredit plaintiff's claim. It will be observed that he was trying to explain his claim that Banche owed him \$700, and that the \$300, the \$200, and the \$100 he says he paid Mrs. Cooper, and the \$100 Banche had collected from Collins, just make the \$700 he claims Banche owed him. It

appears from other witnesses in the case that plaintiff had received the \$100 Banche collected from Collins for him, and that he asked Collins to pay it again. Cooper paid Banche the \$100, to be given plaintiff to carry to Cooper's wife in Stockton. There is no legal evidence, however, to show that Banche ever paid it over to plaintiff. However, the claims for the \$100 collected from Collins and the \$100 paid to Cooper's wife were abandoned by plaintiff, when he presented his claims against the estate of Banche, and it must therefore be presumed that Banche did not owe him these two amounts. The witness Luigi Podesta, who signed both instruments on which this claim is based, came to Dawson City with plaintiff in 1898, and they worked together in the mines and were partners, says: Plaintiff gave Banche the \$300 mentioned in plaintiff's Exhibit 1, in his presence, and Banche wrote the paper and signed it and gave it to plaintiff. He signed as a witness, but does not remember at whose request. That Banche said he wanted the money to start a lodging house. The money was in gold dust, and all that was said by either about interest was when Banche read over the note to Sanguinetti before he signed it, and said that he put in the note that he was to pay 5 per cent. per month interest. This witness says that this exhibit was delivered when the \$300 was, and that it was November 16, 1900. The same thing was repeated in relation to the \$152.80, with the exception that the witness did not see plaintiff deliver to Banche any gold dust at that time, but saw Banche give the paper to plaintiff, and that it was signed and executed December 11, 1900. He did not know anything about the interest, or whether Banche promised to deliver back to plaintiff gold dust or money. On cross-examination Podesta said he had received a letter from plaintiff about a month before his deposition was taken. He did not know whether Banche had repaid plaintiff the \$152.80 just before plaintiff had left Dawson or not, but did not think he had; finally was sure that he had not paid it. He said he and plaintiff loaned Banche and a man by the name of Cooper \$500 to get "grub" with to work the American Gulch property, that this was in October, 1900, and that this \$500 had been repaid, and payment is contradicted by other witnesses.

The plaintiff was asked on redirect examination this question: "Mr. Miller: What items of indebtedness did Banche owe you, outside of the items set out in your claim against the estate, at the time he died? Mr. Ashley: We object to that, unless it be limited to after the death, not being redirect examination and within the inhibition of section 1880, Code of Civil Procedure. The Court: Objection sustained to question in its present form. Mr. Miller: We except." We think there is no reversible error in this ruling, inasmuch as plaintiff was immediately permitted to give evidence to

show of what the item of \$200 was composed, as follows: The following question was then asked plaintiff, to which there was no objection: "What is that amount of \$200 set out in Defendant's Exhibit A, composed of—what items make up the amount of \$200 as set out there?" The answer was that the \$152.80 was a part of that \$200 in Exhibit A, and that "I gave him gold dust to make up the \$200; I gave him four ounces at one time and three ounces at another to make up the balance of \$200." Plaintiff further testified that the said dust was worth from \$15.40 to \$16 an ounce. No objection was made to these questions. This evidence surely had a tendency to impeach the plaintiff's evidence. The difference between \$200 and the \$152.80 is \$47.20, while seven ounces of gold dust, at the lowest price stated by plaintiff, would be worth \$107.80, which latter sum, added to the \$152.80, would make the sum of \$260.60, instead of \$200. Evidently, when plaintiff stated he had given Banche seven ounces of gold dust to make up the balance of the \$200, he did not consider what the seven ounces would amount to. This discrepancy is important, in view of other differences in other parts of the testimony in the case which tend to impeach the plaintiff. After the plaintiff had heard of the death of Banche he visited and talked with the witness Dominico Bertotti at Stockton, who says the plaintiff asked him if Banche had any property, and when he asked plaintiff, "What do you ask me for?" plaintiff replied: "Because he tell me that he wanted to put a little stand close to the lodging house he had, and he said he didn't have no money; he asked me for money; I didn't have no money. I had some gold dust for \$86 and a few cents. Now I am ashamed to ask the old lady." The plaintiff denied having mentioned \$86 to Bertotti.

Antonla Pelligrini testified that in March, 1902, the plaintiff called upon her at her home in Sacramento, and said to her: "Tom had bad luck there. He was a good boy. Towards the last one day he asked me if I could lend him some money. He said he had no money. I had some gold chunks or gold dust. I told him I would let him have that gold dust. I took it out of the sack and weighed it in the store. Tom had a little store in front of the lodging house, and we weighed it in the store there, and it amounted to \$86.70; that was all the money and gold dust I had in my possession at that time. He said nothing about Banche owing him any other money or amount, and then, when he had said this, he said, 'But that's all right.'" Mrs. Banche, the mother of said deceased, also testified to the same statement, and was present when plaintiff called on Antonla Pelligrini. James Cooper, who was mining in American Gulch, 25 miles from Dawson, one of the party for whom Banche borrowed the \$300 from plaintiff, and the \$200 from plaintiff's partner,

the witness Luigi Podesto, testified to, the payment of the said sum of \$300 and \$200, and after Cooper had received the typewritten statement from plaintiff showing Banche to be indebted to him in the sum of \$700 he says plaintiff was in Dawson and met James and George Cooper, when the Coopers interrogated him about all the items of his statement. This witness says: "We asked him all about the items of his typewritten statement and all he could account for was the item of \$152.80. He merely said Banche had borrowed it one time and another, but he could not tell us for what he had borrowed it. * * * The \$152.80 was borrowed for the lodging house and paid when Sanguinetti went outside. * * * I told Banche in the presence of Sanguinetti he could turn over the \$150 of the gold dust he was holding for me and my brother to Sanguinetti to pay that \$152.80, which I am sure he did." As to the loan of \$300 to Banche by Sanguinetti, the witness said he was not present, but that he knew Banche went to Sanguinetti to borrow it and came back with the money and said he had borrowed it from Sanguinetti.

Defendant moved to strike out all the testimony of witness relating to the indebtedness of the \$300 on the ground that it was hearsay. The motion was denied. The witness only knew from what Banche did and said that the money was borrowed from Sanguinetti, and the evidence was therefore hearsay. But it had already appeared in the case from the testimony of the witness Podesto that Banche had borrowed \$300 of Sanguinetti for the Cooper boys, and that the same had been paid. There was, therefore, no harm to plaintiff in the court refusing to strike out. The witness then testified, further, as to what Banche had told him: "He told me he had got a receipt for it. He told me he gave such a memoranda to Sanguinetti. Banche told me he had borrowed from Sanguinetti \$152.80, and he borrowed from my brother George and I \$150 to pay it back." The witness further testified that plaintiff never told him after Banche's death that Banche owed him anything. There was no objection made to this testimony. The witness George Cooper testified that he was familiar with the business transactions of Banche and Sanguinetti about loaning certain money in the winter of 1900, and said: "Yes, I know of the loan of \$300 which Banche borrowed from Sanguinetti to work a lay on American Gulch, and another loan of \$152.80 with which to purchase a rooming house in Dawson. I know of no other loans, and don't believe there were any others. Banche was working a lay on American Gulch with me and my partners, and I know he borrowed \$300 from Sanguinetti to work a lay with us; and that he afterwards borrowed about \$150 from Sanguinetti to buy a rooming house in Dawson. Banche told me this, and so did Sanguinetti,

* * * Banche told me he gave receipts for these amounts, but I never saw anything in writing concerning them. Banche borrowed \$200 from Luigi Podesto at the time he borrowed the \$300 from Sanguinetti to work a lay on American Gulch. Banche stated that he gave him a receipt for the same. My brother and I gave Banche \$500 on May 23, 1901, with which to pay Sanguinetti and Podesto, * * * and both Sanguinetti and Podesto acknowledged to me personally that they received the money. * * * I know the written memoranda of these loans were not returned to Banche because Sanguinetti said he left them on Hunker Creek, and Banche told me he guessed it was all right, as he had known the boys so long that he didn't think it made any difference whether he got his receipts or not." The witness further testified that, when plaintiff returned to Dawson in June, 1902, he questioned him about his claim of \$700 against Banche, asking him if Banche had borrowed that much and what it was for, and plaintiff could not explain, and the only account he could give was that he had let Banche have \$152.80 for his lodging house.

From this evidence the court had to determine the question involved. There are some sharp conflicts in minor parts of the evidence. The testimony of Podesto, the plaintiff's partner, would seem to be sufficient to establish the plaintiff's claim, if true. But the facts that the Coopers, who were mining with Banche before he went to Dawson to take charge of the rooming house, knew nothing of this claim of plaintiff that, when asked about the \$300 in the claim, plaintiff could not explain it or tell when, where, or for what it was loaned to Banche, may have indicated to the court that Podesto was testifying solely with reference to the \$300 Sanguinetti loaned Banche to enable him and the Cooper Bros. to work their mine in American Gulch, and was confused as to Banche wanting this \$300 for the lodging house. The testimony of Podesto was by deposition, and appears to have been on interrogatories. He testified he could read English, but could not write it, and yet says he signed his name as a witness to both instruments. His particularity as to the rate of interest, and how it came to be placed in the \$300 note, may of itself seem as though the witness had been posted to answer in that way. We think that, to bring all the testimony in the case together, there is sufficient to have shown the court below that Podesto's evidence was not true. Then the testimony of plaintiff in reference to the \$152.80, and the letter written to the Cooper boys, when analyzed, would hardly be sufficient to support his claim; besides, it is shown that Cooper gave Banche the money, or gold dust, with which to pay that item, though Cooper did not see Banche pay it over to plaintiff, but it might be fairly presumed he did, because Cooper directed him to

do so, in the presence of plaintiff, out of the gold dust the Cooper boys had left with Banche to be exchanged into currency, and because Banche did pay over to plaintiff, at that time, the \$100 left with him to be taken to Cooper's wife, and the \$100 that Banche had collected for plaintiff from Collins. The fact that plaintiff told defendant and Banche's mother, and also the witness Bertotti, that Banche owed him \$86.70 at the time of his death, would indicate that he owed no more, and that the claim presented to the administratrix was false and an after consideration. The Exhibits 1 and 2 were not taken up when payment was made, as the Cooper boys stated, because they were not present, and Banche did not think it necessary. They were mentioned. We have set out so much of the evidence because it was deemed necessary in order that it may be seen that the evidence supports the court's findings that all the indebtedness of Banche to plaintiff, as set forth in the claim sued on, had been fully paid and discharged prior to Banche's death.

At the close of the testimony defendant asked to file amendments to the answer, and was permitted over the objections of plaintiff. Those amendments contained a copy of the act of the Canadian Parliament passed June 29, 1897, providing that when "any interest is made payable at a rate or percentage per day, week, month or any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of six per cent. per annum shall be chargeable." There was no finding upon this, and, as the court found the debt had been fully paid and nothing was due, a finding upon this was unnecessary. The complaint alleging a debt due, and the answer alleging payment, if the plaintiff proves that the debt was contracted, the burden of proving payment is upon the defendant. *Stuart v. Lord*, 138 Cal. 672, 72 Pac. 142. The plaintiff was permitted to testify as to some matters connected with the \$152.80 claim, but to which no objection was made on the ground that he could not testify under the provisions of section 1880 of the Code of Civil Procedure. But we think that the evidence supports the findings that payment had been made.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

2 Cal. App. 278

PEOPLE v. AH LUNG.

(Court of Appeal, Third District, California.
Nov. 27, 1905.)

1. INDICTMENT—CONVICTION OF LESSER OFFENSE—RAPE—ATTEMPT TO RAPE.

Under Pen. Code, § 1159, providing that the jury may find defendant guilty of any offense, the commission of which is necessarily included in that which is charged, or of an attempt to commit the offense, on an information charging rape on a female under 16 years,

defendant may be convicted of an attempt to commit rape.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 603, 616.]

2. RAPE—CORROBORATIVE EVIDENCE.

In a prosecution for rape, the evidence corroborative of the prosecutrix need not tend directly to connect the defendant with the offense charged.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, §§ 83, 84.]

3. SAME—SUFFICIENCY OF EVIDENCE.

In a prosecution for rape, the evidence corroborative of the testimony of the prosecutrix considered, and held sufficient to sustain a conviction of attempt to commit rape.

4. SAME—PREPONDERANCE OF EVIDENCE.

A conviction of attempt to rape a child under 16 years on her unsupported testimony, though it is contradictory, and the corroboration slight, will not be disturbed, unless the preponderance of the evidence requires it.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, § 84.]

5. CRIMINAL LAW—ADMISSION OF EVIDENCE—HARMLESS ERROR.

In a prosecution for rape of a child under 16 years, the admission of testimony tending to prove penetration, though erroneous, was harmless, where defendant was convicted of an attempt to rape.

6. RAPE—EVIDENCE—ADMISSIBILITY.

In a prosecution for rape, testimony touching the actions of defendant and his associates with the prosecutrix was admissible.

7. CRIMINAL LAW—DECLARATIONS OF THIRD PERSON.

Under Code Civ. Proc. § 1870, subd. 3, relating to the facts which may be proved on the trial, and Pen. Code, § 1102, making such section applicable to criminal prosecutions, the declarations of a third person in the presence of accused, and his conduct in relation thereto, are admissible, in a prosecution for rape.

8. RAPE—EVIDENCE—ADMISSIBILITY.

In a prosecution for rape of a girl under 16 years, it was not error to permit a witness to testify as to an understanding as to a room defendant was to occupy; it being competent for the prosecution to show that he was to occupy a room found locked on the occasion of witness' visit.

Appeal from Superior Court, Placer County; J. B. Prewett, Judge.

Ah Lung was convicted of an attempt to rape, and he appeals. Affirmed.

J. M. Fulweiler, for appellant. U. S. Webb, Atty. Gen., for the People.

McLAUGHLIN, J. The defendant was charged by the information with the crime of rape upon a female under the age of 16 years, and convicted of an attempt to commit rape. The first point made in his behalf on this appeal is that the crime of which he was convicted is not included in a charge of rape, under subdivision 1 of section 261 of the Penal Code, unless it is charged that the rape was accomplished by force and violence, and against the will of the female. Section 1159 of the Penal Code provides that "the jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an at-

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tempt to commit the offense." Where a statute is free from ambiguity, there is no room for construction. Courts are not at liberty to add to, or subtract from, language susceptible of but one interpretation. The meaning of this section is clear, and hence it must be held that every information charging a public offense, includes an attempt to commit the crime charged. In *People v. Gardner*, 98 Cal. 123, 32 Pac. 880, the defendant was charged with and convicted of an attempt to commit rape. The information and proof were assailed as insufficient, but the judgment was affirmed. We have examined the original record in that case, and find that the information charged an attempt to commit rape in language almost identical with the descriptive portion of the information in the case at bar. There was no mention of force, violence, assault, or want of consent. That case is therefore express authority against the contention of the appellant here, and we have neither the inclination nor the right to depart from the rule thus announced. The subsequent enactment of section 288 of the Penal Code does not impair or affect the rule. Under this section, children, regardless of sex, are afforded protection from lewd or lascivious acts, not "constituting other crimes," and this clearly excludes the offense of which the defendant stands convicted.

It is contended that there is no evidence tending to corroborate the testimony of the prosecutrix, and that her evidence is so contradictory that the verdict should not be allowed to stand. It must be borne in mind, however, that in cases like the one at bar, the corroborative evidence need not tend directly to connect the defendant with the offense charged. Indeed, there is no absolute rule requiring corroboration in such cases. *People v. Gardner*, 98 Cal. 180, 32 Pac. 880; *People v. Mesa*, 93 Cal. 584, 29 Pac. 116; *People v. Fleming*, 94 Cal. 311, 29 Pac. 647; *People v. Mayes*, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126; *People v. Stewart*, 97 Cal. 238, 32 Pac. 8. It is only when the testimony of the prosecutrix is not only uncorroborated, but is so inherently improbable as to warrant the belief that the verdict was the result of prejudice, that an appellate court will reverse a judgment in cases of this character. *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *People v. Hamilton*, 46 Cal. 540; *People v. Artega*, 51 Cal. 371. We think no such condition exists in this case. The testimony of prosecutrix is supported by facts and circumstances of deep significance. Defendant was seen standing directly in front of this little girl with his arms around her. They were seen at different times with their arms around each other, and he was seen kissing and hugging her and acting "lovingly" toward her. They were noticed leaving the trail together and going sometimes six feet and sometimes a greater distance therefrom, returning in a "few mo-

ments or seconds." He told an officer for the prevention of cruelty to children that he could not keep her away, that she came there often, that her mother didn't care; that she sometimes came for the horse, and sometimes for something to eat. He also said that "the old lady had taken those children to the Chinamen for the purpose of prostitution." The mother testified that the girl frequently ran away, and went down to the defendant's house, sometimes staying there all night. She also stated that on one occasion, she saw the defendant and her daughter lying on the bed together. Another daughter testified that the prosecutrix had remained at the defendant's house 17 or 18 nights in all. The defendant admitted that she remained there all night on one occasion, but denied that at any time he kissed or hugged or had any improper relations with her.

It is apparent from the testimony of the girl that she was a reluctant witness. She admitted that she liked the defendant, and at first denied that he had done anything wrong with or to her. Only by the use of leading questions was she induced to tell the disgusting story of what he did while she was lying on her back in the barn. Omitting details, it is sufficient to say that her testimony was ample to prove that he not only attempted to, but that he did actually have sexual intercourse with her. It is said that most of the evidence tending to show guilt was unworthy of credence. This, however, was a matter for the jury to determine, and it is quite evident that they did not agree with counsel, who undoubtedly made the same point in argument before them. It is said in defendant's behalf that pity prompted him to allow the girl to come to his house, because she was half starved and illtreated at home; that he bought shoes and clothing for her, and was in many ways her benefactor. But sinister motives frequently prompt such benefactions, and the jury had a right to view his gifts, in the light of other disclosures, not so worthy of commendation. The conduct of the mother stamps her as unfit to bear that honored and sacred title. But her faults cannot excuse defendant's conduct. He was 35 years of age, and, though a Chinaman, he must have known that the course pursued would inevitably subject him to suspicion and bring disgrace and shame to the girl. Children of her age cannot measure consequences, but he was old enough to know that she should be at her home, however poor its shelter might be, instead of walking and riding about with him. He must have known that to allow her to stay even one night in his house, would compromise him and ruin her reputation.

It is the humane and enlightened policy of our statute to throw the protecting arm of the law around our young girls, supplanting the arm of the seducer. Men, whatsoever their nationality, are familiar with the terrible

penalty entailed upon young girls by one false step. They cannot close their eyes to such consequences and disregard the warning voice of law without risking the punishment the law imposes on their lust. They cannot indulge in suspicious and compromising conduct with females who are mere children, and expect that corroborative evidence supplied by such conduct will be treated lightly or held insufficient to support the story of the child victim. In the nature of things, direct corroborative evidence is seldom obtainable, and the prosecution must usually rely on the unsupported testimony of the child. This alone is sufficient; and, though it be contradictory and the corroboration slight, appellate courts will not interfere unless the preponderance of evidence against the verdict makes reversal a duty. *People v. Kaiser*, 119 Cal. 458, 51 Pac. 702; *People v. Stratton*, 141 Cal. 609, 75 Pac. 166; *People v. Roach*, 129 Cal. 34, 61 Pac. 574; *People v. Allen*, 144 Cal. 300, 77 Pac. 948; *People v. Cesena*, 90 Cal. 383, 27 Pac. 300; *People v. Wessel*, 98 Cal. 352, 33 Pac. 216. It could serve no useful purpose to indulge in a homily touching the testimony of the physicians, who stated that the hymen was ruptured when they examined her about six months after the occurrence in the barn. This evidence could have no bearing on the crime of which defendant stands convicted. Penetration is not an element of such offense, and this testimony only tended to prove sexual penetration. Hence, its admission was harmless, if erroneous, for the jury must have disregarded it in reaching a verdict. We think, however, it was relevant and competent as tending in some degree to prove the crime charged in the information. We cannot find evidence of the witness Healey as to declarations made by Ah Moon. As we read the transcript his evidence was confined to declarations made by defendant, but be this as it may, the declarations of Ah Moon in the presence of the accused, and his conduct in relation thereto, were relevant and competent. Code Civ. Proc. § 1870, subd. 3; Pen. Code, § 1102.

There was no error in permitting Mrs. Keeley and Frank Keeley to testify touching the actions of defendant and his association with the prosecutrix. We cannot find the question upon which the fifth assignment of error is based. The court did not err in permitting the witness Jansen to testify touching the understanding as to the room defendant was to occupy. It was competent for the prosecution to show, if they could, that he was to occupy the room found locked on the occasion of Jansen's morning visit. The questions asked the prosecutrix, and excepted to by defendant, were calculated to throw light on the credibility of her testimony, and were favorable, rather than harmful, to appellant.

We deem it unnecessary to examine the instructions excepted to. Most of the objections were based on the premise that an attempt to

commit rape was not included in the offense charged, and we have seen that this contention cannot be sustained. The instruction as to assault certainly did not harm appellant. It was more than favorable to him, and besides, he was not found guilty of assault. We find no error in the record.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

2 Cal. App. 275

MURPHEY v. SOUTHERN PAC. CO.

(Court of Appeal, Second District, California.
Nov. 25, 1905.)

CARRIERS — DISCHARGE OF PASSENGERS — NEGLIGENCE—QUESTIONS FOR JURY.

In an action for injuries to a passenger, where it appeared that passengers usually alighted on either side of the train as best suited their convenience, and that there was a track on the easterly side next the station, it was for the jury whether plaintiff was negligent in alighting on the westerly side, and whether defendant was negligent in starting the train without examining as to the safety of passengers who might alight by either exit, and whether the train was started before an opportunity was afforded to alight.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1228, 1339, 1390.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by J. L. Murphey against the Southern Pacific Company. From a judgment for plaintiff, and a motion denying a new trial, defendant appeals. Affirmed.

Rehearing denied by Supreme Court, January 24, 1906.

J. W. McKinley, for appellant. C. C. Wright, E. A. Meserve, and J. L. Murphey, for respondent.

ALLEN, J. Action for damages on account of alleged negligence. Judgment for plaintiff, from which and a motion denying a new trial, defendant appeals.

The record discloses the situation of affairs at the time of the accident to be substantially as follows: Alameda street, one of the streets in the city of Los Angeles, runs north and south. Upon this street defendant maintains a double line of railroad track upon which all of its southern traffic, including switch engines, is operated. Trains going south run on the western track. Upon the east side of Alameda street, near First, the company has a ticket office, the agent at which station left the same at 6:15 p. m. on the day mentioned, and before the accident. No lights were provided at the station after such hour other than a coal oil lamp within the station room. No platform or other convenience was provided at the station upon which passengers might alight, but the passengers alighted upon the surface of the street, usually upon either side of the train as best suited their con-

venience. On December 5, 1902, plaintiff was a passenger on a train going south, which was stopped at the station above named after notice to passengers that it would stop. Plaintiff undertook to alight therefrom, in company with other passengers, on the westerly side of the train and on the side opposite from the easterly track; and while in the act of alighting the train was started, by reason of which the injuries were occasioned.

The first contention of appellant is that the plaintiff should have alighted on the side of the train next the station, and that the employes being upon that side were warranted in starting the train, not having information that passengers were alighting upon the other side, and that no negligence was therefore shown in starting the train under these circumstances. The question of negligence, as well as the claim of contributory negligence, were questions of fact properly submitted to the jury, and it found against appellant upon both issues, and testimony appears in support thereof. It was for the jury to say whether the act of the plaintiff in alighting, as he did, and thus avoiding the necessity of alighting upon another railroad track—both means of exit being open to him—was justifiable. And it was within the province of the jury to say whether it was negligence upon the part of the defendant to start its train without first making some examination as to the safety of passengers who might alight by either exit thus provided, and from either side of a train where no barriers were present preventing exit, or notices to make exit in any particular way; and it was also within their province to determine the reasonableness of the celerity with which passengers alighted therefrom, as well as to the question of fact whether the train was started before an opportunity was afforded to alight; or, upon the other hand, whether the plaintiff undertook to alight from a moving train. All of these matters were properly submitted to the jury; and, no question of negligence in law being presented by the record, this court, under the well-established rule, will not disturb the verdict.

Appellant's criticisms of the charges given, we think, are unfounded. Reading all the charges together, they clearly set forth the law applicable to the various questions involved, and upon which they treated respectively, and none of them can be said to charge as to any question of fact, and the language used therein could not have produced upon the mind of an intelligent juror the idea that the court was intending to assert that any question of fact had been established. Nor was there error in refusing the charges offered by defendant. Everything contained therein had been fully and carefully presented in the other charges given, and no necessity is apparent for their repetition.

A careful examination of the entire record, upon the various other points presented, indicates to us that there is no prejudicial error in the record; and the judgment and order appealed from are therefore affirmed.

We concur: GRAY, P. J.; SMITH, J.

2 Cal. App. 274

PHILLIPS v. MIRES.

(Court of Appeal, Second District, California.
Nov. 25, 1905.)

PARTNERSHIP — WHAT CONSTITUTES — EVIDENCE.

An agreement by a rancher with another that he may milk the cows on the ranch, and for his labor in their care and milking have a certain part of the proceeds of cream sold and of any calves born, and that he shall feed the skimmed milk to hogs owned by both parties equally, does not establish a partnership.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 13-15, 25.]

Appeal from Superior Court, Kings County; E. N. Rector, Judge.

Action by Perry O. Phillips against George S. Mires. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Dixon L. Phillips, for appellant. Letus N. Crowell and E. T. Cooper, for respondent.

ALLEN, J. Action for money had and received by defendant for plaintiff's use. Judgment for plaintiff. Defendant appeals upon a bill of exceptions.

The action was originally commenced in a justice's court. An answer was filed, which was considered by the court and all parties to the proceedings as sufficient to authorize the certification of the case to the superior court, under section 838 of the Code of Civil Procedure, and the superior court proceeded to the trial of the action upon the same theory. It is apparently assumed by both parties that the case is within the jurisdiction of this court, and for the purposes of the decision we will so assume. The sole contention of appellant is that a partnership existed between plaintiff and defendant, and the rule that one partner may not sue his copartner at law, where no accounting or settlement of the partnership affairs has been had, is invoked. In our opinion, no partnership relation is shown. The mere fact that a rancher agrees with another that he may milk the cows upon a ranch belonging to the former and for his labor in their care and milking shall have one-half of the proceeds of the cream sold, and one-half of any calves born while he is so caring for them, and, in addition, shall feed the skimmed milk to hogs owned by both parties equally, does not establish a partnership.

There was no error in the rendition of the judgment, and the same is affirmed.

We concur: GRAY, P. J.; SMITH, J.

2 Cal. App. 261

MEEK v. DE LATOUR.

(Court of Appeal, First District, California.
Nov. 25, 1905.)

1. NUISANCE—RIGHTS OF PRIVATE PERSONS.

A nuisance, rendering the occupancy of dwellings materially uncomfortable, is a private one as to each occupant, for which each may have an action.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, § 24.]

2. SAME—ACTION TO ABATE—NATURE OF REMEDY.

An action to abate a private nuisance is an action in equity.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, §§ 49, 50.]

3. JURY—RIGHT TO JURY TRIAL—ACTION IN EQUITY.

In an action in equity to abate a nuisance and for damages, neither party is entitled to a trial by jury as a matter of right.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 49, 78.]

4. SAME—DEMAND FOR JURY.

Even if one is entitled to have the question of damages in an equitable action tried by a jury, it is not error to refuse a general demand for a jury.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 166.]

5. TRIAL—FINDINGS—DUTY TO MAKE.

Where, in an action to abate a nuisance and for damages, the complaint alleged that plaintiff had frequently notified defendant of the nuisance and requested an abatement, defendant having denied the nuisance and the court having found damages, there was no error in the court's failure to find as to the requests to defendant.

6. NUISANCE—ACTION TO ABATE—EVIDENCE—ADMISSIBILITY—ATTEMPTS TO MITIGATE.

In an action to abate a nuisance consisting of a factory, it was not error to permit several witnesses to testify that, after complaint had been made, defendant caused a longer smokestack to be used, and that thereafter the evils were not so great.

7. SAME—DEPRECIATION IN VALUE OF PROPERTY.

Code Civ. Proc. § 731, defines a nuisance as anything injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, interfering with the comfortable enjoyment of life or property. Held that, in an action for damages from a nuisance, evidence as to the depreciation in the value of plaintiff's property is not admissible to show the actual existence and gravity of the nuisance.

8. SAME.

In an action for damages from a nuisance and to abate the same, evidence as to the depreciation in the value of plaintiff's property is not admissible on the question of damages.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, § 117.]

Appeal from Superior Court, Santa Clara County; W. G. Lorigan, Judge.

Action by Nellie R. Meek against George De Latour. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Duncan Hayne and William A. Bowden, for appellant. J. H. Campbell and C. C. Coolidge, for respondent.

HALL, J. Action to abate a nuisance (a cream of tartar works) and for damages.

The action was tried before the court without a jury, findings made and filed, and judgment entered for plaintiff that the nuisance be abated and for \$1,000 as damages. A motion for new trial was denied, and the case comes here upon an appeal from the judgment and order, upon the judgment roll and a bill of exceptions.

The first question presented is as to the correctness of the ruling of the trial court overruling defendant's demurrer to the complaint; it being urged that, because the complaint shows that many persons lived near to the works complained of and were similarly injured, the complaint states a public and not a private nuisance. The complaint, among other things, alleges that the works of the defendant are situated within 100 feet of the property of plaintiff, upon which there are two dwelling houses, and that defendant, in conducting his works for the manufacture of cream of tartar, has permitted foul, vile, and noxious odors, stenches, etc., to emanate therefrom, etc.; that, by reason of said odors, stenches, and smells, plaintiff's said premises and dwelling houses have been rendered uncomfortable and unfit for occupation by plaintiff, and that by reason thereof her enjoyment of her said premises has been interfered with; that the maintenance of said business by said defendant has been, and now is, injurious to the health and offensive to the senses of plaintiff, and has interfered, and does interfere, with the comfortable enjoyment of her said premises, and has been, and is, an obstruction to the free use of the same. The rule applicable to a case of this kind is fully discussed in *Fisher v. Zumwalt*, 128 Cal. 493, 61 Pac. 82, which was a case of a nuisance caused by the operation of a creamery in a thickly settled community. It was there held that a nuisance, the effect of which extends to the dwellings of other persons to such an extent as to render their occupancy materially uncomfortable, is a private nuisance as to each of them, for which each one thus injured may have a private action, though there are many persons thus affected. The case at bar comes fairly within the rule as laid down in *Fisher v. Zumwalt*, supra. The case of *Reynolds v. Presidio & Ferries R. R. Co.* (Cal. App.) 81 Pac. 1118, is a case of an obstruction to a public highway, an interference with a right which the plaintiff enjoyed in common with the public, and belongs to a class of cases clearly differentiated from this case in *Fisher v. Zumwalt*. The court did not err in overruling the demurrer.

Defendant demanded a jury trial, which demand was by the court refused, and this refusal is now assigned as error. It has uniformly been held in this state that an action to abate a nuisance is an action in equity. *People v. Moore*, 29 Cal. 428; *Courtwright v. Bear R. W. & M. Co.*, 30 Cal. 573; *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51; *Richardson v. City of*

Eureka, 110 Cal. 441, 42 Pac. 935; *Fisher v. Zumwalt*, supra; *McCarthy v. Gaston Ridge M. Co.*, 144 Cal. 542, 78 Pac. 7. In such a case the verdict of the jury would be advisory only, and neither party is entitled to a trial by jury as a matter of right. *Richardson v. City of Eureka*, supra; *Fisher v. Zumwalt*, supra. The demand for damages is but incidental to the main purpose of the suit (*Courtwright v. Bear R. W. & M. Co.*, supra); but, if it should be conceded that defendant may have been entitled to have the question of damages determined by a jury, no such demand was made; but the demand was for a jury to try the entire case.

It is not error to refuse a general demand for a jury to try a cause consisting of legal and equitable issues. 6 Am. & Eng. Ency. of Law, 975; *Greenleaf v. Bagan*, 30 Minn. 316, 15 N. W. 254; *Iace v. Fixen*, 39 Minn. 46, 38 N. W. 763; *Peden v. Cavins*, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276.

As to the point that the evidence is insufficient, it is sufficient to say that there is a conflict of evidence as to the facts tending to show the existence of a nuisance.

Appellant insists that "the defendant was entitled to a finding upon the issue tendered by paragraph 7 of the complaint and the denial as exhibited in paragraph 7 of the answer." The paragraph in question contains allegations to the effect that plaintiff had frequently notified defendant of the effects of maintaining said business upon her and her property, and that she had requested defendant to abate the same, and also allegations as to damages suffered by plaintiff; upon all and each of which allegations defendant took issue. The court found as to the damages. The other allegations are immaterial ones, especially in view of the fact that defendant denied the existence of any nuisance.

The court, over the objection and exception of defendant, allowed evidence from several witnesses to the effect that, after complaint had been made to defendant, he caused a longer smokestack to be used, etc. Several witnesses testified that thereafter the evils were not so great. This was not error. The matters thus testified to were a part of the history of the alleged nuisance—a part of the *res gestæ*. It all tended to show in what manner defendant conducted the works complained of during the time complained of. The ruling of the court in this regard in no way contravenes the doctrine, laid down in *Sappenfield v. Railroad Co.*, 91 Cal. 61, 27 Pac. 590, and *Limberg v. Glenwood Co.*, 127 Cal. 604, 60 Pac. 176, 49 L. R. A. 33, that a plaintiff cannot show that after an accident the defendant took new or additional precautions to prevent the recurrence of such accident. Over the objection and exception of defendant, several witnesses were permitted to testify that, by reason of the presence of the cream of tartar works, property in the vicinity had been depreciated in

value, and that particular parcels other than the property of plaintiff had been depreciated in value. The following may be taken as types of the questions now under discussion: "What effect, in your judgment, has the cream of tartar works in that vicinity had upon the value of real estate in that locality? A. I think the maintenance of the tartar works in that vicinity depreciated the surrounding property over 50 per cent. in value." And to another witness (not the plaintiff): "How did the location of the works affect the value of your property? A. In 1888 my property was worth \$2,700, and now I am offering it for \$1,500." To each of the above questions, and to others of like character, the defendant lodged the objection that they were incompetent, irrelevant, and immaterial. It seems perfectly clear that such testimony, even where limited to the property of plaintiff, where the abatement of a nuisance is sought, is inadmissible on the question of damages. Otherwise a plaintiff could recover for the depreciation in value of his property and at the same time remove the depreciation by abating the cause of it. "The nuisance may be abated or removed, and to give damages on account of the decreased value of the land would be to give damages for all the injury the premises would ever sustain, which would be clearly wrong." *Bigley v. Nunan*, 53 Cal. 403. See, also, *Hopkins v. W. P. R. R. Co.*, 50 Cal. 194, and the cases there cited; *Severy v. C. P. R. R. Co.*, 51 Cal. 195. (It was stated at the oral argument in this case that the works have, since the trial, been removed to another county.)

It is insisted, however, by plaintiff that, though the depreciation in the value of property may not be recovered in an action of this sort, such evidence is proper for the purpose of proving the actual existence of the nuisance and the gravity thereof. No authorities have been cited to us in support of this contention. "Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action." Code Civ. Proc. § 731. Under this section, neither the existence of the nuisance nor the right to have the same abated depends upon the depreciation in value of neighboring property. The erection of an unsightly structure in a fashionable residence section might very much depreciate the value of property for residence purposes, yet, unless the structure interfered with comfortable enjoyment of life or property in the manner pointed out in the above section, it would not be a nuisance, and, if it did, it could be abated whether it depreciated the market value of property in its vicinity or not. The existence of the nuisance must be proved by evidence of the things that constitute the nuisance. The gravamen of the charge made in the complaint in this case is that defendant permit-

ted the most foul, vile, and noxious odors, stenches, and smells to emanate from his premises in the maintenance of his business, and that the maintenance thereof has been, and is, injurious to the health and offensive to the senses of plaintiff, and has interfered, and does interfere, with the comfortable enjoyment of her premises, and has been, and is, an obstruction to the free use of the same. The proof of the above recited matters established the existence of a nuisance, and the depreciation of the value of property was an immaterial matter. The allegations of the complaint as to damages are that plaintiff has been damaged "one thousand dollars for distress and inconvenience suffered by plaintiff by reason of said nuisance, and three thousand (\$3,000) for the loss and damage to her said property by reason thereof." The court found that plaintiff has suffered damage in the sum of \$1,000. We cannot say that this finding is not in large part based upon the evidence as to depreciation in the value of property. The court erred in admitting the testimony as to depreciation in the value of property.

It was also urged at the oral argument that the court erred in allowing testimony to be given, over the objections of defendant, that there was a general complaint in the community with reference to the tartar works conducted by defendant, and that a public meeting had been called and held by the people of the vicinity to protest against the carrying on of the manufacture of cream of tartar. The question, "Is there, or is there not, a general complaint in that community with reference to the tartar works conducted by the defendant?" clearly called for hearsay testimony; but the objection was not upon that ground. Doubtless, if it had been, the objection would have been sustained. Neither the fact that meetings were held at which defendant was not present, nor what took place at such meetings, was evidence against defendant.

For the errors above pointed out, the judgment and order are reversed.

We concur: HARRISON, P. J.; COOPER, J.

2 Cal. App. 306
BRENNEKE et ux. v. SMALLMAN et al.
 (Court of Appeal, First District, California.
 Dec. 1, 1905.)

1. CHATTEL MORTGAGES—ACTIONS TO FORECLOSE—TRIAL—FINDINGS.

A finding, in an action to foreclose a chattel mortgage, of the execution by defendant of a mortgage, in accord with the allegations of the complaint, is sufficient, though not in so many words referring to the mortgage described in the complaint; it being perfectly apparent that it is the same mortgage.

2. CHATTEL MORTGAGES—FORECLOSURE—DESCRIPTION OF PROPERTY.

The mortgagor, in an action to foreclose a chattel mortgage as written, may not complain of the indefinite description of the property.

3. BILLS AND NOTES—EXTENDING TIME OF PAYMENT.

Time for payment of a note is not extended by the acceptance of interest in advance to a time beyond that at which the note is due on its face, so as to prevent action before expiration of the time for which interest was paid; Civ. Code, § 1898, providing that a contract in writing may be altered by a contract in writing or by an executed oral agreement, but not otherwise.

4. HUSBAND AND WIFE—LOAN OF COMMUNITY PROPERTY—NOTE TO WIFE.

That the note given for a loan of money, the joint earnings of husband and wife, was made payable to the wife, does not prevent the husband suing thereon, in the absence of evidence that he intended to give it to his wife; and he is not required to first litigate with her the question of ownership, but, if the maker is in doubt as to whom he should pay, he may require them to interplead.

5. BILLS AND NOTES—EXTENSION—INDEFINITE INDORSEMENT.

The words "Renewed July 6," indorsed on the back of a note over the signature of the payee, are too indefinite to extend time of payment.

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Louis Brenneke and wife against A. H. Smallman and others. From an adverse judgment, defendant Smallman appeals. Affirmed.

Maguire & Gallagher and James G. Maguire, for appellant. Frank Schilling, R. Percy Wright, and J. J. Roche, for respondents.

HALL, J. This is an action to foreclose a chattel mortgage, and the appeal by defendant A. H. Smallman is from a judgment of foreclosure in favor of Louis Brenneke, and an order denying appellant's motion for a new trial.

The complaint alleges that the plaintiffs, Louis Brenneke and Lena Brenneke, are, and have been at all times in the complaint mentioned, husband and wife. It is alleged that defendant A. H. Smallman, on January 5, 1900, borrowed from plaintiff Louis Brenneke \$1,000, and made and delivered to him, through plaintiff Lena Brenneke, a promissory note, which is set out in full. The note bears date January 5, 1900, and is in terms payable to Lena Brenneke January 5, 1901. It is alleged that the \$1,000 loaned is a part of the joint earnings of plaintiffs, and that, though Lena Brenneke appears as the payee in said note, and mortgagee in the mortgage which is alleged to have been given to secure the note, Louis Brenneke is, and at all times has been, the owner and holder of said note and mortgage.

It is urged that the findings do not support the judgment in this, that "the findings do not show that the defendant A. H. Smallman ever executed the chattel mortgage described in plaintiff's complaint." The finding in question follows a finding as to the execution of the note, and is as follows: "At the same time, as part of the same transaction, and for the purpose of securing the payment of

said promissory note and the interest to accrue thereon, and also, in case of foreclosure of mortgage, in order to secure the payment of the costs and charges thereof, together with a counsel fee at the rate of 5 per cent. on the total principal and interest unpaid, the defendant A. H. Smallman executed to the plaintiff Louis Brenneke, through said Lena Brenneke, a mortgage of the personal property described in paragraph 3 of the complaint herein." The wording of this finding is in exact accord with the allegations of the complaint. The next succeeding finding, which is also in exact accord with the next succeeding allegation of the complaint, finds that said mortgage was recorded in the office of the county recorder of said city and county, in volume 85 of Mortgages of Personal Property, at page 271 thereof. While the finding attacked does not in so many words refer to the mortgage described in the complaint, it is perfectly apparent that it is the same mortgage referred to in the complaint. The objections to its sufficiency we regard as hypercritical. Findings are to be liberally construed in support of the judgment (*Ames v. San Diego*, 101 Cal. 390, 35 Pac. 1005), and any uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it (*Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986).

It is further objected that the property mortgaged is not sufficiently described in the findings. The findings refer to the property described in paragraph 3 of the complaint. As originally drawn, this paragraph, besides naming the articles as "one Royal Wilton carpet," etc., also described them as being in the house designated as No. 109 Devisadero street, at the city and county of San Francisco, state of California. The mortgage, however, on being introduced in evidence, simply gave an enumeration of the articles, but did not locate them or otherwise describe them. At the close of the case the complaint was amended to conform to the proof by striking out certain lines of paragraph 3, and inserting matter which, if we correctly understand the record, leaves the description of the property simply as set forth in the mortgage; that is, it is enumerated and not otherwise described. The result of this is that, reading the decree, the findings, and complaint as amended, we have simply an enumeration of various articles of household furniture as set forth in the mortgage, but not otherwise described. If this were an action in claim and delivery, it might well be said that the description was too vague, but it is an action to foreclose a chattel mortgage. "In an action to foreclose a mortgage as it is written, a mortgagor cannot be heard to complain of an indefinite description of the property mortgaged, whatever might be the effect of a sale under the description." *Graham v. Steward*, 68 Cal. 374, 9 Pac. 555; *Whitney*

v. Buckman, 13 Cal. 536; Tryon v. Sutton, 13 Cal. 490.

It is urged that the findings show that the action was commenced prematurely, because it appears that the action was brought May 10, 1901, although interest had been paid in advance to and including June 4, 1901. Plaintiff's theory seems to be that by accepting interest in advance plaintiff extended the time of payment accordingly. The promissory note is, of course, a written contract, and in this instance it was past due on its face. "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, but not otherwise." Civ. Code, § 1698. The payment of interest in advance was in strict compliance with the terms of the promissory note, and, if the receipt thereof could be held to imply an agreement to forbear for the time for which the interest was paid, such contract would not be fully executed until the expiration of the time for which interest was paid, and could not be effectual to vary the terms of the note or to extend the time of payment thereof. *Henehan v. Hart*, 127 Cal. 656, 80 Pac. 426; Civ. Code, § 1698. The finding that the money loaned was part of the joint earnings of Louis Brenneke and Lena Brenneke is amply supported by the evidence in the record, as is also the finding that defendant A. H. Smallman borrowed the sum of \$1,000 from plaintiff Louis Brenneke. Louis Brenneke testified that he told his wife to go to the bank and get the money and give it to Smallman. The fact that the note and mortgage were made payable to Mrs. Brenneke did not divest her husband of his ownership thereof, in the absence of evidence that he intended to make her a gift of the same. The husband has a right to sue for and recover community property. This right is necessarily incident to his right to the control and disposition of such property. *Fennell v. Drinkhouse*, 131 Cal. 451, 63 Pac. 734, 82 Am. St. Rep. 361; *Rowe v. Hibernia Bank*, 134 Cal. 403, 66 Pac. 569; *Meyer v. Kinzer*, 12 Cal. 248, 73 Am. Dec. 538. We see no force in the suggestion that the husband should, by a judicial proceeding, litigate the question of ownership of the note and mortgage with his wife before enforcing his rights against the defendant. If the mortgagor had any doubt as to whom he should pay the money to, he could have required the Brennekes to interplead; but as Mrs. Brenneke joined in this action, praying for a judgment in favor of her husband, she would doubtless be forever estopped from claiming anything in her own right against the defendant.

It is urged that the evidence shows that on the 5th day of January, 1901, Lena Brenneke agreed to extend the time of the maturity of the note to July 6, 1901, and that certain findings to the contrary are not supported by the evidence. This contention is predicated upon the fact that interest was paid and received monthly in advance, and that

on the 5th day of January, 1901, Lena Brenneke indorsed on the back of the note these words: "Renewed July 6. Lena Brenneke." We have already seen that in this state a payment of interest in advance does not amount to a contract to extend the time for payment of a written contract (*Henehan v. Hart*, supra; Civ. Code, § 1698), which leaves for consideration the written words above set forth. The word "renewed" may properly be used to express an agreement on the part of the maker of a note, but is quite out of place as expressing an agreement on the part of the payee extending the time of payment. "July 6" does not indicate with any certainty the period to which the note was "renewed," or to which payment was extended, if we should construe "renewed" as meaning "extended." We may conjecture that it was intended by the words written to extend the time for payment of the note to July 6, 1901, but it would be but a conjecture, which is not sufficient upon which to base judicial action. The original agreement was to pay at a certain time. The burden of proving any modification which would afford a defense to the action on the original contract was upon the defendant. The words relied upon are too vague and uncertain in their meaning to amount to a modification of the promissory note as originally executed. The case of *Corbett v. Clough*, 8 S. D. 176, 65 N. W. 1074, cited by appellant, is a striking example of the kind of language that should have been used in this case to effectuate the object claimed to have been intended by appellant. The words were "Extended to December 1st, 1891," written by the payee. The language was apt, and the time certain. Of the same nature is *Niblack v. Champeny*, 10 S. D. 165, 72 N. W. 402. In *Lime Rock Bank v. Mallett*, 34 Me. 547, 56 Am. Dec. 673, there was no uncertainty as to the time, and there was no controversy as to the action of the court as to the meaning of the words giving the extension, but the controversy was as to whether or not the defendant was a surety only, and had consented to the extension. We do not think that the words "Renewed July 6" can be construed as expressing an agreement to extend the time of payment of a note upon which they are written to July 6, 1901. Defendant asked a witness the question: "What was that conversation?" to which plaintiff objected, whereupon counsel for defendant stated that he offered to prove that "Lena Brenneke verbally agreed with the defendant A. H. Smallman that the time of payment of said note should be extended to the 6th day of July, 1901," and thereupon the court sustained the objection. This was not error. A written contract may not be altered, except by a contract in writing, or by an executed oral agreement. Civ. Code, § 1698; *Henehan v. Hart*, supra.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; COOPER, J.

EKSTRAND v. BARTH et al.

(Supreme Court of Washington. Jan. 5, 1906.)

1. PLEADING—MOTIONS.

In an action for damages for failure to construct a house for plaintiff according to the contract, the complaint having contained a copy of the specifications and alleged the substance of the contract, there was no error in denying a motion to require a setting out of the contract in the complaint and to make paragraphs more definite and certain.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 54.]

2. DAMAGES—BREACH OF CONTRACT.

In an action for damages for defendant's failure to construct a house for plaintiff in accordance with the contract, plaintiff was entitled to recover costs and expenses reasonably necessary to make the work conform to the requirements of the contract, notwithstanding that plaintiff had sold the house and that there was no evidence that she paid any money to repair any defects or was compelled to sell the property for any less on account of the defects than she would otherwise have obtained for it.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 322-324.]

3. CONTRACTS—ACCEPTANCE OF WORK—WAIVER OF DEFECTS.

Where defendant contracted to build a house for plaintiff, and failed to build it according to the contract, plaintiff being without any knowledge or experience in building, and having no knowledge of the defects until she had fully paid for the work, and being a personal friend of defendant's, and relying entirely upon him to properly build the house, her payment of the contract price and occupancy of the house was not such an acceptance of the work as to estop her from claiming damages for defendant's failure to properly carry out the contract.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1469.]

4. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In cases tried to the court without a jury, the reception of improper evidence is not reversible error.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4185, 4186.]

5. CONTRACTS—BREACH—ACTION—EVIDENCE—ADMISSIBILITY.

In an action for damages for defendant's failure to construct a house for plaintiff in accordance with the contract, it was proper to exclude evidence that the plans of the building showing its location were filed in the office of the building inspector of the city, and that he approved the building after an examination; it being admitted that the building encroached upon the street, and not being claimed that the building inspector was authorized to permit buildings to so encroach.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by Sophia Ekstrand against A. Barth and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Charles A. Riddle, for appellants. Larabee & Wright, for respondent.

MOUNT, C. J. Respondent brought this action in the court below to recover from appellants damages alleged to have been caused by the faulty construction of a building in Seattle. The cause was tried to the court without a jury. Findings were made in

favor of the plaintiff below, and a judgment entered in her favor for the sum of \$648. Defendants have appealed.

The facts are in substance as follows: On the 10th day of July, 1902, respondent and appellants entered into a written building contract, whereby appellants agreed, for the consideration of \$5,300, to furnish the material and construct for respondent, "in the best, most substantial, and workmanlike manner," and to her satisfaction, a frame building, consisting of four flats, on lot 1 in block 12 in Eastern addition to the city of Seattle, according to certain plans, specifications, and drawings attached to the contract and made a part of it. These plans, specifications, and drawings were made by one of the appellants, who was an old friend and acquaintance of the respondent. The superintendence of the work was left to the appellants upon whom respondent relied. Soon after the execution of the contract, appellants proceeded to grade down the lot and to construct the building thereon. Respondent stated to appellants that she wanted the building placed on the lot as near the street as was possible. There is some dispute as to whether the appellants undertook to locate the building on the lot where it was placed without the advice of the respondent. The respondent testified that she did not know the location of the lot lines, and was assured by one of the appellants that he knew the lines, that he had much experience in locating lot lines, and that he would place the house where it should be placed; while appellants testified that respondent herself gave directions where the house should be placed. We are inclined to follow the lower court upon this question, and believe the respondent's statements in this regard. The house was located on the lot in such a manner that the front porch extended about 2½ feet over the line of the lot, and upon the inside parking strip between the lot line and the sidewalk along the street. During the time the building was in course of construction, the respondent was there frequently and saw the work as it progressed. She saw nothing wrong about it, and made no complaint, but authorized some minor changes in the specifications as extras. She was satisfied with the work as it appeared to her. About two weeks before the building was completed, she moved into one of the flats, and continued to reside there until the time of the trial. She paid for the work from time to time as demands were made upon her by the appellants. About October 28, 1902, the building was finished, and on that day a settlement was made of the accounts between the parties, and the full contract price of the building was paid by respondent to the appellants, and in addition thereto extras were paid for to the amount of \$42.82, leaving a balance of \$7.98 due the appellants. Soon after this settlement was made leaks began to appear in the roof of the building, the plastering became wet and broke and fell in places,

the foundation settled and cracked, the doors sagged, the windows leaked rain into the house, and a cement floor turned water into the basement instead of away from it; and the respondent also learned that the house projected into the street, and she was notified by the city authorities to remove it. She thereupon called the attention of the appellants to these conditions, and they attempted to repair the roof and other defects, but without success. On February 7, 1903, respondent sold and conveyed the premises to her son, and thereafter, on May 7, 1904, brought this action to recover damages from appellants on account of failure to construct the building in the best, most substantial, and workmanlike manner.

Appellants first contend that the trial court erred in denying a motion to require the respondent to set out the contract in her complaint, and to make several paragraphs more definite and certain. The complaint contained a copy of the specifications in full. It also alleged the substance of the contract. The appellants could not have been misled by the failure of the court to sustain the motion, because the substance of the contract was set out, and because the items of damage were sufficiently specified. We do not think it necessary to quote the allegations or discuss them further in this opinion.

Appellants' principal contention upon this appeal is that respondent cannot recover in this action because she had sold and conveyed the premises before she brought the action, and because there is no evidence that she paid out any money to repair any of the defects in the material or construction of the building, or that she lost any rent on account thereof, or that she is now obligated to remedy any defects in the building, even if appellants did not perform their contract properly, or that she was compelled to sell the property for any less money on account of such defects. No authorities are cited to support the point above made, but appellants cite a number of authorities in support of the rule stated in 13 Cyc. p. 158, as follows: "Where a contract has been defectively performed and damages are claimed for such reason, the damages should be measured by the difference between the value of the property in its defective condition and its value if it had been completed in compliance with the contract; and this rule obtains even where the property as delivered has no market value. The measure of damages in such cases has been held to be the costs and expenses reasonably necessary to make the work conform to the requirements of the contract, on the principle that plaintiff is entitled to work such as he contracted for." This, in our opinion, is the correct rule for the measurement of damages in these cases, but it does not depend upon the fact whether or not the builder retains his ownership of the property or makes the necessary repairs to conform the building to the contract.

He may, of course, make the repairs if he chooses, but he is not required to do so in order to recover. He may also keep the property, but his right of action does not depend upon that fact. He may sell it either at a loss or at a profit, at a forced or a voluntary sale, but such sale does not deprive him of a right of action already accrued. The property may be lost to the builder by fire or other means after his right to damages for defective construction has accrued. In that event no one could reasonably claim that the right of action abated by the destruction of the property, and allege as a reason for the abatement that the builder had suffered no damages, and no expenses in repairs had been incurred, and no damages resulted by reason of defective workmanship. If the contractor fails to perform his contract, the builder may, of course, recover damages therefor, as in case of the breach of any other contract. 30 Enc. of Law (2d Ed.) p. 1219. The damages are not against the freehold. They are personal to the builder, who has paid for the service and is entitled thereto or to be recompensed for his loss, without reference to the fact whether he has sold the premises or kept them. *Bryant v. Broadwell*, 140 Cal. 400, 74 Pac. 33.

Appellants next argue that because respondent was present during the progress of the work and saw it done, and thereafter without objection took possession of the building and paid and settled for it, she thereby accepted the work, and is estopped now to claim damages. It is true that, where a builder knows of defective work and materials used and makes no objections, but accepts the work and pays for it, he cannot thereafter be heard to complain. But this rule does not apply where the payment is made and possession taken without notice or knowledge of the defects. 30 Enc. of Law (2d Ed.) pp. 1323, 1233. It appears in this case that the respondent was a widow without any knowledge or experience in building, and that appellants knew this fact. It also appears that she was present in the house while a part of the work was being done, but she had no knowledge of any of the defects until after she had fully paid for the work. At the time of her last payment, she was told that all defects would be carefully repaired. She learned of the defective condition of the roof, of the windows, of the foundation, and of the fact that the front porch extended into the street, after the payment had been made. In fact, it appears that she was a personal friend of the appellants, and gave the contract to them for that reason, and relied entirely upon them to build the house in accordance with the contract therefor, and relied upon their promise to make good any defects therein. Under these circumstances, her payment of the contract price and her occupancy of the building cannot be held to be an acceptance of the work such as to estop her from claiming damages.

Appellants complain because the court admitted certain evidence, which is claimed to have been erroneously admitted, and rejected certain evidence, which should have been received. In cases tried to the court without a jury, we have frequently held that the reception of improper evidence is not reversible error, because the case is tried here de novo and such evidence will not be considered. The evidence offered by appellants and rejected by the court was to the effect that the plans of the building showing the location of the building with reference to lot lines were filed in the office of the building inspector of the city of Seattle, and that the building inspector examined the premises and approved the building. It was admitted that the building encroached upon the street. The evidence offered was therefore clearly immaterial. Furthermore, it is not contended that the building inspector was authorized to permit buildings to be placed so that they would encroach upon the street, and even if he had such authority, the respondent had a right to have her building placed upon the lots as appellants had agreed to place it.

Appellants contend that the findings and conclusions of the lower court are not supported by the evidence; but after carefully examining the evidence, we think the findings are supported thereby. There is much conflict between the statements of the witnesses on the material points, but we think the court found the facts in the case, and arrived at substantial justice between the parties.

The judgment is therefore affirmed.

ROOT, HADLEY, FULLERTON, CROW, and DUNBAR, JJ., concur.

HYDE v. BRITTON et al.

(Supreme Court of Washington. Jan. 2, 1906.)

1. PARTITION—PROOF—TITLE.

In partition, plaintiff has the burden of proving his title by a fair preponderance of the evidence.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, § 183.]

2. SAME—EVIDENCE—SUFFICIENCY.

Evidence in a suit for partition examined, and held to support a finding that plaintiff had no title to the property sought to be partitioned.

3. SAME—POSSESSION TO SUSTAIN SUIT—EVIDENCE—SUFFICIENCY.

Evidence in a suit for partition examined, and held not to show that plaintiff or his predecessor had been in the possession of the property within 10 years preceding the commencement of the action, essential to its maintenance within 2 Ballinger's Ann. Codes & St. § 4797, providing that no action for the recovery of real estate shall be maintained unless plaintiff or his predecessor was possessed of the premises within 10 years before the commencement of the action.

4. LIMITATION OF ACTIONS — RECOVERY OF REAL PROPERTY—PARTITION.

Under 2 Ballinger's Ann. Codes & St. § 4797, declaring that actions for the recovery of real property must be begun within 10 years after the accrual of the cause of action, an ac-

tion for partition against one who, together with his predecessors in interest, has exercised dominion over and claimed the property adversely against the world for over 10 years, is barred.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 77.]

Appeal from Superior Court, King County; George C. Hatch, Judge.

Action by Joseph A. Hyde, Jr., against L. B. Britton and others. From a judgment for defendants, plaintiff appeals. Affirmed.

H. D. Moore, for appellant. Fred H. Peterson and H. C. Force, for respondents.

ROOT, J. This is an appeal from a final judgment against the plaintiff and appellant, made and entered by the superior court of King county, in an action for a partition of lot 9, block 10, Cove addition to the city of Seattle. In 1882 this lot was conveyed by the owner to one John Webster. There were in Seattle at that time two men by the name of John Webster. One of these, at that time and for many years thereafter, was the husband of Phoebe Ann Webster, with whom he was residing in the city of Seattle. As to which one of these men the property in question was conveyed was a question in dispute in this case. In 1884 Phoebe Ann Webster died, leaving as her sole heirs four persons who, in April, 1904, conveyed by quitclaim deed whatever interest they had in said property to the Title Guarantee Company, which shortly thereafter quitclaimed the same to this appellant, who claims an undivided one-half interest in said lot as the successor in interest to the community right of Mrs. Webster. Respondents claim title to the entire property, through a deed executed in 1886, purporting to convey the whole thereof from John Webster to Lewis McCallister, and by certain mesne conveyances made thereafter, all of said deeds being duly recorded soon after execution. The taxes for 1891-92 were paid by persons who, at those dates or when said taxes became due, claimed to be owners of said property under the deed from John Webster, above referred to, and from whom respondents claim title. In 1898 a certificate of delinquency was issued to King county for taxes upon said property for the years 1893, 1894, and 1895. The taxes thereafter, to and including 1901, were paid by one Albert Meinhardt, who in that year began suit to foreclose said tax certificate. On January 20, 1903, the lot was redeemed by H. R. Carr, who paid the costs of the foreclosure proceedings, and also the taxes for 1902. Respondents acquired the interests of said Meinhardt and Carr, and paid the taxes for 1903. Appellant, in his complaint, set forth the purchase of said property by said John Webster, who was at said time the husband of said Phoebe Ann Webster; alleged the deceased of said Phoebe Ann Webster, without having disposed of her interest in this property; alleged the subsequent conveyance by her heirs of their in-

terest in said property, and the acquiring by appellant of whatever right, title, and interest said Mrs. Webster had owned in said property, and prayed for a partition of said property. Respondents denied the allegations of the appellant as to the facts showing or tending to show any community interest on the part of Phoebe Ann Webster in said lot, and set up two affirmative defenses: (1) A plea of the 10-year statute of limitations; (2) that they and their predecessors in interest had for seven years prior to the commencement of this action been in the actual possession, under color of title, and in good faith, and had made improvements and payment of taxes on said property during said seven years. The trial court found that the appellant had no title whatever to said land, and also found in favor of the respondents upon both of the affirmative defenses. Exceptions were taken to these findings, and we are called upon to review the same.

As to whether or not the purchasing and foreclosure of a tax certificate by one claiming an interest in property, instead of paying the taxes year by year would permit such party to avail himself of the provisions of the seven-year statute, would present a serious question; but the view we take of the other questions makes it unnecessary to decide the matter.

Upon the question of title and upon the question of adverse possession, we think the finding of the trial court should be sustained. This being an action for a partition, the burden of proof was upon the plaintiff to establish his case by a fair preponderance of the evidence. It does not appear that Mrs. Webster was ever in possession of this lot. It appears that she left a will, but did not therein mention the property in question here. In the administration of her estate, said property was not considered, and in no manner dealt with, and it does not appear that her heirs ever made any claim to said property until a comparatively short time before the commencement of this action. Then said lot and several others were conveyed by quitclaim deed to the trust company, which, in turn, by quitclaim deed, conveyed the same to appellant, who paid only \$200 as consideration for the entire interest conveyed. It is claimed by respondents that the purchase of this property by appellant was purely for speculative purposes. It is not made to appear as to which John Webster this property was conveyed. The burden was on appellant to show that the grantee in the original deed of the property was the identical John Webster who was the husband of Phoebe Ann Webster. The statute of limitations, in regard to the bringing of actions of this kind, reads as follows: "The period prescribed in the preceding section for the commencement of actions shall be as follows: Within ten years, (1) actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintain-

ed for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action." Section 4797, 2 Ballinger's Ann. Codes & St.

In answer to interrogatories submitted by respondents to the appellant, the latter said he did not live upon said lot, and to the question, "What acts of possession has he [appellant] ever performed with regard to said lot, and when?" he answered, "Buying said lot, and taking and recording a deed thereto; the lot being unoccupied and unimproved." In answer to questions as to the possession and as to what acts of possession had been performed by his alleged predecessors in interest, he answered, "I do not know." In answer to a question as to when the heirs of Phoebe Ann Webster first learned of their alleged interest in said lot, he answered, "I am informed that they knew of it first within the present year." We do not think a further review or analysis of the evidence necessary. The plaintiff is not shown by the evidence to have been in the possession or control of the property within the 10 years immediately preceding the commencement of the action, and we do not think that the evidence established a title in him to a half or any other interest in the said lot. Respondents and their predecessors in interest had exercised dominion over and claimed the property adversely against the world since the Webster deed in 1886.

The judgment of the superior court will therefore be affirmed.

MOUNT, C. J.; and DUNBAR, CROW, HADLEY, RUDKIN, and FULLERTON, JJ., concur.

STATE ex rel. KRUTZ v. WASHINGTON IRR. CO.

(Supreme Court of Washington. Jan. 3, 1906.)

MANDAMUS — ADEQUATE REMEDY AT LAW — EFFECT.

A person having a contract with an irrigation company, binding it to furnish water for the irrigation of his lands, has an adequate remedy at law for the company's refusal to comply with the contract, though it be conceded that the company is a common carrier of water, and mandamus does not lie to compel it to comply with the contract, under Ballinger's Ann. Codes & St. § 5756, providing that the writ of mandate will issue where there is not an adequate remedy at law.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 8, 34, 275.]

Appeal from Superior Court, Yakima County; Frank H. Rudkin, Judge.

Mandamus by the state, on the relation of Carrie A. Krutz, against the Washington Irrigation Company. From a judgment of dismissal, the relator appeals. Affirmed.

See 80 Pac. 803.

W. H. Bogle and H. J. Snively, for appellant. Ira P. Englehart and E. F. Blaine, for respondent.

HADLEY, J. This is an action in mandamus. The affidavit in support of the application for the writ states that the Washington Irrigation Company is a corporation, and is the owner of an irrigating canal commonly known as "Sunnyside Canal"; that it is a common carrier of water for irrigation purposes, and is charged with the duty of furnishing water for irrigation of lands lying under said canal, upon reasonable compensation being tendered and made therefor; that the relator is the owner of certain described lands lying under said canal, amounting to 320 acres more or less, which are arid and dependent upon irrigation to produce agricultural crops; that the relator holds a water deed and water right contract from and with said corporation for water to irrigate her said lands, which contract was executed in November, 1902; that said contract provides that she shall pay annually in advance to the irrigation company, on the first Monday in May of each year from the date of the contract, the sum of \$1 per acre, and, in case of default in such payment for the period of 30 days after the same shall become due, the irrigation company shall have the right and option to refuse to furnish water until such rental and arrearages shall be paid in full; that the contract further provides that the irrigation company shall deliver to her a lateral or flume, to be connected with its main or branch canal nearest her land along the line of its right of way at such point as to the company may seem most practicable, which lateral flume shall be located by the company and shall be constructed and maintained by the relator. The contract further requires that the company shall construct and maintain the necessary works of delivery, except the lateral flume, and shall place and maintain at the point of delivery suitable measuring boxes or gates. The affidavit further states that one branch of the canal is about one-half mile from the north line of the relator's lands, and another branch runs near the west line thereof; that, desiring to cultivate her lands during the year 1904, she notified the company about March 23d of that year to designate the point on the canal from which the lateral to her land should be constructed, and to locate the lateral; that she thereupon tendered to the company the sum of \$320 in payment of the annual rental for water for the year 1904, and demanded the delivery of water to her lands during the season of said year; that thereupon the company did indicate that she should receive water through a certain small lateral running across the lands of one Eaton, but refused and still refuses to furnish her with any water whatever, except on condition that she shall pay to the company the sum of \$320, claimed by it for water

rental for the year 1903, as well as the further sum of \$320 as rental for the year 1904; that no water was delivered during the year 1903, and that the company never, at any time, prior to March 28, 1904, designated the point from which a lateral to be constructed by the relator should receive water from the canal, and did not locate such lateral; that it has never at any time constructed the necessary works of delivery, and has not provided measuring boxes or gates. On the above facts the relator asked the issuance of the writ of mandate to compel the irrigation company to deliver water to her lands for the year 1904, and also to compel it to provide suitable measuring boxes or gates at the point of delivery of the water upon her lands. The company answered the affidavit, making issues thereon, and the cause came on for trial before a jury. A witness was sworn to testify, when the company objected to the introduction of any testimony, and moved that the cause be withdrawn from the jury, and that it be dismissed on the ground that the affidavit did not state facts sufficient to authorize the issuance of the writ of mandate. The objection was sustained, the motion granted, and judgment was entered dismissing the action. From the judgment the relator has appealed.

Appellant assigns as error that the court refused the admission of its offered evidence and entered judgment of dismissal. She insists that mandamus is the proper remedy in the premises. It will be observed from the foregoing statement that the parties entered into a contract by the terms of which respondent is to furnish water to appellant under certain specified conditions. The contract is a private one between the parties. Appellant argues in her brief, however, that respondent is a public service corporation, a common carrier of water, and that it is under the duty to furnish water to her lands upon demand and upon payment or tender of a reasonable compensation therefor. We need not examine the question as to whether respondent is a common carrier, with such public duties imposed upon it by law as may be enforced by mandate when there is no other adequate remedy. Appellant's application shows that she is not dependent upon the remedy which is provided for the enforcement of a mere public duty. It shows that she holds a private contract whereby respondent has obligated itself to furnish water. She can resort to the ordinary remedies upon that contract, as in the case of any private contract. In support of her contention that mandamus is the proper remedy here she cites *Price v. Riverside L. & I. Co.*, 56 Cal. 431, and *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. 264. An examination of those cases, however, discloses that each was based squarely upon the theory that there was a refusal to discharge a public duty. It does not appear that a private contract between the parties existed in either case. Our stat-

ute provides that the writ of mandate will issue "where there is not a plain, speedy, and adequate remedy in the ordinary course of law." Ballinger's Ann. Codes & St. § 5756. This is the general rule, and the courts hold that mandamus is a remedy to compel the performance of a duty required by law where the party seeking relief has no other adequate remedy, and where the duty sought to be enforced is clear and indisputable. Board of Commissioners of Knox County v. Aspinwall, 24 How. (U. S.) 376, 16 L. Ed. 735; Bayard v. White, 127 U. S. 246, 8 Sup. Ct. 1223, 32 L. Ed. 116; Redfield v. Windom, 137 U. S. 636, 11 Sup. Ct. 197, 34 L. Ed. 811; Territory ex rel. Crosby v. Crum (Okl.) 73 Pac. 297; Mount Pleasant Cemetery Co. v. Patterson, etc., R. Co., 43 N. J. Law, 505. In Florida, etc., R. Co. v. State (Fla.) 13 South. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30, it was said that mandamus will not lie to enforce the performance of private contracts. See, also, State ex rel. Poyser v. Trustees of Salem Church, 114 Ind. 389, 16 N. E. 808; Parrott v. City of Bridgeport, 44 Conn. 180, 26 Am. Rep. 439; Merrill on Mandamus, § 16; High on Extr. Legal Rem. (3d Ed.) § 25. We think appellant has an adequate remedy upon her contract, and that mandamus does not lie.

The judgment is affirmed.

MOUNT, C. J., and FULLERTON, ROOT, and CROW, JJ., concur. RUDKIN, J., having heard the case in the court below, took no part.

BROWN et al. v. CITY OF BLAINE.

(Supreme Court of Washington. Jan. 3, 1906.)

1. APPEAL—MATTERS REVIEWABLE—DISCRETIONARY ACTION.

The action of the court in setting a case for trial on a certain day is so largely within the discretion of the court that it will not be interfered with on appeal, unless such discretion is manifestly abused.

2. SAME—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action by a husband and wife for personal injuries to the wife, the complaint set up, among other things, a claim for \$330 on account of money expended, and advanced no other claim which was subject to itemization. The jury made special findings of damages, in which they allowed \$1,000 for permanent injury, \$420 for physical pain, etc., and \$330 on account of money expended. The court, in passing on a motion for new trial, stated that "the special findings include one item of damages, amounting to \$210, which there is no testimony to support," and required plaintiff to remit that amount. Deducting the item of \$210 from \$330, there was sufficient evidence in relation to the amount paid for doctor's services and for nurse hire to amount to the balance of \$120 under the claim for money expended. Held, that error in admitting evidence of plaintiff's husband as to what it would cost him to get a woman to do his housework was affirmatively shown to be without prejudice.

3. DAMAGES—PERSONAL INJURIES—EVIDENCE—PHYSICIAN'S SERVICES.

In an action for personal injuries, testimony of the amount paid to the attending

physician is admissible on the issue of the reasonable value of the services rendered by the physician.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 494.]

4. SAME—PRIOR HEALTH OF PLAINTIFF.

In an action for personal injuries, testimony as to the general condition of plaintiff's health and as to her physical appearance prior to the time of the injury is admissible.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 482, 483.]

5. MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—INJURIES TO PEDESTRIANS.

In an action against a city for injuries caused by a defective sidewalk, a question asking witness what he knew as to the boards of the sidewalk being loosened from the nails or fastenings was properly allowed.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1728.]

6. DAMAGES—PERSONAL INJURIES—EVIDENCE—MORTALITY TABLES.

In an action for personal injuries, where there is sufficient evidence of permanent injury to go to the jury on that question, Carlisle Mortuary Tables are admissible to show the probable duration of the impairment of plaintiff's health and of her inability to earn a livelihood.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 487-489.]

7. MUNICIPAL CORPORATIONS—TORTS—ACTIONS—PLEADING—ALLEGATIONS OF NOTICE.

A complaint against a city for injuries caused by a defective sidewalk, which alleges that the city "knew the dangerous and unsafe condition of said sidewalk and carelessly and negligently neglected to nail down said planks and make said sidewalk safe," sufficiently alleges notice to the city of the defective condition of the walk to authorize evidence of constructive notice to the city of that fact.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1714.]

Appeal from Superior Court, Whatcom County; Jeremiah Neterer, Judge.

Action by Emma L. Brown and another against the city of Blaine. From a judgment for plaintiffs, defendant appeals. Affirmed.

George D. Montfort and Whitcomb & Mathis, for appellant. Frank W. Bixby and Fairchild & Bruce, for respondents.

DUNBAR, J. Action for damages for injuries sustained by the respondent Emma L. Brown by falling on a sidewalk in the city of Blaine, by reason of the alleged negligence of said city in allowing said sidewalk to become and remain out of repair. Judgment was rendered for \$1,750, which was afterwards reduced to \$1,540, from which judgment this appeal is taken.

The answer of the appellant was a general denial, with an affirmative allegation that the defendant is informed and believes that on or about the 15th day of July, 1904, the Sunset Telephone & Telegraph Company, a corporation, owning and operating a system of telephone poles, wires, etc., in the city of Blaine, willfully, negligently, and carelessly loosened the aforesaid planks; that said telephone company replaced and left

said planks in their proper places, but willfully, negligently, and carelessly failed and neglected to nail or fasten said planks; that the fact that said planks were loose or that they had been disturbed by said telephone company was not apparent, and could not be determined by looking at said sidewalk; that, as far as the eye of an observer could tell or detect, the said planks were firmly nailed and secured in their places. The reply to the affirmative matter was to the effect that the Sunset Telephone & Telegraph Company referred to in said answer was under a contract with the city of Blaine, by which the said Sunset Telephone & Telegraph Company is authorized and permitted to erect telephone poles in the city of Blaine, and that it is authorized and empowered to take up and remove planks from the sidewalks, etc. This is only important as going to the admission of the city that the planks had been negligently and carelessly loosened and left in that condition, which fact eliminates some of the controversies in relation to the testimony in this case, and leaves the question of negligence simply as to the proposition of notice on the part of the city.

The first contention, that the court erred in setting the case for trial on the day on which it was tried, seems to us to be without merit. Such proceedings in the course of a trial are so largely within the discretion of the court that, unless such discretion is manifestly abused, this court will not interpose an interference, and there seems to be no evidence of such abuse in this case. In addition to that, there was no application for a continuance on the part of the appellant.

The following question was asked witness W. H. Brown, the husband of the respondent Emma L. Brown: "Mr. Brown, in moving about—you stated you were married in Minnesota—do you know what it would cost you to get a woman to do your housework for you, if you were endeavoring to keep house?" This was objected to as irrelevant and immaterial, and the question was answered over the objection. It was contended that the witness did not show qualification to answer, nor was it shown that he intended to keep house, or had been doing so. Whatever may be said as to the merits of this objection, it seems to us to be immaterial, by reason of the fact that the jury found by special findings three items of damage—for permanent injury \$1,000, for physical pain, humiliation, and disfigurement \$420, on account of money expended for physician's services and nurse hire, \$330. Before judgment was entered, the court made the following announcement: "Now at this time the court renders oral decision on motion for a new trial, and announces that the special findings include one item of

damages amounting to \$210, which there is no testimony to support, and under the statute and decisions of the Supreme Court this amount should be remitted or a new trial granted; and it is ordered that plaintiff be given 10 days in which to remit said amount, and on failure so to do a new trial will be granted." The plaintiff elected to remit the \$210 in conformity with the court's order, and judgment was entered for the amount found by the jury, less that amount. The record does not show what item it was that was found by the jury, and there is no item in the special findings for \$210. It could not have been the item for permanent injury or for physical pain and humiliation, because those things were not itemized. The only allegation in the complaint which was subject to itemizing was the charge of \$330 on account of money expended. So that the court must have deducted the item of \$210 from the claim of \$330, which would only leave \$120 under that claim, which was incorporated in the judgment; and, as there was testimony in relation to the amount paid for doctor's services and for nurse hire to amount to that much, we must conclude that the amount deducted was for things which were not legally proven. In any event, under the order of the court in relation to the deduction of \$210, it affirmatively appears that the error, if any was committed, was not prejudicial.

It is objected, also, that the court erred in allowing the witness Brown to testify that he had paid a certain amount to the attending physician, the contention being that the amount paid was immaterial; that he should have shown that the payment represented the reasonable value of the services. It seems to us that the amount paid would, in any event, be some evidence of the reasonable value of the services rendered, and that, if it was not sufficient evidence, that was a matter which should have been presented to the consideration of the jury.

The fourth assignment of error, in relation to the amount paid for board, is disposed of by what we have said in relation to the second. Appellant also assigns as error the admission in evidence of the testimony of witness Williams as to the general condition of Mrs. Brown's health and her physical appearance prior to the time of the injury. We think there was no error committed in admitting this testimony. It would have been proper for the defense to have shown in mitigation of damages that prior to the injury the woman was in poor health and unable to make a living.

It is also insisted that the court erred in allowing a Dr. Reeves to testify on direct examination in relation to the boards being loosened from the nails or fastenings. The question was, "What, if anything, do you know about the boards being loosened from the nails or fastenings?" We think that this

exception is without merit, although the testimony was not material under the admissions of the defendant in relation to the boards being loose and without nails or fastenings.

Neither did the court err in permitting the respondents to show, by the Carlisle Mortuary Tables, the respondent Emma L. Brown's expectancy of life. The objection is based on the fact that there was no testimony of permanent injury. But there was sufficient evidence of permanent injury to go to the jury, and the jury found that the respondent was permanently injured, and the tables were admissible to show the probable duration of the impairment of respondent's health and her inability to earn a livelihood, if the theory of the respondents were to be accepted by the jury.

The eighth, tenth, and eleventh assignments are to the effect that the court erred in allowing certain witnesses on behalf of respondents to testify in regard to the condition of the sidewalk at and about the place where respondent Emma L. Brown claims she was injured, at a time previous to the injury; all this evidence objected to on the theory that notice was not pleaded by respondents in their complaint. The allegation is that on or about the 31st day of July, 1904, the planks in said sidewalk were loose and unsafe, and the stringers were decayed, so that travel on said sidewalk was dangerous and unsafe, and the said city knew the dangerous and unsafe condition of said sidewalk, and carelessly and negligently neglected to nail down said planks and make said sidewalk safe for the travel of its citizens. The contention of the appellant is that there was no allegation that the sidewalk had been out of repair prior to the 1st day of July, 1904, and, there being no proof of communication made to the city of its need of repair, that constructive notice could not be shown under this allegation. But we think that this would be a narrow construction to place upon the allegation, because the language that the city carelessly and negligently neglected to nail the said planks down, knowing of the said unsafe condition of the sidewalk, must be interpreted to mean a knowledge for some appreciable time.

The instructions in this case so completely and carefully state the law, presenting with such exact justness the theory and rights of plaintiffs and defendant in the action, that no objection can be found to them, or the refusal to give other instructions; the instructions given covering all the issues of the case.

We are unable to find error in any respect, and the judgment is therefore affirmed.

MOUNT, C. J., and CROW, HADLEY, RUDKIN, ROOT, and FULLERTON, JJ., concur.

BARTON v. WICKIZER.

(Supreme Court of Washington. Jan. 8, 1906.)

1. APPEAL—BOND—SUPERSEDEAS.

In an action for the recovery of real property in which there was a counterclaim, where the judgment fixed the value of the real property and the amount of recovery under the counterclaim, an order of the court fixing the amount of an appeal and supersedeas bond is not necessary to the validity of the bond, which is otherwise sufficient.

2. EJECTMENT—IMPROVEMENTS — STATUTES — RETROACTIVE OPERATION.

The betterment law (Laws 1903, p. 262, c. 137), authorizing a recovery for improvements by one holding land in good faith under color and claim of title, is not retroactive, and does not authorize a recovery for improvements made before its enactment.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 469.]

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by Elizabeth A. Barton against Mrs. R. A. Wickizer. From the judgment, plaintiff appeals. Reversed.

F. E. Knowles, for appellant. Wilson & Thorgrimson and Jerold Landon Finch, for respondent.

ROOT, J. This action was brought by appellant to recover possession of certain real estate in the city of Seattle. It is the second action instituted by appellant against respondent for the recovery of the same property. The first was instituted in November, 1902, and resulted in a decree wherein appellant was found to be the owner of said property, but was denied the right of possession on account of not having made proper demand. In the second action respondent set up a counterclaim for the value of improvements made on the premises, relying upon the provisions of the betterment law (Laws 1903, p. 262, c. 137). The trial court made findings of fact to the effect that appellant was the owner in fee simple and entitled to the immediate possession of the premises; that a proper demand had been made; that respondent had entered the premises in good faith, under color and claim of title, and believing that she was the legal owner; that during the years 1900 and 1901 she had made permanent improvements on said premises of the value of \$525, and paid taxes in the sum of \$2.25; that respondent made said improvements while holding the property in good faith, under color and claim of title, adversely to appellant; that the value of the realty, apart from the improvements, was \$800; that the first action was brought in November, 1902, and resulted as hereinbefore stated. Conclusions were made and signed in accordance with the findings, and a judgment and decree entered thereupon. In said judgment and decree it was recited, first, that the plaintiff was the owner and entitled to the immediate possession of the premises; then the following provisions appeared:

"(2) That the defendant have and recover from the plaintiff as a counterclaim in this action the sum of \$525, for the permanent improvements made by the defendant on said premises and taxes paid on the same. (3) That if plaintiff shall, within two months from the date of the signing of this decree, pay to the defendant said sum of \$525, then said plaintiff shall become the owner of, and be vested with the title to, said permanent improvements; that, if the plaintiff does not pay said sum of \$525 within said two months, then said defendant may, within two months thereafter, pay the plaintiff the sum of \$800, the value of said land apart from the improvements, and said defendant shall then be vested with the title to said land, including said improvements, and be entitled to the immediate possession of said premises and said improvements and each and every part thereof. (4) That, should the plaintiff and defendant both fail to make the payments as provided in paragraph 3 herein, then the plaintiff and defendant shall be and are hereby declared to be and deemed tenants in common of said premises, including said improvements, in proportion to their interests and valuations to said realty and improvements." From this judgment and decree the plaintiff appeals.

Respondent moves to dismiss the appeal for the reason that the undertaking on appeal is in the form of an appeal and supersedeas bond, and in an amount equal to, or exceeding, twice the amount of the money portion of the judgment and costs plus \$200, which amount was not, however, fixed by any order or action of the trial court. Respondent's contention is that the amount of the supersedeas bond must be fixed by an order of the trial court in all cases where the judgment is for anything else than money; and contends that the judgment in this case contained provisions which made it other than a judgment for money as that expression is used in the appeal statute. It is not contended that the amount of the bond is insufficient. In fact, it is conceded that it was sufficient, if the rule applicable to money judgments controls. The contention of the respondent with reference to this bond is in opposition to the former holdings of this court, and for that reason cannot be sustained. *State ex rel. Bridge Co. v. Superior Court*, 11 Wash. 366, 39 Pac. 644; *State ex rel. Natl. Bank v. Superior Court*, 14 Wash. 365, 44 Pac. 859; *Title, Guarantee & Trust Co. v. McDonnell*, 28 Wash. 359, 68 Pac. 890; *Lacaff v. Dutch Miller Min. & Smelt. Co.*, 31 Wash. 566, 72 Pac. 112. The motion to dismiss the appeal is denied. Upon the merits a former decision of this court is conclusive. In the case of *the Investment Co. v. Hambach*, 37 Wash. 629, 80 Pac. 190, the exact questions involved in this case were passed upon and decided contrary to respondent's contention herein. It was there held that the provisions of the betterment law of

1903 were not retroactive, and that a person could not recover for improvements made prior to the existence of said statute. As the improvements made by the respondent in this case were so made before this statute was enacted, it follows that she cannot offset or counterclaim the same against the owner of the land in a suit brought by him to recover its possession.

The judgment and decree of the honorable superior court is reversed, and the cause remanded, with instructions to enter an unconditional judgment and decree in favor of appellant for the possession of the premises in question.

MOUNT, C. J., and DUNBAR, CROW, HADLEY, RUDKIN, and FULLERTON, JJ., concur.

MONK et ux. v. DUELL et al.

(Supreme Court of Washington. Jan. 9, 1906.)

1. PRINCIPAL AND AGENT — CONTRACT FOR SALE—CONSTRUCTION.

By a contract between plaintiffs and defendant, plaintiffs agreed within six months to sell to defendant certain lots, defendant within the six months to sell the lots at not less than a certain sum per lot net to plaintiffs, all money received by defendant to be placed in a bank to the credit of plaintiffs, less a 5 per cent. commission, and it was stipulated that after six months plaintiff should turn over to defendant all money over \$145 per lot, and that defendant would assume all lots not sold and pay plaintiffs \$145 for the lots not sold. Held, that the contract was one of sale, whereby defendant was to purchase all the lots within six months, and was granted the privilege of negotiating sales of the separate lots for cash in order to enable him to perform the contract, and hence he was not the agent of plaintiffs, and installment contracts made by him for sales of the lots and payments made to him were not binding on plaintiffs.

2. EJECTMENT—IMPROVEMENTS—STATUTES.

Sess. Laws 1903, p. 262, c. 137, providing for the protection of occupants of land who have made improvements and paid taxes in good faith, does not apply to improvements made prior to the taking effect of the statute.

3. SAME—TIME OF MAKING IMPROVEMENTS—BURDEN OF PROOF.

Where, in an action for the recovery of real estate, defendant seeks to recover for improvements under the statute, the burden is upon him to show the dates when the several improvements were made.

Appeal from Superior Court, King County; George E. Morris, Judge.

Action by George R. E. Monk and wife against Fred Duell and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

Shank & Smith, for appellants. Winsor & Hadley, for respondents.

CROW, J. This is an action in ejectment, instituted by George R. E. Monk and Anna Monk, his wife, appellants, against Fred Duell, Ella Duell, his wife, and Nelson Duell, respondents, to recover possession of certain

real estate in King county. From a judgment in favor of respondents this appeal has been taken.

The action was tried to the court without a jury. Brief findings were made in favor of respondents, and findings requested by appellants were refused. From the evidence we find: That on March 26, 1902, appellants George R. E. Monk and Anna Monk, his wife, entered into a written contract with one Henry Slepman, as follows: "Articles of agreement made and entered into this 26th day of March, one thousand nine hundred and two (1902) between Geo. R. E. Monk, of the city of Seattle, King county, state of Washington, party of the first part, and Henry Slepman, of the city of Ballard, King county, state of Washington, party of the second part. Witnesseth: It is hereby agreed by and between the above-named parties, that Geo. R. E. Monk, party of the first part, is the owner in fee simple of lots 8, 9, and 10 in block number nine (9), lots number one (1) to fourteen (14), inclusive, in block number eight (8) and lots number nineteen (19) to twenty-four (24), inclusive, in block number three (3), Sander's addition to Gilman Park and Salmon Bay, and he agrees to sell the same to Henry Slepman, the party of the second part, for the sum of three thousand three hundred and forty (\$3,340) dollars within six (6) months from the above date. It is also agreed and understood that Henry Slepman in this six (6) months is to sell the above-named lots in the above-named blocks at not less than one hundred and forty-five (\$145) dollars per lot net to the party of the first part. All money received by the party of the second part is to be placed in the Boston National Bank of the city of Seattle to the credit of the party of the first part, less the five (-5 p. c.) per cent. commission, and after six (6) months the party of the first part is to turn over to the party of the second part all money above one hundred and forty-five (\$145) dollars per lot sold; also the party of the second part is to assume all lots not sold and pay the party of the first part the sum of one hundred and forty-five (\$145) dollars for the lots not sold. In case the party of the second part does not fulfill his agreement, then this agreement is to be null and void." That at the expiration of said six months an extension of 30 days was given to Slepman and indorsed upon the contract. That thereafter the contract was further verbally extended from time to time for several months, and then forfeited for nonperformance by Slepman. That on or about March 21, 1903, the said Henry Slepman entered into a written contract with respondent Nelson W. Duell, whereby he agreed to sell to said Duell lot 2, in block 8, of said Sander's addition to Gilman Park and Salmon Bay for the sum of \$175, payable in installments, \$25 in cash, and \$10 on the 21st day of each month thereafter until the full purchase price should be paid. That said contract was in usual form,

did not mention or allude to appellants, but purported upon its face to effect a sale from said Henry Slepman, as vendor, to said Nelson W. Duell, as vendee. That on or before September 21, 1903, said Henry W. Duell, by installments, had paid Slepman thereon purchase money to the total amount of \$85. That on said March 21, 1903, said Henry Slepman also executed and delivered to respondent Fred Duell a like written contract, whereby he sold Fred Duell lot 1, in said block 8, for the sum of \$200, payable in installments, \$25 in cash, and \$10 on the 21st day of each month thereafter, upon which said Fred Duell had, on or before September 21, 1903, made payments by installments to the total amount of \$85. That on March 24, 1903, said Henry Slepman also executed and delivered to respondent Ella Duell a like written contract for lots 7 and 9, in said block 8, for the sum of \$350, payable in installments, \$175 in cash and \$20 on the 24th day of each month thereafter, upon which said Ella Duell had, on or before May 27, 1903, made payments in installments to the total amount of \$275. That said Henry Slepman never had any record title to said real estate, nor was the contract between him and appellants placed of record. That said respondents made no examination of the title, but were informed by one Keene, who acted as agent for said Slepman, that the title was good, without naming the party in whom the record title stood. That prior to making said sales to respondents said Slepman had made cash sales of other lots for prices of more than \$145 each, paying to appellants Monk the money received therefor, instead of depositing the same in the bank. That thereupon appellants had immediately executed and delivered their deeds conveying said lots directly to the several purchasers. That Slepman never informed Monk of said sales to respondents, nor did he ever deposit in bank or pay to Monk any of the installments of purchase money which he had collected from respondents. That some time in August, 1903, said Monk first learned of said sales, and immediately notified respondents that Slepman had no authority to make such contracts, whereupon respondents ceased making payments to Slepman. That immediately thereafter said Monk, through his attorneys, made unsuccessful efforts to reach some adjustment, in order that respondents might be protected. That afterwards, on or about October 13, 1903, appellants demanded possession of said real estate, which being refused this action was commenced.

Respondents pleaded said contract between appellants and Slepman; also said contracts between Slepman and themselves; alleged that Slepman was the agent of Monk, with authority to make said contracts of sale; alleged that valuable improvements had been made by them upon the lots, without stating the exact dates of such improvements; and alleged they had tendered the remainder of

the purchase money to appellant Monk, and that they were still ready, willing, and able to pay the same. Upon trial appellants contended that the contract between themselves and Slepman was merely an option to Slepman to purchase said real estate, and that it did not constitute Slepman their agent to sell said real estate, or, in any event, if he should be construed to be their agent, he had no authority to sell on installment contracts, or to give any contracts. Respondents contended that by said contract Slepman became the agent of appellants, with full authority to make said sales to respondents, and that such sales were afterwards ratified by appellants. The evidence, however, utterly fails to show any such ratification. The rights of the parties herein must be determined by a proper construction of the contract between Monk and Slepman, which is exceedingly vague and difficult to understand. After a careful examination of its terms, in the light of the evidence showing the construction placed thereon by the actions of Monk and Slepman, we have concluded it was a contract of sale; that Slepman was to purchase all of the lots therein described within six months from its date; that for the purpose of enabling him to perform the contract he was granted the privilege of negotiating sales of separate lots, not on time, but for cash, being required to promptly pay into bank for Monk the entire proceeds of such sales, as and when made, less a 5 per cent. commission, with the understanding, however, that the amount so turned in should in no instance net Monk less than \$145 for each lot sold. It was evidently contemplated that Slepman might, from time to time, within said six months, sell lots for much larger prices than \$145 each (in fact, he did this), and that, when he did so, it became his immediate duty to turn the entire proceeds over to Monk, less the 5 per cent. commission. The contract also provided that, at the expiration of said six months, Monk should account to Slepman for all the proceeds of such previous sales, over and above the sum of \$145 per lot, provided, however, that Slepman should then fully complete his contract by paying for all unsold lots at \$145 each. It is true a commission is mentioned, but our understanding of the purpose of this is that whereas Slepman might, and did, sell lots for cash for sums in excess of \$145 each, he would thereby be compensated for such sales which would inure to the benefit of Monk, in the event of the failure of Slepman to fully complete his contract of purchase within the six months. While the contract is indefinite, we conclude that Slepman was not authorized to sell lots upon installments; nor was he authorized to execute and deliver his own contracts of sale therefor. *Carstens v. McReavy*, 1 Wash. St. 359, 25 Pac. 471; *Armstrong v. Oakley*, 23 Wash. 122, 62 Pac. 499; *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180. To hold that he might execute such

contracts, and thereby bind appellants, would be to hold that he could convey a better title or a greater right than he himself possessed. As Slepman's acts in making said installment sales to respondents were without authority, and as he was not the agent of appellants for any such purpose, appellants were not bound by his acts, nor compelled to give respondents credit for the purchase money collected by him. Before appellants demanded possession from respondents they had declared a forfeiture of their contract with Slepman by reason of his nonperformance. It appears that, at the time respondents purchased under their contracts with Slepman, the lots were vacant, unimproved, and not occupied by any person. We think the trial court erred in finding appellants were not entitled to possession of the real estate in dispute at the time of the commencement of this action.

The evidence shows that improvements of considerable value were made by respondents after they purchased from Slepman. There is no evidence, however, which definitely discloses the dates of such improvements. In 1903 an act entitled "An act for the protection of occupants of land who have in good faith made improvements and paid their taxes thereon" was passed by the Legislature. *Sess. Laws*, 1903, p. 262, c. 137. This act did not go into effect until June 11, 1903. We have held said act does not apply to improvements made prior to the date upon which it went into effect. *Investment Co. v. Hambach*, 37 Wash. 629, 80 Pac. 190; *Barton v. Wickizer* (filed January 3, 1906) 83 Pac. 312. Respondents, however, purchased in good faith, were holding in good faith under color or claim of title adversely to the claim of appellants, and their improvements were made in good faith. If such improvements were made on or after June 11, 1903, they would be entitled to recover therefor under the provisions of said act. If they were made prior to that date, they are not entitled to recover. There is evidence tending to show that some improvements were made prior to that date, while other evidence tends to show that some may have been made thereafter. It was respondents' duty to show the exact dates of the making of these several improvements. This they failed to do, perhaps for the reason that the case was tried for the purpose of determining who was entitled to possession of the real estate, and not so much with reference to the value of the improvements or time they were made. Justice should be done to all the parties; hence we do not feel that we should order final judgment.

It is ordered that the judgment of the superior court be reversed; that this cause be remanded, with instructions to the superior court to make a finding that appellants Monk and wife were entitled to possession of said real estate at the date of the commencement of this action, and with further instructions

to permit the introduction of additional evidence for the purpose of ascertaining when the various improvements were made, with their value, and also the value of said lots, in order that the court may be enabled to enter final judgment and decree in accordance with the provisions of chapter 137, p. 262, Sess. Laws 1903, if the same shall be found to be applicable by reason of any of such improvements having been made after said act went into effect. The appellants will recover costs on this appeal.

MOUNT, C. J., and DUNBAR, HADLEY, RUDKIN, and ROOT, JJ., concur.

PONISCHIL et ux. v. HOQUIAM SASH & DOOR CO. et al.

(Supreme Court of Washington. Jan. 3, 1906.)

1. MUNICIPAL CORPORATIONS—STREETS—VACATION—PETITION.

Where a petition for the vacation of a street was signed by the owners of all private property actually abutting on the portion of the street sought to be vacated, as required by Sess. Laws 1901, p. 175, c. 84, § 1, it was sufficient, though it was not signed by the owners of two-thirds of the frontage of all lots in the blocks abutting on such street.

2. SAME—LEGISLATIVE POWER—DELEGATION—REVIEW.

The Legislature having delegated its power to vacate streets to municipal corporations by Laws 1901, p. 175, c. 84, the exercise of such power is a political function, which will not be reviewed by the courts, except on a clear showing of collusion or fraud.

3. SAME—FRAUD—EVIDENCE.

That a petitioner for the vacation of a portion of a street will be benefited thereby is not sufficient to constitute such a fraud or abuse of discretion on the part of the city as, in the absence of any further showing, will authorize a court of equity to declare the vacating ordinance invalid.

4. SAME—INJUNCTION—EVIDENCE.

Where complainants were not the owners of any property abutting on the vacated portion of a street, and, notwithstanding such vacation, had ingress and egress from their property, not only by the nonvacated portion of the street, but also by another street, they were not entitled to enjoin the vacation proceedings, in the absence of fraud, even though a cul-de-sac was formed by such vacation.

5. SAME—DAMAGES—SPECIAL INJURY.

Where a portion of a street vacated prior to the vacation proceedings had been impassable for teams, had never been improved, and no sidewalks had been laid thereon, except two planks laid lengthwise, which were rarely used, and a short time prior to the passage of the vacation ordinance complainants had offered to sell their property, which did not abut on the vacated portion of the street, for \$1,000, but immediately afterwards refused \$1,200, complainants were not shown to have sustained actual damages differing in character from that sustained by the public in general, requiring the assessment of damages to them as a condition precedent to the city's right to close the street.

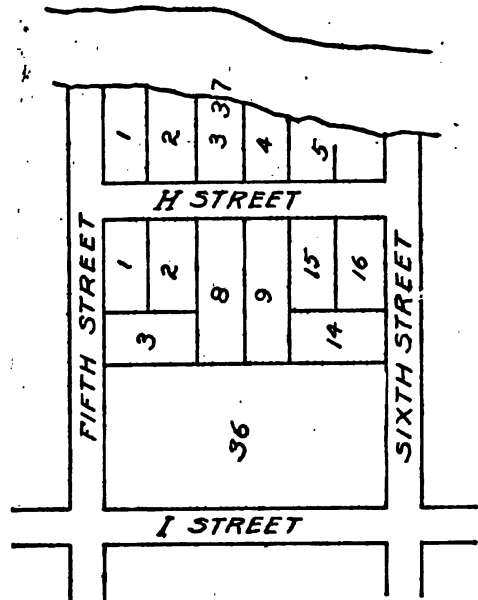
[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 267, 268; vol. 36, Cent. Dig. Municipal Corporations, § 929.]

Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by Adolph Ponischil and wife against the Hoquiam Sash & Door Company and others. From a judgment in favor of plaintiffs, defendant Hoquiam Sash & Door Company and certain others appeal. Reversed.

C. W. Hodgdon, for appellants. Ben Sheeks and Will Lanning, for respondent.

CROW, J. On October 25, 1889, one A. M. Simpson and the Northwestern Lumber Company, a corporation, platted certain lands in Hoquiam, now a city of the third class, and thereby dedicated H, Fifth, and Sixth streets to the use of the public. Said plat shows all of block 37 and one-half of block 36, fronting on H street, to be subdivided as follows:



Each lot on H street shown on the above diagram has a frontage of 50 feet, except lot 5 in block 37, which has a frontage of 100 feet. Long prior to the vacation herein-after mentioned respondents Adolph Ponischil and Mary Ponischil, his wife, acquired title to lot 16 in block 36, which they improved and occupied as a homestead. About February 3, 1903, appellants, the Hoquiam Sash & Door Company, a corporation, J. A. Acteson, and Henry Craswell, being the owners of lots 1, 2, and 8 in block 36, and 1, 2, and 3 in block 37, petitioned the city of Hoquiam to vacate that portion of H street upon which their said lots abutted, extending from Fifth street to the easterly line of lot 3 in block 37, and lot 8 in block 36; it being thereby proposed to close said street for a distance of 150 feet from Fifth street. Regular proceedings were taken, which resulted in the granting of said petition and the passage of an ordinance making such vacation. Respondents appeared at all stages of said proceedings, and objected on account of damages which, they claimed, would necessarily re-

sult to said lot 16 in block 36. After said proceedings were completed respondents commenced this action to enjoin the city of Hoquiam from closing said portion of said street, and also to enjoin appellants from occupying or using the same. Findings were made in favor of respondents, upon which judgment was entered restraining said city from enforcing said ordinance until the damage to respondents' property should be agreed upon or ascertained by legal proceedings and paid; also enjoining appellants, the Hoquiam Sash & Door Company, a corporation, J. A. Acteson, and Henry Craswell, from using, obstructing, or building upon said street until respondents' damages should be settled or ascertained by legal proceedings and paid. From this judgment the Hoquiam Sash & Door Company, a corporation, J. A. Acteson, and Henry Craswell have appealed.

Numerous assignments of error have been made, some of which need not be discussed. Respondents contended below, and now contend, that the ordinance of vacation is void because the owners of a two-thirds frontage of all lots in blocks 36 and 37, abutting on said H street, did not petition therefor. The vacation proceedings were had in pursuance of chapter 84, p. 175, Sess. Laws 1901. The petition was signed by the owners of all private property actually abutting upon the portion of said street sought to be vacated, and was therefore sufficient, under the requirements of section 1 of said act.

An important question arising on this appeal is whether the city of Hoquiam had authority to vacate said portion of H street without providing that respondents should first be paid such damages as their property, lot 16 in block 36, might sustain by reason thereof. Appellants contend that respondents have sustained no damage whatever, or that, if they have, it is only of a character similar to that sustained by the public in general, differing only in degree. They further contend that only the owners of lots actually abutting upon the particular portion of the street vacated can recover damages, and then only for special injuries sustained by them other than those sustained by the public in general, such, for instance, as damage by reason of loss of ingress to or egress from such abutting property. Respondents insist that by reason of said vacation their lots now front upon a cul-de-sac, instead of an open street, depriving them of direct access to Fifth street and points beyond, and that by reason thereof they have suffered special damage. They also contend that the vacation of said portion of H street is the result of collusion between appellants and said city, and that said ordinance was passed for appellants' benefit only, and not for any general or public benefit; and they undertake in this action to inquire into the motives that actuated the city authorities in making such vacation. The Legislature has power to vacate streets, and may delegate

such power to the municipal corporations of the state. Such delegation has been made by chapter 84, p. 175, Sess. Laws 1901. Such power having been so delegated, the exercise thereof rests within the discretion of the municipal authorities, and, being a political function, will not be reviewed by the courts, except upon a clear showing of collusion or fraud. Respondents have pleaded collusion and fraud on the part of the city and appellants, but fail to sustain their allegations by evidence. It does, perhaps, appear that appellants will be benefited by such vacation, as they are proceeding to use the abandoned portion of H street for a large manufacturing plant. But the fact that such vacation has been made at their instigation, or that they are benefited thereby, is not sufficient to constitute such a fraud or abuse of discretion as, in the absence of any further showing, will authorize a court of equity to interfere and declare the vacating ordinance to be void. *Knapp, Stont & Co. v. St. Louis*, 156 Mo. 343, 56 S. W. 1102. *Elliott*, in the second edition of his work on *Roads & Streets*, at section 879, says: "Whether it is expedient to discontinue a highway is a question for legislative decision, and when the authority to discontinue is delegated to local officers, and no restrictions are placed upon its exercise, the officers are invested with a very broad discretion, and, unless this discretion has been abused, the courts cannot interfere. This is in accordance with the general rule that, where officers are invested with discretionary power, courts will not substitute their judgment for that of the officers invested by law with the right to decide upon the necessity or expediency of doing a designated act." See, also, *Glasgow v. St. Louis*, 107 Mo. 198, 17 S. W. 743.

From the record before us we conclude (1) that the petition for vacation was sufficient; (2) that the proceedings of the city authorities were in strict conformity to law; (3) that no fraud or collusion has been shown; and (4) that, the city having exercised its discretion in making said vacation, the courts should not interfere, unless respondents are entitled to compensation for special damages sustained, and payment thereof, before said street is closed. Did respondents sustain such special damages as would entitle them to restrain the closing of said street until said damages may be ascertained and paid? Their lot is on the corner of H and Sixth streets. They have ingress to, and egress from, the same, not only by the nonvacated portion of H street, but also by Sixth street. The evidence shows they have an outlet to the northwest portion of the city by going around block 36. They are not owners of property abutting on the vacated portion of H street, and, even though a cul-de-sac has been formed, they are not within it, but at its entrance. There is some conflict of authority as to whether owners of lots not abutting upon that por-

tion of a street actually vacated can recover damages. The current of authority seem to be against any such right of recovery, unless special damage is shown, as distinguished from that sustained by the public in general. "Where a municipality attempts to vacate a street, property owners not abutting thereon have no grounds for objecting to the validity or regularity of the proceedings, nor the right to an injunction restraining such vacation." 27 Enc. of Law (2d Ed.) 114, 115, and cases cited. In *Heller v. Atchison, T. & S. F. Ry. Co.*, 28 Kan. 625, Brewer, J., at page 628, said: "Where a party owns a lot which abuts on that portion of the street vacated, so that access to the lot is shut off, it is clear that the lot owner is directly injured, and may properly challenge the action. The closing up of access to the lot is the direct result of the vacating of the street, and he, by the loss of access to his lot, suffers an injury which is not common to the public; but in the case at bar access to plaintiff's lots is in no manner interfered with. The full width of the street in front and on the side is free and undisturbed, and the only real complaint is that by the vacating of the street away from her lots the course of travel is changed. But this is only an indirect result. There is nothing to prevent travel from coming by her lots, if the travelers desire it. The way to the heart of the city by her lots is a little more remote than it was before, but still free passage is open to all who wish to pass thereby. No one is compelled to stay away. Access to the lots is the same that it was before, so that the injury is only the indirect result of the action complained of, and it is an injury which, if it exists at all, is sustained by all other lots along the street west of the parts vacated." In *Nichols v. Richmond*, 162 Mass. 170, 172, 38 N. E. 501, 502, the court says: "The line has to be drawn somewhere, on practical grounds, between those who may and those who may not recover for damages caused by the discontinuance, in whole or in part, of a street or way; and it has been drawn so as to limit the right of recovery to damages which are special and peculiar, and different in kind from those suffered by the public at large. In the present case, although, owing to the proximity of her premises to the discontinued portion of the way, and to the use which she made of them, the inconvenience and damage to the petitioner were greater than to others having occasion to use the way, the difference was one of degree, and not of kind." See, also, *Smith v. St. Paul, M. & M. Ry. Co.* (Wash.) 81 Pac. 840; *Dillon, Mun. Corp.* (4th Ed.) § 666; *Paul v. Carver*, 64 Am. Dec. 649; *Smith v. City of Boston*, 7 Cush. 254; *Stanwood v. Malden*, 157 Mass. 17, 31 N. E. 702, 16 L. R. A. 591; *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 62 N. E. 341, 87 Am. St. Rep. 600. From the above

authorities, and many others which might be cited, we conclude respondents are not entitled to recover damages for the vacation of said street, nor to enjoin such vacation; no collusion or fraud having been shown.

Appellants requested the court to find that respondents were not damaged in any sum by said vacation, and also that their property was not damaged. This request was refused, and we think such refusal was error. The evidence utterly fails to show any damage to appellants or their property. But, even though it be conceded that any damage was sustained by them, it has been only of a character similar to that sustained by the public in general. The business portion of the city and respondents' place of business were towards the southeast, in an opposite direction from Fifth street. The portion of the street vacated was impassible for teams, had never been improved, and had no sidewalk, except two planks laid lengthwise, which were rarely used. A short time prior to the passage of the ordinance respondents had offered to sell their property for \$1,000, but immediately afterwards refused \$1,200. We fail to find any showing of special damage, and, if any damage be conceded, it was only such damage as might have been also sustained by owners of property in other portions of the city, differing only in degree. The trial court erred in enjoining the closing of said portion of said street.

The judgment is reversed, and the cause remanded, with instructions to dismiss the action.

MOUNT, C. J., and DUNBAR, HADLEY, RUDKIN, and ROOT, JJ., concur.

CALDWELL v. HURLEY.

(Supreme Court of Washington. Jan. 3, 1906.)

1. PRINCIPAL AND SURETY—INDORSEMENT ON NOTE—CONTRIBUTION.

Where a note was executed prior to the enactment of the negotiable instruments act (Sess. Laws 1899, p. 340, c. 149), persons who indorsed their names on the back of the note at the time of its execution were liable to each other for contribution.

2. LIMITATION OF ACTIONS—CONTRIBUTION BETWEEN CO-SURETIES.

The right to contribution between persons who have indorsed a note as sureties is an implied liability arising out of a written agreement, within Ballinger's Ann. Codes & St. § 4798, subd. 2, prescribing a six-year limitation for actions on such liabilities.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 113, 271; vol. 40, Cent. Dig. Principal and Surety, § 644½.]

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by Frank M. Caldwell against Harry Hurley. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

T. L. Stiles, for appellant. Fitch & Harris, for respondent.

CROW, J. This action was commenced by respondent, Frank M. Caldwell, against appellant, Harry Hurley, for contribution as co-surety on a promissory note. From a final judgment in favor of said Caldwell, this appeal has been taken.

Appellant demurred to the amended complaint for the reasons (1) that it did not state facts sufficient to constitute a cause of action, and (2) that the action was not commenced within the time limited by law. This demurrer being overruled, appellant answered, denying allegations of the amended complaint, and affirmatively pleading the statute of limitations.

Upon the trial the court made findings of fact as follows: "(1) That on the 23d day of January, 1896, at Tacoma, Wash., the Northwestern Supply Company, a corporation duly organized and existing under the laws of the state of Washington, as principal, made and delivered to the Pacific National Bank its promissory note in writing, bearing date on that day, in the words and figures following, to wit: '\$2,000.00 Tacoma, Wash., January 23, 1896. 90 days after date without grace for value received we promise to pay to the order of the Pacific National Bank of Tacoma, two thousand dollars with interest from date at the rate of 10 per cent. per annum until maturity, principal and interest payable in U. S. gold coin at the Pacific National Bank, Tacoma, Washington. And in case this note shall be placed in an attorney's hands for collection we agree to pay five per cent. upon the amount then due, as attorneys' fees, if paid before suit is commenced; if not paid until suit is commenced we agree to pay as attorneys' fees ten per cent. upon the amount then due, and that the judgment shall include such fees. This note shall bear interest at the rate of twelve per cent. per annum after maturity. Northwestern Supply Co. F. M. Caldwell, Pres. No. 16,742.' (2) That at the date of said note said Frank M. Caldwell was the president of said Northwestern Supply Company, and the owner of one-half of the stock thereof, and said Harry Hurley was the owner of the other half of said stock. (3) That the consideration of said note was the loan of \$2,000 by said Pacific National Bank to said Northwestern Supply Company, which sum was received by said company and was used by it in its business. That the said Northwestern Supply Company was the principal in said note, and said Caldwell and Hurley were sureties for said principal. (4) That said Pacific National Bank was not willing to loan said money or accept said note without security additional to the signature of said Northwestern Supply Company, and thereupon, to furnish such additional security, said Caldwell and Hurley, before the delivery of said note to said

bank, wrote their names on the back of said note thus: 'F. M. Caldwell. Harry Hurley'—and that both of said names were written on the back of said note at the same time. (5) That on the 29th day of October, 1897, there being a balance of \$1,040.23 due and unpaid upon said note, the said Frank M. Caldwell, being threatened with suit thereon by said Pacific National Bank, did on the 29th day of October, 1897, pay to said bank the sum of \$1,040.23, the balance due on said note, and said note was thereupon surrendered to said Frank M. Caldwell by said bank. (6) That after the payment of the balance due upon said note by said plaintiff the said defendant departed from and resided out of the state of Washington for a period of 2 years, 10 months and 2 weeks prior to the commencement of this action, so that on December 29, 1904, the time of the commencement of the action, the statutory limitation applicable to causes of action on implied liabilities arising out of written agreements had not run. (7) That this action was commenced on the 29th day of December, 1904. (8) That between the 13th day of October, 1904, and the 29th day of December, 1904, the plaintiff demanded payment of one-half of the sum paid by him upon said note, to wit, \$520.11, with interest thereon from October 29, 1897, of the defendant, but defendant refused to pay said sum, or any other sum on account thereof, and has not paid the same."

Upon said findings of fact the trial court made conclusions of law, as follows: "(1) That by writing their respective names on the back of said note the plaintiff, Frank M. Caldwell, and the defendant, Harry Hurley, entered into an agreement in writing whereby they became co-sureties of said Northwestern Supply Company. (2) That the liability existing between said Caldwell and said Hurley by reason of their writing their names on the back of said note was an implied liability arising out of the written agreement, and upon the payment by said Caldwell of the balance due upon said note said Hurley, defendant, became legally bound to contribute and pay to the plaintiff the sum of \$520.11, being one-half of the sum paid by said plaintiff. (3) That this action is not barred by the statute of limitations. (4) That the plaintiff, Frank M. Caldwell, is entitled to a judgment of this court that there is due and owing him from said defendant, Harry Hurley, the sum of 520.11, together with interest thereon at the rate of 6 per cent. per annum from the said 29th day of October, 1897, and for his costs and disbursements herein all in conformity to the prayer of plaintiff's complaint."

Appellant has taken no exceptions to the findings of fact, but, having excepted to each and all of the conclusions of law and the final judgment, now presents the following assignments of error: (1) Error in overruling the demurrer; (2) error in the conclusions

of law; (3) error in rendering judgment for respondent; and (4) error in refusing to render judgment for appellant dismissing the action. As the allegations of the amended complaint substantially covered all facts found by the trial court, it will not be necessary to pass upon the first assignment of error; all points raised by the demurrer being involved in deciding whether the judgment is sustained by the facts so found. Appellant in his brief has discussed two propositions: (1) That he is not liable to contribution, being an accommodation indorser only; (2) that this action is barred by the statute of limitations.

In support of his first contention appellant insists he was not a co-surety with respondent, but an accommodation indorser only, and that, under the greater weight of authority, accommodation indorsers of negotiable instruments, in the absence of an express agreement between themselves, are not liable for contribution. The facts found show said note to have been executed by a corporation in which appellant and respondent each owned one-half of the capital stock; that the money borrowed was used in the business of said corporation and for its benefit; that appellant and respondent wrote their names on the back of said note at the same time, and before its delivery to the payee, for the purpose of giving additional security to the payee. The note was executed prior to the enactment of the negotiable instruments act. Sess. Laws 1899, p. 340 et seq., c. 149. Under the law of this state, as announced prior to the date of said note, appellant and respondent, under the facts found, were *prima facie* joint makers. *Donohoe-Kelley Banking Company v. Puget Sound Sav. Bank*, 13 Wash. 407, 43 Pac. 359, 942, 52 Am. St. Rep. 57. The trial court found appellant and respondent to have been co-sureties for the said Northwestern Supply Company. Hence, for the purposes of this case, they occupy the position of *prima facie* joint makers, who are in fact co-sureties. This being true, they were liable to each other for contribution. *Daniel on Negotiable Instruments* (5th Ed.) § 1340; *Brandt on Suretyship & Guaranty* (2d Ed.) § 254.

Appellant's second and principal contention is that this action is barred by the statute of limitations. The statute began to run on October 29, 1897, the date of payment by respondent. After deducting all time appellant was absent from the state, a period of 4 years, 3 months and 16 days had elapsed after said payment at the date of the commencement of this action. If either the three-year or the two-year statute (*Ballinger's Ann. Codes & St.* §§ 4800, 4801) applies, as contended by appellant, the action is barred. If the six-year statute (*Ballinger's Ann. Codes & St.* § 4798) applies, as contended by respondent, it is not barred. Subdivision 2 of said section 4798 reads as follows:

"An action upon a contract in writing, or liability express or implied, arising out of a written agreement." It seems to be conceded that this is not an action upon a contract in writing, but respondent contends, and the trial court held, that it is an action on an implied liability arising out of a written agreement. This contention is most strenuously resisted by appellant, who, in argument, insists that the liability of a co-surety for contribution is not contractual in its nature, but is only an implied equitable liability which rests on one man to do what is right by another. There is no doubt but that the doctrine of contribution between co-sureties was originally recognized and enforced in courts of equity only, being based upon the principle that equality is equity. But many modern authorities now hold said liability to be contractual in its nature, and that it arises *ex contractu*. "The right to contribution has its foundation in, and is controlled by, principles of equity and natural justice, and does not arise from contract; but, although the doctrine so originated, it is now almost universally enforced in courts of law on the theory of an implied contract of contribution existing between the parties jointly liable *ex contractu*." 9 Cyc. 794, and cases cited. Said subdivision 2, § 4798, *Ballinger's Ann. Codes & St.*, differs from the statutes of limitation of most, if not all, the other states. In fact, after a painstaking research, we have found no similar statute. The peculiar feature of our statute is that an implied liability arising out of a written instrument is included in the same clause with an express liability arising out of a written contract. The Legislature evidently thereby intended that a certain class of actions should be included within the terms of said section which had not in other states been associated or connected with actions on written instruments or actions founded upon written agreements. The liability for contribution of appellant and respondent is an implied liability, which arose by reason of their becoming co-sureties on the note. If they had not entered into the written contract which resulted from their signing their names on the back of the note at the time, under the circumstances, and for the purpose found by the court, there would be no liability. This liability now exists, is contractual in its nature, and is the direct result of that written agreement by which respondent was compelled to make the payment for which he now seeks contribution. The allegations of the amended complaint, and the facts found by the court, show a cause of action in favor of respondent, on account of an implied liability arising out of a written agreement. To place any other construction on our statute would be to hold that the words contained in the last clause of said subdivision 2 were placed there without purpose or meaning. Appellant, in

support of his contention that the six-year statute does not apply, has cited authorities from numerous states, including California, Ohio, and Illinois; but said authorities afford us no assistance, as the statutes upon which they are based are utterly unlike our own in the particular above mentioned. We think the trial court placed the proper construction on said subdivision 2 of section 4798, *supra*, and such construction necessarily leads to the conclusion that this action has been commenced within the time limited by law. The judgment is affirmed.

MOUNT, C. J., and DUNBAR, FULLERTON, HADLEY, RUDKIN, and ROOT, JJ., concur.

WATKINS v. BALCH et ux.

(Supreme Court of Washington. Jan. 4, 1906.)

1. FRAUDS, STATUTE OF — PAROL LEASE FOR YEARS—DURATION OF TERM.

A lessee in a parol lease for a term of years, who shows that he has made permanent improvements on the premises of a specified value, without showing the amount of the increased rental value of the premises in consequence of the improvements, does not show that he would suffer material injury, if the statutes making a parol lease for a period of years a lease from year to year were applied, essential to deprive the lessor of the right to terminate the lease at the expiration of any year.

2. SAME—EVIDENCE—BURDEN OF PROOF.

A lessee in a parol lease for a term of years has the burden of proving that he would suffer some material injury if the lessor be permitted to terminate the lease at the expiration of any year, as provided by the statute, in order to prevent the lessor exercising such right.

Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by Thomas J. Watkins against Henry Balch and another. From a judgment for plaintiff, defendants appeal. Affirmed.

W. H. Abel, for appellants. J. A. Hutcheson, for respondent.

FULLERTON, J. This is an action under the statute of forcible entry and detainer. On March 1, 1902, the respondent and the appellants entered into an oral agreement whereby the respondent undertook to lease to the appellants certain farm lands situated in Chehalis county for a term of five years, in consideration that the appellants would during that time care for a flock of goats the respondent intended purchasing and putting on the land, and would perform work and labor in clearing and improving the land to the amount in value of \$100 for each year during the term of the lease. Pursuant to this agreement, the appellants entered into possession of the property and have since continued in such possession, during which time they have carefully cared for the goats and have performed work and labor on the premises in the way of permanent improvements of the value required by the terms thereof.

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Some days prior to March 1, 1905, the respondent served written notice on the appellants to quit and surrender the possession of the premises on that date; it being the end of the third year of the term. The appellants refused to surrender such possession, whereupon the respondent brought this action to obtain such possession. He was successful in the court below, and the appeal is from the judgment in his favor.

The sole question presented by the record is the validity of the oral lease. The appellants concede that ordinarily an oral lease of real property for a longer period than one year is void under the statute of frauds, but they argue that because of the peculiar nature of the rental they were to atford for the use of the land, this case is differentiated from the ordinary oral lease, where only a money rent is reserved, and presents equitable features which entitle the appellants to the full enjoyment of the term. Were this the ordinary case of an oral lease for a fixed period, with a yearly reservation of rent and a taking of possession thereunder, we would have no hesitancy in holding that it was a tenancy from year to year, as the statute itself provides that such is the effect of an oral lease void under the statute of frauds which has been thus partially performed. The statute, after providing that all conveyances of real estate or interests therein, and all contracts evidencing any incumbrances thereon, shall be by deed, and that such instruments, other than a lease for a term not exceeding one year, shall be in writing, signed and acknowledged by the party bound thereby, provides that when premises are rented for an indefinite time, with monthly or other periodic rent reserved, such tenancy shall be construed to be a tenancy from month to month, or from period to period on which rent is payable, and shall be terminated by written notice of 30 days or more, preceding the end of any of such months or periods, given by either party to the other. An oral lease, therefore, where possession of the property has been taken, is not void in toto, but it may not be a lease for the term agreed upon. If the rent reserved is to be paid periodically, it is a lease good for one of such periods, but subject to be terminated at the end thereof, or at the end of any other of such periods. Thus under the statute where one enters into the possession of real property under an oral lease for a definite time, with periodic rent reserved, he is not a tenant for the time agreed upon, but a tenant from period to period, corresponding to the times on which rent is payable. Such a lease can be terminated, as the statute provides, by written notice given at the prescribed time before the end of such period. *Richards v. Redelsheimer*, 36 Wash. 325, 78 Pac. 934; *Evans v. Winona Lumber Co.*, 30 Minn. 515, 16 N. W. 404; *Morrill v. Mackman*, 24 Mich. 279, 9 Am. Rep. 124; *Arbenz v. Exley, Watkins & Co.*, 52 W. Va. 476,

44 S. E. 149, 61 L. R. A. 957; Coudert v. Cohn, 118 N. Y. 309, 23 N. E. 208, 7 L. R. A. 69, 16 Am. St. Rep. 761; Rosenblatt v. Perkins, 18 Or. 156, 22 Pac. 598, 6 L. R. A. 257; Bard v. Elston, 81 Kan. 278, 1 Pac. 565; 18 Am. & Eng. Enc. of Law, p. 194. On the other hand, the courts generally hold that, where there is an entry and the payment of rent in advance for a fixed term under an oral lease, the lease is good for an entire term, although the lease be a longer term than is permitted by the statute. This on the principle that it would be permitting the statute to perpetrate rather than prevent frauds, if thereunder a landlord may accept rent for a given term, and then use the statute to evict the tenant before the end of such term. Clark v. Clark, 49 Cal. 586; Morrison v. Herrick, 130 Ill. 631, 22 N. E. 537; Dunckel v. Dunckel, 141 N. Y. 427, 36 N. E. 405.

It is this principle that the appellants seek to invoke in this case, but we think the finding of the court too meager to bring them within the rule. The evidence is not brought here in the record, and the facts must rest on the findings of the court. And, while the court found that permanent improvements had been made on the premises to the value of \$300, it did not find whether or not such improvements increased the rental value of the premises. It, of course, is inferable that such improvements would increase the rental value to some extent, but the amount is conjectural, and, as the appellants are relying on an equitable principle, the burden was upon them to show that they would suffer some material injury if the ordinary rules of law were enforced against them. This, as we view the findings, they have not done, and we must hold that they were tenants from year to year, and subject to ouster at the end of each yearly period.

The judgment is affirmed.

MOUNT, C. J., and RUDKIN, HADLEY, CROW, and ROOT, JJ., concur.

DORMAN et al. v. PLOWMAN et al.

(Supreme Court of Washington. Jan. 23, 1906.)
LANDLORD AND TENANT—UNACKNOWLEDGED LEASE—TERMINATION.

Ballinger's Ann. Codes & St. § 4568, provides that leases, though in writing, are, when unacknowledged, valid for a period not exceeding one year, and by section 4569, when premises are rented for an indefinite time, with periodic rent reserved, the lease may be terminated by either party by a written notice given thirty days preceding the end of any period. Held that, though there had been part performance of an unacknowledged lease of land for four years, the lease was terminable at the end of the first year by proper notice, whether the first section means that an unacknowledged lease for a term longer than one year is valid as a lease for one year only, or means that such a lease is void from its inception, since, under the second construction, the lease was governed by the second section.

Appeal from Superior Court, Whitman County; S. J. Chadwick, Judge.

Action by Ortho Dorman and others against L. Plowman and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Gallagher & Thayer, for appellants. J. N. Pickrell, for respondents.

FULLERTON, J. On December 24, 1903, the respondents L. Plowman and Jennie M. Plowman entered into a written lease with the appellants, by the terms of which they leased to the appellants certain farm lands which they owned for a term of four years, at a yearly rental of \$400. The lease was not acknowledged, and the respondents, treating it as a lease from year to year, served upon the appellants a written notice to quit and surrender the premises at the end of the first year thereof, viz., December 24, 1904. On that date, finding no one in the actual possession, the respondents re-entered, and subsequently sold the property to the respondents Pierce. This action was brought by the lessees to recover the possession for the remainder of the unexpired term. The trial court held the lease valid as a lease of the property for a period of one year, but invalid because not acknowledged as to the remainder of the term, and entered judgment for the lessors.

It is the contention of the appellants that a contract in writing purporting to convey or create an interest in or incumbrance on real property is valid under the statutes of this state, although not acknowledged, whenever accompanied by part performance, such as payment of the consideration or a part thereof, or a voluntary delivery of possession under the terms of the contract. This court has held in a number of cases that contracts to convey land, or to create incumbrances thereon, were valid as between the parties, where there had been a substantial part performance, although not executed with the formalities required by statute, but we think these cases are distinguishable from the one at bar. They proceed on the theory that equity will relieve from the statute of frauds whenever the enforcement of the statute will enable the party seeking to enforce it to perpetrate a fraud upon the other party; while the statute itself has undertaken to define the rights of parties who have taken possession of property under a void or defectively executed lease, and paid rent for a given period only. By statute it is expressly provided that leases, although in writing, are, when without acknowledgment, valid for a period not exceeding one year. Ballinger's Ann. Codes & St. § 4568. And, also, that when premises are rented for an indefinite time, with monthly or other periodic rent reserved, such tenancy shall be construed from month to month or from period to period, according to which such rent is payable, and that such a lease may be terminated

by either party by written notice given 30 days or more preceding the end of any such month or period. *Id.* § 4569. The first of these sections is capable of different constructions. It may mean that an unacknowledged lease for a term longer than one year is valid as a lease for one year only, or it may mean that such a lease, being for a prohibited period, is void from its inception. But, whichever of these may be the true construction, it is not necessary to determine here, as either reaches the same result. If the first be adopted, there can be no further question as to the correctness of the judgment, since the lease expired by its own terms on December 24, 1904, and the respondents had the right of re-entry on that day, and did no more than exercise that right when they took possession and ousted the appellants. On the other hand, if the second construction is to be adopted, the second section of the statute above cited governs. That section would make the lease one for an indefinite time with periodic rent reserved, and hence terminable at the option of either party by notice given 30 days preceding the end of any one of such periods. *Watkins v. Balch* (Wash.) 83 Pac. 321. Therefore, by entering and paying rent for one year, the appellants did not acquire a right to the full term. The lease was terminable by either party at the end of any year, and was terminated by the written notice given by the respondents.

The further contention, namely, that the appellants are entitled to equitable relief because they purchased of the respondents a band of cattle as a part consideration of the lease, we think is founded on a mistaken view of the evidence. The appellants did purchase of the respondents a band of cattle, but we think the view of the trial court that this purchase formed no part of the consideration for the lease is the true one.

The judgment is affirmed.

MOUNT, C. J., and HADLEY, RUDKIN, CROW, and ROOT, JJ., concur.

WILLIAMS v. BALLARD LUMBER CO.
(Supreme Court of Washington. Jan. 5, 1906.)

1. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — WHAT CONSTITUTES.

In order to charge an injured person with contributory negligence, it must appear that some act or omission on his part caused or contributed to cause the injury, and that such act or omission was not such an one as would have been done or omitted by a person of ordinary prudence under the circumstances.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 83, 112.]

2. SAME—QUESTION FOR COURT OR JURY.

Where the court can say from the evidence that ordinarily intelligent, reasonable, and fair-minded men would not, and should not, believe that plaintiff was acting as an ordinarily prudent person would have acted under the same circumstances, the question of plaintiff's contributory negligence is for the court, and a non-

sult or directed verdict should be granted; but where the evidence is such that the court believes that intelligent, reasonable, and fair-minded men might properly differ as to whether plaintiff's conduct was such as might have characterized a man of ordinary prudence under the same conditions and circumstances, the question of contributory negligence is for the jury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 286, 291, 296, 299, 333-346.]

3. MASTER AND SERVANT—INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

In an action for injuries to a servant caused by his suddenly and impulsively moving his hand so as to involuntarily bring it in contact with revolving cogwheels, of the presence of which he knew, but had momentarily forgotten, because startled by the sudden and unexpected starting of a machine under which he was stooping, whether or not plaintiff was guilty of contributory negligence *held*, under the evidence, a question for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089-1132.]

4. SAME — NEGLIGENCE OF MASTER—EXPOSED MACHINERY.

The maintenance of exposed cogwheels at a place near which servants must necessarily work, when it is easy and practicable to cover such wheels at a slight expense, is negligence on the part of the master.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 229.]

5. SAME—PROXIMATE CAUSE.

Negligence of the master in maintaining exposed cogwheels at a place near which servants were obliged to work, and in permitting the machinery to get into a defective condition, by reason of which the cogwheels started automatically by the starting of other machinery which should not have affected them, was a proximate cause of injury to a servant who involuntarily thrust his hand into the cogwheels when startled by the sudden starting of the machinery.

6. SAME—CONCURRENT NEGLIGENCE OF SERVANT.

Where a master's negligence contributes as proximate cause to an injury to a servant, he is responsible therefor, although the negligent act of a fellow servant also contributes to produce the injury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 515-534.]

7. SAME — ASSUMPTION OF RISK — STATEMENT OF DOCTRINE.

Ordinarily a servant employed to work about dangerous machinery assumes, in the absence of a statute otherwise providing, the open, apparent, and obvious dangers thereof, and the dangers which he knows or should know to be naturally or necessarily incident to his employment; but he does not assume the risk of dangers which are not open, apparent, or obvious, and of which he does not know and has no reason to expect to be incident to his work.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 574-600, 610-624.]

8. SAME—QUESTION FOR JURY.

Whether a servant, injured by involuntarily thrusting his hand into cogwheels when startled by the sudden starting of other machinery, assumed the risk, was a question for the jury, where the servant knew the exposed dangerous condition of the cogwheels, but did not know of defects in the machinery which caused the cogwheels to improperly start automatically.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1008-1088.]

9. APPEAL—REVIEW OF FACTS—CONCLUSIVE-NESS OF VERDICT.

A verdict supported by a sufficient amount of competent evidence to take the case to the jury, and sustained by the trial court, is conclusive on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3948-3950.]

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Charles A. Williams against the Ballard Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

G. M. Emory, for appellant. James McNeny and S. H. Steele, for respondent.

ROOT, J. Respondent recovered a judgment of \$1,075 in the superior court for damages occasioned by having his hand crushed between the cogwheels on the side of a planer in the mill of appellant for whom he was working. The facts as admitted and revealed by the evidence were about as follows: The machine upon which the plaintiff was injured is known as a "Hoyt Planer, No. 11," and consists of an iron frame or bed nearly 14 feet long. The bed of the machine is 3 feet 4 inches wide, and 2 feet 4 inches above the ground. Upon the bed of the machine are three sets of rollers; each set consisting of two steel cylinders, one placed above the other, the function of which is to carry the lumber through the machine and hold it in place against the planing knives. The first set of rolls are about 5 feet away from the front of the machine where the feeder stands. The distance between the first set of rolls and the second set of rolls is 2½ feet; the distance between the second and the last set of rolls is about 4 feet. It is between the last-named sets that the knives which plane the boards are situated. Each set of rolls is equipped with four cogs geared together in such a manner that they revolve, thereby causing the rolls to turn. These cogs are 9 inches in diameter, and each pair of the left-hand cogs is so arranged as to afford an opening as much as 6 inches, so as to accommodate a piece of lumber of that thickness. These are known as expansion gears. The planer in question lay east and west in the mill; the operator standing in front of the machine at its east end. At the northwest corner of the planer were the cogs upon which the plaintiff was injured. Near the rear or west end of the machine, the plaintiff was kneeling just prior to his injury. The top of the two upper cogs is guarded with an iron strap conforming to the contour of the cogs and covering one-half of their circumference. The two right-hand cogs at the corner indicated mesh inwards, so that any object touching them at their point of contact and coming from the west would be drawn between them and crushed. At the east end of the machine the operator stands and feeds the lumber into the ma-

chine. It is customary to start the machine by taking hold of the lever just to the right of the large pulley on the right of the machine, and, by applying that lever and the idler, which is attached to it, to the main power belt which extends from the pulley near the roof to one attached to the counter-shaft on the floor, power is communicated to the belts on the right of the machine and which operate the knives alone. To the left of the machine is another driving pulley around which is a belt which goes around the driven pulley at the west end of the machine. The belt and pulleys on the left side of the planer operate the cogs and rolls which carry the lumber through the machine. The power is applied to the feed belt by taking the left-hand lever, to which is attached an idler, and pressing it upon the belt in question. The feed rolls are not supposed to be placed in operation unless the left-hand tightener is applied to the feed belt. The distance between the right-hand and the left-hand tightener is about 6 feet.

Some of the plaintiff's witnesses testified that the feed rolls and cogs on the planer started of themselves by the application of the right-hand or main tightener alone, and without the application of the feed tightener which was intended for that purpose. Plaintiff's witnesses also testified that there was a crack in the bed of the machine near the front rolls; that the driven pulley on the left-hand side wobbled; that the feed belt tightener was too short; that the belt operating the feed gear was too tight, and was in the habit of running up on the five-eighths inch flange on the driven feed gear pulley on the left-hand side. There was testimony tending to show that the planing mill in question was an old pattern, and out of repair; that the frame thereof had been broken and mended; that its shafts, pulleys, and gear were badly out of line; that the driven pulley on the feed gear belt wobbled, and the belt frequently ran on its flanges; that the feed gear lever had been broken and shortened; that in rainy weather the feed gear belt ran in the water, and was wet and unreliable and caused shavings and other sticky matter to adhere thereto, and such belt was, by reason of being wet, subject to the elements and contracted and expanded. There was some evidence to the effect that said machine had been in an improper condition and the feed gear thereof had been customarily starting itself automatically for months before plaintiff was injured; that appellant knew of all of said defects and dangers, and the respondent had no knowledge thereof; and that the appellant failed and neglected to warn or caution the respondent against danger from automatic starting. Two experts testified for the plaintiff that a machine which starts automatically and in the condition described by the plaintiff's witnesses is not in proper repair, and that it was practicable to cover cogs such as the ones which injured

the plaintiff's hand. One witness testified that it was customary in the state of Washington to hood such cogs, but the same witness admitted that he did not know the custom as to hooding cogs in Ballard where this mill was situated. The plaintiff was 25 years old at the date of his injury. He had been a millwright for about 9 years, and had worked around sawmills since childhood. The greater part of his experience as a mill hand had consisted in running an edger. Respondent testified that he expressly told the foreman, at the time of his employment, that he was not a planing mill man; that he was only hired to "fill in with" for a few days; that he had been at work on the machine five days before the injury; that his experience with planing machines of any kind was very limited; and that he was without any as to a machine like the one in question—all of which the appellant knew. He was familiar with the situation of the particular cogs, and knew that they would injure his hand if it came in contact with them. He had worked upon the planer in question a little over five days before his hand was injured. He had started up the machine a number of times himself, and knew the noise that it made with the feed gear in operation, and its sound when at rest. He had frequently seen the knives of the machine changed. The plaintiff claimed, however, that on the occasion of his injury he did not know that the machine was to be started up. Between 10 and 11 o'clock on the morning of March 11, 1903, the day of his injury, the plaintiff had cut all of the lumber he had on his trucks, and shut his machine down. He went to the back end of the machine on the south side. Avey, one of appellant's foremen, then ordered him to clean out the shavings from under the machine. This he proceeded to do at the northwest corner. Paul Kirkendall, a fellow laborer of respondent, worked at the trimmer to the west of the planer. Just before his conversation with Avey respondent asked Kirkendall if he was going to change the knives on the machine, and Kirkendall replied that he did not know. The attitude of plaintiff immediately before his injury was as follows: He was kneeling upon the floor on one knee, with his head partly under the northwest corner of the machine, with his right hand engaged in pushing shavings up the blower, and with his left hand resting on the bed of the machine, between eight inches and one foot from the point of contact of the two meshing cogs. It appears that at this time Paul Kirkendall, the trimmerman, had been ordered by Avey, the foreman, to leave his position as trimmer and change the knives on the planer. In order to do this, it was necessary to run from the machine the last board of the truck load Williams had been cutting. Kirkendall accordingly went around to the east end of the planer and applied the main tightener.

There was a sharp conflict of evidence as to whether Kirkendall had started up the feed rolls by the application of the main tightener alone, or whether he had put them in motion by applying the feed lever. The plaintiff testified that, at the time his hand was caught in the cogs, he looked toward the front end of the machine and saw Kirkendall standing at the main idler at the northeast corner applying it to the power belt. Plaintiff also testified that, while he was in the attitude described, using his right hand and with his left hand resting on the bed of the planer, his attention was attracted by a noise of some kind; that he was so startled and frightened by the sound that, in attempting to arise from his position on the floor, he put his hand into the cogs, where it was cut off. He also stated that he did not intend to put his hand into the cog, and that his motion in so doing was involuntary, the cogwheels being not much higher than his waist; that he was under said machine and not expecting it to start, when he heard the machine in motion; that mechanically he made a natural, quick movement to get from under the machine and away from danger, and in doing so, and while his head was under the machine, his hand was moved some eight inches instantly and mechanically, and caught in these open, dangerous, and unguarded cogs, so running automatically; that, had the cogs in which plaintiff was injured not started until the lever on the south side (which operated them and tightened the belt that propelled said cogs) been pulled forward and the idler placed upon that belt, plaintiff would have had ample time to have escaped from under said machine safely, and to have walked many feet while said cogs remained at rest; that the automatic starting of these feed gear cogs put plaintiff in immediate peril; that they could have been protected and guarded with a trifling expense.

The testimony of the defense was directed toward the following issues: Witnesses testified that the automatic starting referred to was not unusual; that the machine in question was in perfect order at the time of the injury to the plaintiff; that it was unusual and impossible to guard expansion gears such as the ones in question; that all modern planers are provided with open cogs; that the condition of the belt, the mended bed, and the short lever, had nothing to do with the automatic starting of the machine; and that the planer would not start automatically under any circumstances with the pressure of the rolls upon a board. At the close of the plaintiff's case, the defendant moved for a verdict of nonsuit, on the ground that the plaintiff had failed to show any negligence which contributed to the plaintiff's injury; that the plaintiff's contributory negligence was the proximate cause of his injury; that his injury was the result of assumed risks, and was also caused by the negligent act of a fellow servant. A motion for nonsuit was

made and denied, and an exception allowed. The defendant, at the end of all the testimony, requested the court to charge the jury that it was their duty under all the evidence to render their verdict in favor of the defendant. This the court declined to do, and the defendant duly excepted. The jury returned a verdict in the sum above mentioned. A motion for new trial having been interposed and overruled, judgment was entered upon said verdict. From this judgment defendant appeals.

The appellant assigns but two errors: first, that the court erred in refusing to grant defendant's motion for nonsuit; second, that the court erred in refusing to grant defendant's request for a peremptory instruction. These errors are supported in argument under four heads, as follows: (1) That the plaintiff was guilty of contributory negligence preclusive of recovery; (2) that, if there was negligence on the part of the defendant, it was not the proximate cause of plaintiff's injury; (3) that the proximate cause of the injury to respondent was the negligent act of a fellow servant mingled with his own contributory negligence; (4) that respondent assumed the risk of dangers which caused his injury.

To charge a plaintiff in an action of this character with contributory negligence, it must appear that some act or omission on his part caused or contributed to the cause of his injury, and that such act or omission on his part was not such an act or omission as would have been done or omitted by a person of ordinary prudence under the same circumstances. As to whether a person of ordinary prudence would have done or omitted to do such act, presents a question which is sometimes for the court and sometimes for the jury to decide. If, from the evidence and facts in a given case, the court can say that ordinarily intelligent, reasonable, and fair-minded men would not, and ought not to, believe that said plaintiff was acting as an ordinarily prudent man would have done under the same circumstances, then it is a question for the court, and a motion for a nonsuit, judgment, or directed verdict should be sustained. On the other hand, if the evidence, facts, and circumstances are such that the court believes that such men might properly differ as to whether or not the conduct of a plaintiff was such as might have characterized a man of ordinary prudence surrounded by the same conditions and circumstances, then it is a question to be submitted to the jury. Hence, it is for us to decide whether or not the facts and circumstances revealed by the evidence here were such that ordinarily intelligent, reasonable, fair-minded men might differ on the question indicated. The plaintiff, at the time and immediately prior to the accident, was in a stooping or kneeling posture, with his head and shoulders projected under a large, powerful, and dangerous machine. This machine was suddenly, and

to him unexpectedly, set in motion. He says he was startled by this occurrence, and suddenly and impulsively moved his hand in such a way as to bring it involuntarily in contact with the revolving cogwheels. He had known of these cogwheels and of the danger appertaining thereto; but at this instant, with his head under the machine and his face turned from said wheels, and a portion of the machine being between his head and said wheels, the existence of such dangerous cogwheels was for the moment forgotten. That he should suddenly move his hand or throw it up in order to assist in getting from under the machine and rising to his feet would seem to be a very natural movement for a person so situated to make under the circumstances mentioned. At least, we cannot say, as a matter of law, that no ordinarily intelligent, reasonable, fair-minded man would think such a movement consistent with what a man of ordinary prudence might have done under the same circumstances. In the light of the substantial, competent evidence on behalf of the plaintiff, touching the situation and circumstances, and the admitted facts and conditions relative thereto, we think that the question of whether or not the plaintiff was guilty of contributory negligence was a proper one for the jury; and, the latter having passed upon the same adversely to appellant, we are bound thereby. That momentary forgetfulness of a known danger does not of itself, as a matter of law, necessarily constitute contributory negligence on the part of the one injured by reason of said danger has been heretofore held by this court. *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114.

As to the question of proximate cause, it cannot be, and is not by appellant seriously argued, that the maintenance of these exposed cogwheels, where respondent and other workmen must necessarily work in close proximity to them, was not in itself negligence without which this accident would not have occurred. The presence of these exposed cogs certainly contributed to the proximate cause of plaintiff's injury. It must also be remembered that there was evidence on the part of the plaintiff which tended to establish the fact that, if the machine had been in proper repair, the cogwheels would not have started for some moments after the other part of the machine was in operation, and plaintiff would have had plenty of time to have removed from the dangerous position which he was in. From the evidence adduced in behalf of respondent, it appears that the proximate cause of this injury was made up of three elements: (1) The maintenance by the mill company of the cogwheels in an unnecessarily and improperly exposed condition, when it was easy and practicable to cover them at slight expense; (2) the unexpected starting of a portion of the machine by respondent's fellow workman, Kirkendall; (3) the defective condition of the machine and its appurtenances, by reason of which these cogwheels automatically and un-

expectedly started when the lever and idler were applied, which should have set in motion the planing knives only. Two of these elements thus contributing to the proximate cause are chargeable to the negligence of the defendant. The other was the fault of respondent's fellow servant. Where a defendant's negligence is shown to have contributed, with that of a third person, to produce the proximate cause of an injury to another, such defendant is chargeable as if solely responsible for the proximate cause. *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64. If a fellow workman of plaintiff, by starting the machine at the time he did, also contributed to the proximate cause, this would not relieve the appellant, as it has been heretofore held by this court that, where the negligence of the master and a fellow servant combine to create a proximate cause, the master is chargeable. *Ralph v. American Bridge Co.*, 30 Wash. 500, 70 Pac. 1098; *Howe v. N. P. Ry. Co.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949.

The determination of the question of assumed risk, presented by the case, is not without difficulties. Ordinarily a servant employed to work about dangerous machinery assumes, in the absence of a statute otherwise providing, the open, apparent, and obvious dangers thereof, and the dangers which he knows, or ought to know, to be naturally or necessarily incident to his employment, and is called upon to protect himself against such dangers and those of which, by the exercise of ordinary prudence and care, he ought to know, as a workman of ordinary prudence would do under the same circumstances. In this case the dangerous condition of these exposed cogwheels was open, apparent, and known to him; but he testified that he did not know of the defects in the machine which, it was testified, caused these cogwheels to immediately start when the other portion of the machine was set in motion in the manner that it was started at this time by a fellow workman; and he also testified that he had worked about this machine only a few days, and knew nothing of the tendency of these cogwheels to start automatically, or that they had ever done so theretofore. While the servant assumes those dangers which he knows, or ought to know, to be naturally or necessarily incident to the employment in which he is engaged, yet he does not assume the danger of those that are not open, apparent, or obvious, and which he does not know of or have reason to expect as incident to his work. The question presented to the court is this: Can we say, as a matter of law, that the sudden, unexpected starting of these cogwheels automatically, by reason of some defect or improper arrangement of the machinery, was a danger of which respondent knew, or which he should have anticipated and guarded against as an incident to his work about said machine? We must answer this in the negative. If it were established

that he knew this part of the machine to have been in the habit of starting automatically, or that the condition thereof was such that automatic starting was liable to occur, or if the record showed unquestionably that his experience about the machine or his surroundings and opportunities were such that, by the exercise of ordinary prudence and observation, he should have known of the likelihood of such an occurrence, a different question would be presented. But there being competent, material, and substantial evidence that this part of the machine, by reason of its defective condition, had been in the habit of starting automatically, and was liable to so do, and that the owner knew of these things and that respondent did not, we cannot overlook such testimony. The evidence tending to show all these matters was sufficient to raise a question for the jury, and, the latter having determined the same, we must be bound by its finding thereupon. Some of the testimony on behalf of respondent is very unsatisfactory, and much of it is contravened by strong evidence in support of appellant. But as respondent's contention as to every one of the questions raised on this appeal was supported by a sufficient amount of competent, material evidence to carry the case to the jury, and, if believed by them, to justify a verdict for him, which the trial court sustained, we cannot set the same aside, but are constrained to uphold such verdict.

The judgment of the superior court is affirmed.

MOUNT, C. J., and CROW, HADLEY, and FULLERTON, JJ., concur. DUNBAR, J., concurs in the result.

BRANDON v. WEST et al. (No. 1,681.)

(Supreme Court of Nevada. Dec. 28, 1905.)

1. SPECIFIC PERFORMANCE—EXECUTED CONTRACT—BURDEN OF PROOF.

Where, in a suit to enforce specific performance of an oral contract for the sale of land, there was a doubt as to whether the vendor intended to sell the land in fee or only the sand thereon, the court properly refused to enforce a conveyance of the freehold to complainant; the burden being on him to clearly establish an executed sale.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 383.]

2. SAME—LIABILITY OF HEIRS.

Where the owner of land granted to complainant by an executed oral sale all the sand on the land, the legal title to the land having passed to such owner's descendants by operation of law, it was incumbent on them to convey to complainant the right purchased.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 55.]

3. EQUITY—PLEADING—VARIANCE.

Where complainant sued to enforce specific performance of an alleged executed oral contract for the sale of certain land, but his proofs showed that only an easement entitling complainant to remove the sand from the property had been sold, the variance was not fatal, but complainant was entitled to relief to conform to the proof to prevent a multiplicity of suits.

4. COSTS—APPEAL—TRANSCRIBING RECORDS—TYPEWRITING BRIEFS.

Under Supreme Court Rule 6 (24 Pac. vi) providing that the expense of printed transcripts on appeal in civil cases and papers constituting the record in original proceedings required by the rules to be printed shall be allowed as costs, the reporter's fee for transcribing notes or the record on appeal and the cost of type-writing briefs are properly taxable to the successful party.

Fitzgerald, C. J., dissenting.

Appeal from District Court, Washoe County.

Suit by William J. Brandon against N. H. West, as administrator of the estate of B. G. Clow, deceased, and others. From a decree in favor of defendants, plaintiff appeals. Reversed.

Mark & Farrington, for appellant. Cheney & Massey, for respondents.

TALBOT, J. This action was brought against the defendant West as administrator, and the other defendants as heirs, of the estate of B. G. Clow, deceased, to compel the execution of a deed to plaintiff for a triangular piece of land, marked with three iron pins and less than one acre in extent, as described in the complaint. The uncontradicted testimony of several witnesses introduced by the plaintiff shows that Clow in the year 1901, and a considerable time before his death, sold to plaintiff a sand hill or sand pit which is identical with or embraced in the boundaries of the parcel of land mentioned; that he went upon the premises, marked and pointed out the boundaries to the plaintiff, put him in possession, and accepted a cow in payment. Thereafter plaintiff hauled and sold sand from the pit exclusively, and his right to the same was expressly acknowledged upon different occasions by Clow, who directed to the plaintiff persons applying for sand. No evidence was offered by the defendants. The court was in doubt as to whether the proofs showed a sale of the land, but, at the request of the plaintiff, found that he "purchased the sand situated upon and in the sand hill described in plaintiff's complaint and the exclusive right to take sand therefrom"; that Clow received and retained possession of the cow, and that prior to and long after his death plaintiff was in possession of the property and taking sand. From a judgment in favor of defendants for their costs, and an order overruling a motion for a new trial, this appeal is taken.

The burden being upon the plaintiff to establish clearly an executed sale, and there being a doubt as to whether Clow intended to sell the land in fee, or only the sand, leaving the land for him or his estate when stripped of it, the court properly refused to enforce a conveyance of the freehold to plaintiff, but it having been plainly indicated by the evidence and the court having found that there was an executed sale of

the sand by Clow to the plaintiff, the latter was entitled to relief to that extent. In principle, the plaintiff has an interest in the land like the right to remove stone or cut timber or maintain a roadway or other easement, or like a lease or term for life or years, and although less than freehold, the plaintiff, after being placed in possession and making payment, became entitled upon demand to a conveyance to the extent of his purchase, which could be recorded, and which would give notice of his ownership from Clow, who held that part of the title for him as a trustee, the same as Clow would have retained the whole title if the sale had been of the freehold. This legal title having passed to his successors by operation of law, it is incumbent upon them to convey it to plaintiff. *Schroeder v. Gemeinder*, 10 Nev. 367; *Lake v. Lewis*, 16 Nev. 94; *Powell v. Campbell*, 20 Nev. 233, 20 Pac. 156, 2 L. R. A. 615, 19 Am. St. Rep. 350; 1 *Tiffany*, *Modern Law of Real Prop.* § 10; *Thomson v. Smith*, 63 N. Y. 303, and cases there cited; *Kerr v. Day*, 14 Pa. 112, 58 Am. Dec. 526, and annotation; *Felch v. Hooper*, 119 Mass. 52; *Masterson v. Pullen*, 62 Ala. 146; *Wehn v. Fall*, 55 Neb. 547, 76 N. W. 13, 70 Am. St. Rep. 397; *Swepson v. Rouse*, 65 N. C. 34, 6 Am. Rep. 735; *Adams v. Harris*, 47 Miss. 144; *Corson v. Mulvany*, 49 Pa. 88, 88 Am. Dec. 485; *Morgan v. Morgan*, 2 Wheat. (15 U. S.) 302, 4 L. Ed. 242; *Massee v. Watts*, 6 Cranch, 148, 3 L. Ed. 181; *Newton v. Bronsin*, 67 Am. Dec. 89; *W. U. Tel. Co. v. Pittsburg, C., C. & St. L. Ry. Co.* (C. C.) 137 Fed. 435; 5 *Pom. Eq. Jur.* (3d Ed.) §§ 12-16, and cases cited, volume 1, Id. 367. If the proofs had indicated the sale of sand on land different from that described in the complaint, there would have been a fatal variance; but when they establish that the plaintiff is entitled to an interest in or a part of the estate, quantity, or amount of land, money, or personal property claimed under the allegations and demand in the complaint, he should be given, under such circumstances as exist here, relief to that extent, and not be forced to further litigation. That the plaintiff may recover less than the whole of that which he demands without being relegated to another action is according to usual practice, and any other rule would tend to a multiplicity of suits, and occasion unnecessary delays and hardships. In *Bogan v. Daughdrill*, 51 Ala. 316, the bill averred a contract for the sale of more than 400 acres, and the decree of the chancellor enforcing it as to 80 acres only was sustained, and it was said that it is a general rule at law and in equity that a plaintiff may recover a part only of what he claims. In *Drury v. Conner*, 6 Har. & J. 288, cited in that opinion, the plaintiff claimed the conveyance of the whole of a piece of land, but the proofs entitled him to an undivided one-fourth only, which was decreed to him. In *Vicksburg R. R. Co. v. Ragsdale*, 54 Miss. 215; "We

know of no rule of equity which denies relief to a party altogether, because he has made a false claim as to part of it. In so far as he has shown title to relief, to that extent he should be redressed." The sand is a part of the land for which the plaintiff seeks a deed in his complaint the same as ore, marble, or stone before removal is a part of the realty. *State v. Berryman*, 8 Nev. 268; *Kingsley v. Holbrook*, 45 N. H. 319, 86 Am. Dec. 173; *Stevenson v. Bachrach*, 170 Ill. 256, 48 N. E. 327; *State v. Pottmeyer*, 33 Ind. 402, 5 Am. Rep. 224; *Cary v. Daniels*, 8 Metc. 480, 41 Am. Dec. 532; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; 2 *Blackstone Com.* 18; *Lime Rock R. Co. v. Farnsworth*, 86 Me. 130, 29 Atl. 957.

The defendants were aware that the plaintiff demanded a conveyance of the whole of the land, and they could have avoided costs by tendering a deed for that part of it comprising the sand, and the right of its removal, in the same way that immunity from costs may be secured by an offer to allow judgment for a less sum or estate, or for a smaller quantity of land or personal property than that demanded in the complaint. In *Schroeder v. Gemeinder*, Justice Hawley, speaking for this court said: "We are satisfied that the objection urged, upon the ground that the premises described in the deed were not the same as described in the lease, is not well taken, for the reason that no such objection was made at the time the deed was presented. If that was the only objection, respondent ought to have so settled at the time of the tender. But, in any view, this objection could only be urged upon a question of costs, and not to defeat appellant's rights. Courts of equity ought to determine the rights of the parties according to the broad principles of justice and fair dealing, and not by the technical and refined distinctions of the law."

The judgment and order are reversed, and the district court is directed to decree the execution on the part of the defendants of the proper deed conveying to the plaintiff the sand on the premises described in the complaint, and the exclusive right to remove the same, to which he is entitled as shown by the uncontradicted evidence and findings, with his costs, if the proper memorandum thereof is filed within two days after the entry of the decree under the usual practice and section 3581, Comp. Laws 1861-1900. Pursuant to the motion of respondents the items of expense in the lower court are stricken out of the cost bill filed here, but the reporters' fees of \$34, for transcribing notes or the record on appeal, and the cost of typewriting briefs, are allowed to stand under rule 6 (24 Pac. vi) and the decision in the recent case of *Candler v. Ditch Co.* (Nev.) 82 Pac. 458.

NORCROSS, J., concurs.

FITZGERALD, C. J. (dissenting). Finding myself unable to concur in the prevailing opinion, I deem it proper to make a brief statement of my view of the case as it appears from the transcript filed in this court. This is a suit for specific performance of an alleged contract to convey land. The contract was in the complaint of plaintiff alleged to have been made by plaintiff with one B. G. Clow in the lifetime of said Clow; and the suit is against N. H. West, as administrator of the estate of said Clow, and also against others named in said complaint as claiming under said Clow. The case was tried without a jury, and the trial court gave judgment against plaintiff. The plaintiff appeals from said judgment, and also from the order of the court denying his motion for a new trial.

The question before us on this appeal is: Does the evidence sustain the judgment and order? I think it does. The plaintiff sued for land, specifically describing it, alleging a contract with defendants' intestate to convey the same; but his evidence—the defendants not having put in any other than to cross-examine plaintiff's witnesses—shows that he had no contract to convey land, but merely the sand on the premises described. I deem it unnecessary to quote or minutely state the evidence here. It is deemed sufficient that the general statement be here made that no one of plaintiff's witnesses gives evidence of a buying or selling of land or a contract for buying or selling land. All the evidence is as to buying and selling the "sand pit" or the "sand hill" on certain premises described in said evidence; or contracting to sell such sand pit or sand hill. Under such state of facts this court would not be justified in disturbing the finding of fact made by the trial court that there was no contract for buying, selling, or conveying land; and without such contract there was nothing of which the court could decree specific performance. The court however did find, as a fact, that there was a contract between plaintiff and defendants' intestate to sell to plaintiff the sand on a certain piece of land described in plaintiff's complaint; and on this finding, appellant claims that it was error in the court not to give plaintiff judgment for this sand and for plaintiff's cost of suit. Under the pleadings and evidence in the case I think the court could not have properly so adjudged.

There was no allegation in the complaint of a denial on the part of defendants, or any one of them, of this right of plaintiff to the sand; or any allegation of refusal by the defendants, or any one of them, to permit plaintiff to take the sand in accordance with the contract as stated in said finding. It is true the court made a finding of such contract; but it made no finding of any breach of said contract. So far as anything that appears in said finding is con-

cerned the defendants may have always permitted plaintiff to take the sand in accordance with the contract found to have been made with plaintiff by defendants' intestate. Under such circumstances the court could not have adjudged against the defendants for either the sand or the costs of the suit, because plaintiff had failed to prove defendants to have been in default. Should defendants hereafter refuse to permit plaintiff to take the sand in accordance with the contract, as stated in the said finding, it may be that plaintiff would have his action to enforce said contract; for then it may be that he could allege, not only a contract to take the sand, but also breach thereof by defendants. But as the case now stands here there is no breach of such contract, either alleged in the complaint or proved by the evidence.

Therefore, finding no error in reference to either the judgment or the order appealed from, I think said judgment and the said order should be affirmed.

STATE v. LOVELACE. (No. 1,679.)

(Supreme Court of Nevada. Jan. 4, 1906.)

1. INDICTMENT—SUFFICIENCY—TEST.

The sufficiency of an indictment is to be determined from the provisions of the statutes in relation to the form and requisites of an indictment, and not by the common law.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 89-92.]

2. BURGLARY—INDICTMENT—SUFFICIENCY.

Comp. Laws 1900, § 4199, provides that an indictment shall contain a statement of the acts constituting the offense, in ordinary language, so as to enable one of common understanding to know what is intended. Section 4206 provides that the words used in an indictment shall be construed in the usual acceptance in common language, and section 4209 enacts that no indictment shall be deemed insufficient by reason of any defect in form not prejudicial to defendant. *Held*, that an indictment for burglary, charging that defendant on a certain day, "in the nighttime of said day or thereabouts," etc., was not defective because of the phrase "or thereabouts."

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, § 34; vol. 27, Cent. Dig. Indictment and Information, §§ 200-214.]

3. CRIMINAL LAW—TESTIMONY OF ACCOMPLICE—CORROBORATION—SUFFICIENCY.

Where, on a prosecution for burglary, an accomplice testified that he and defendant burglarized the store in question and stole a lot of amalgam and buried it, such testimony was sufficiently corroborated by the testimony of another witness that defendant requested witness to help him rob the store, that defendant told witness that he would have got the amalgam if something had not happened, and that he was trying to dispose of the amalgam and asked witness what he was to do about it.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1128-1133.]

Appeal from District Court, Elko County.

Paul Lovelace was convicted of burglary, and he appeals. Affirmed.

Wm. Woodburn, for appellant. Jas. G. Sweeney, Atty. Gen., for the State.

FITZGERALD, C. J. Defendant appeals from a judgment rendered against him in the district court in and for Elko county for the crime of burglary, and he assigns two reasons why, as he claims, the judgment should be reversed: First, the insufficiency of the indictment on which the judgment was based; and, second, the absence of corroboration of the testimony of an accomplice who testified against the defendant.

Under the first head the point made is on the proper interpretation of the following clause in the indictment: "The said Paul Lovelace on the 11th day of May, 1904, in the nighttime of said day, or thereabouts, in the county of Elko, state of Nevada, without authority of law and before the finding of this indictment, did willfully, unlawfully, and burglariously break and enter the building of one Alexander Burrell." Counsel for defendant in his or their brief, if an unsigned paper in the usual form of a brief found among the papers in the case as they appear filed in this court is by us treated as a brief, say: "Appellant claims that this indictment is not good at common law because the words 'or thereabouts' relate to and qualify the word 'nighttime.'" This question was not raised in the court below, but is here presented for the first time. The question is not whether this indictment would be good "at common law." It is whether it is good under the statute of Nevada that governs the subject. The subject is governed by the sections following concerning indictments: Section 4199, Comp. Laws 1900, provides that the indictment shall contain " * * * a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Section 4206, Comp. Laws 1900, has the following: "The words used in an indictment shall be construed in the usual acceptance in common language, except such words and phrases as are defined by law, which are to be construed according to their legal meaning." Section 4208, Comp. Laws 1900, provides: " * * * Sixth. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. * * *" Section 4209 is as follows: "No indictment shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon, be affected, by reason of any defect or imperfection in matters of form, which shall not tend to the prejudice of the defendant. * * *" The foregoing enactments show that it was the intention of the Legislature of Nevada that in construing indictments the courts should not indulge in a too exact and overnice view of language, but that certainty to a common intent was all that should be required. True,

in the paragraph of the indictment under discussion, there is something of a departure from the best models of grammatical, rhetorical, or linguistic expression. But we think the paragraph meets the requirement of the statute that "the acts constituting the offense should be charged in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." To hold the indictment not fatally bad is, we think, to keep within the statutory command, as expressed above in section 4206, or at least not to depart too far from such command, to wit, to construe "in the usual acceptance in common language." We think the defect of the indictment complained of was such as, in the language of section 4209, above quoted, was a "defect or imperfection in matters of form, which did not tend to the prejudice of the defendant."

The language of the indictment could doubtless be made more accurate; but we think it is not fatally defective. In the brief of counsel for defendant the following correction is offered: "If the words 'or thereabouts' had been inserted after the words 'on the 11th day of May, 1904,' the indictment could not be the subject of criticism or assault." Perhaps the following phraseology might be considered an improvement on the phraseology of the indictment: "The said Paul Lovelace did in the nighttime of the 11th day of May, 1904, or in the nighttime of some day thereabouts, to the said 11th day of May, 1904, enter," etc. "Said Paul Lovelace did, in the nighttime, on or about the 11th day of May, 1904, * * * enter," etc., might perhaps be considered a still better collocation of words, although this is something of a departure from the form suggested in the statute concerning the form of indictments. That mere grammatical, punctuational (if verbal "free coinage" may be here allowed), rhetorical, or linguistic error does not always vitiate is fully sustained by decisions of courts and text-writers. The following notably excellent authority is cited to sustain this doctrine: *Cyclopedia of Law and Procedure* (Cyc.) vol. 6, p. 199, and authorities there mentioned. While this indictment in the respect mentioned is in truth inartistically drawn, yet under the statutes and the authorities above stated we cannot say that it is fatally defective. The sections of the statute above quoted show the legislative intent was that the courts of the state should give interpretations liberal to sustain, rather than rigid to overthrow, indictments, when, as in this case, substantial rights of defendants are not thereby prejudiced; and, as we have from the authority mentioned seen, even under the common law to overthrow this indictment would seem too rigid an interpretation.

Under the second head the error claimed is stated in the brief of counsel for defendant as follows: "On the trial of appellant the

deposition of one Ross taken at the preliminary examination was read in evidence, because he broke jail and escaped before the trial, and his presence could not be procured. He testified that he and appellant entered the store of Alexander Burrell on the day named in the indictment, stole a lot of amalgam of the value of about \$2,400, and buried it a short distance from the scene of the crime. Appellant claims there was no testimony corroborative of that of Ross, and that a conviction could not be had." In this contention counsel is, we think, clearly mistaken. Besides minor points of corroboration, not necessary to mention here, the testimony of the witness W. J. Davidson corroborates the testimony of the accomplice, Ross. Davidson testifies that the defendant requested him (Davidson) "to help him rob the store at Edgemont;" that is, the store that was robbed. Davidson further testifies that the defendant "told me he would have got the amalgam if something had not happened." The amalgam was the article stolen in the robbery. Davidson further testifies that the defendant was trying to dispose of the amalgam, the thing stolen, and asked Davidson this question, "What am I going to do about that damned stuff?" If this testimony was true, and its truth was a question entirely for the jury, there was corroboration of the testimony of the accomplice, Ross.

Defendant fails in sustaining either of his two points urged in argument for reversal of the judgment. The judgment is therefore affirmed.

TALBOT and NORCROSS, JJ., concur.

McCREADY v. RIO GRANDE WESTERN RY. CO.

(Supreme Court of Utah. Nov. 21, 1905.)

1. DISMISSAL AND NONSUIT—VOLUNTARY—AUTHORITY OF PLAINTIFF.

Under Rev. St. 1898, § 3181, providing that an action may be dismissed by plaintiff at any time before trial, if a counterclaim has not been made or affirmative relief sought by the answer, a plaintiff in condemnation proceedings, in which no counterclaim is made or affirmative relief asked for by the owner, is entitled as of course to dismiss the cause pending the selection of the jury.

2. COSTS—STATUTES—CONSTRUCTION.

The word "costs," as used in Rev. St. 1898, § 3181, authorizing plaintiff to dismiss an action on the payment of costs; in section 3190, providing that, on the dismissal of an action within the jurisdiction of the court, judgment for costs must be rendered, and in section 3605, declaring that in condemnation suits costs may be allowed, etc., in the discretion of the court—includes only the costs that are taxable under the statute in an action or proceeding.*

3. EMINENT DOMAIN—COSTS IN PROCEEDINGS TO CONDEMN LAND.

Under Rev. St. 1898, § 3606, providing that the provisions of the Code relative to civil actions shall be applicable to proceedings to condemn land, the rule governing the allowance and taxation of costs in civil actions must control in proceedings to condemn land.

*Davidson v. Munsey, 80 Pac. 743, 29 Utah, —.

4. SAME—DISMISSAL OF PROCEEDING—LIABILITY FOR EXPENSES INCURRED.

A railway company, dismissing in good faith its proceeding to condemn land for railway purposes pending the selection of the jury for the trial of the cause, is not liable to the landowner for the expenses incurred in preparing his defense which cannot be taxed as costs.

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by John McCready against the Rio Grande Western Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

On October 17, 1903, the Rio Grande Western Railway Company commenced an action in the Third district court against John McCready to condemn a portion of block 136, plat A, Salt Lake City survey, for railway purposes. The complaint was in the usual form, and, among other things, alleged that the land therein described and belonging to McCready was necessary for railway purposes. On May 31, 1904, said cause was called for trial and the impaneling of a jury proceeded with, which occupied the entire day. On June 1st, the second day of the trial, and before the jury had been fully selected, counsel for the railway company, in open court and without assigning any reason therefor, made a motion asking for a dismissal of the action. The court granted the motion, and the action was thereupon dismissed. On the 21st day of June, 1904, McCready commenced an action against the Rio Grande Western Railway Company to recover for certain costs and expenses incurred by him in the preparation of his defense in said cause, such as attorney's fees, expert witness fees, and his own personal expenses and loss of time, which were not taxable as costs under the statutory fee bill. The complaint, among other things, alleges that the suit—condemnation proceedings referred to—had been commenced, and recited the successive steps that were taken in the cause up to and including the dismissal of the action, but contains no allegation of malice or bad faith on the part of the railway company in instituting the suit, or of any unreasonable delay on the part of said company in the dismissal of the case. To this complaint the railway company interposed a demurrer, and alleged as grounds that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court and plaintiff given permission to amend, but he declined to do so, and elected to stand on his complaint, whereupon the court ordered that a judgment of dismissal be entered in favor of the defendant railway company and for its taxable costs incurred in the action, which was accordingly done. To reverse this judgment plaintiff has appealed to this court.

A. N. Cherry and Patterson & Moyer, for appellant. Sutherland, Van Cott & Allison, for respondent.

MCCARTY, J., after making the foregoing statement of the case, delivered the opinion of the court.

The decisive question presented by this appeal is whether a party who in good faith commences an action under the eminent domain act to condemn land is liable, upon a dismissal of the suit by such party, to the owner of the land for the expenses he was put to in employing counsel, hiring expert witnesses, and his own loss of time and expenditures made in the defense of such suit; that is, such expenditures as a party may be put to in preparing his defense that cannot be taxed as costs in the action. Section 3181, Rev. St. Utah 1898, so far as material in this case, provides as follows: "An action may be dismissed or a judgment of nonsuit entered in the following cases: (1) By the plaintiff himself at any time before trial upon the payment of costs, if a counterclaim has not been made, or affirmative relief sought by the answer of the defendant. * * *

By the court, when upon the trial and before the final submission of the case the plaintiff abandons it." Section 3190 provides that, "upon the dismissal or disposition of an action in which the court has jurisdiction of the subject-matter of the action, it is the duty of the court to render judgment for costs." In the condemnation suit under consideration no counterclaim was made or affirmative relief asked for by defendant. Therefore the plaintiff in that case, under the foregoing provisions of the statutes, was entitled as of course to have the case dismissed. And section 3005 provides that in condemnation suits "costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court." The term "costs," as used in the foregoing provisions of the statutes, refers to and includes only the costs that are taxable in an action or proceeding; that is, such costs and fees as are fixed and regulated by statute. Davidson v. Munsey, 29 Utah, —, 80 Pac. 743. Section 3006 of the eminent domain act, so far as material here, provides as follows: "Except as otherwise provided in this chapter the provisions in this Code relative to civil actions * * * shall be applicable to and constitute the rules of practice in the proceedings in this chapter." It is apparent from the foregoing provisions of the statutes that the same rule governing the allowance and taxation of costs in civil actions generally must control in suits commenced under the eminent domain act. There being no allegation in the complaint in this case of malice or bad faith on the part of defendant in bringing the action, or of delaying for an unreasonable length of time in the dismissal of the same, the underlying principle in the case, as stated by counsel for respondent in their brief, "is not merely whether upon the dismissal of a condemnation suit, but upon the dismissal of any case, the plaintiff, no matter how good

his motives may have been either in the institution or the dismissal, is bound to indemnify the defendant for expenses incurred in employing counsel, hiring expert witnesses, and for loss of time in consulting his lawyer and preparing his defense." As such losses and expenditures cannot, under our statutes, be taxed as costs in a case in the first instance, neither can they be made the basis for a recovery in an independent action, especially where, as in this case, there is no allegation in the complaint of malice or bad faith on the part of plaintiff in bringing the suit, or of an unreasonable delay in procuring its dismissal.

Counsel for appellant do not question the general proposition that in civil cases generally the defendant is not entitled, upon a dismissal of a suit brought in good faith, to recover for expenses made by him in preparing his defense which are not taxable as costs in the case; but they contend that in eminent domain proceedings to condemn land, because the plaintiff is given the right to acquire the title and possession of land without the owner's consent, a different rule should govern, and, in addition to the expenditures which the landowner is permitted to tax as costs upon a dismissal of the action, he should be permitted to recover for whatever other damages or losses he may have sustained by the institution of the suit. We know of no reason—and certainly none has been suggested or pointed out—why the exception contended for should be made in this class of cases. For aught that appears in the record, the defendant acted in perfect good faith in bringing its suit to condemn. And, so long as it acted in good faith, it cannot be held to be guilty of a legal wrong, as suits of this character are expressly authorized by the laws of this state, and, if the defendant in that case necessarily incurred expenses in that case in preparing his defense that were not taxable as costs in the action, it is a case of *damnum absque injuria*, for which no recovery can be had.

This same question has been before the courts of other states and, except in those jurisdictions where there are special statutes giving the courts discretionary powers in the allowance and taxation of costs in this kind of cases, they have almost uniformly held that only such costs as are taxable in civil actions generally can be collected by the landowners. In *Andrus v. Bay Creek Railway Co.*, 60 N. J. Law, 10, 36 Atl. 826, the plaintiff brought suit to recover counsel fees and other expenses incurred by him in defending a suit to condemn his land, which was dismissed before the commissioners had made their report assessing the damages. A demurrer to the declaration was sustained, and the plaintiff appealed, and the Supreme Court, in the course of the opinion, say: "At the argument the court intimated with some emphasis that the demurrer should be sustained, and subsequent reflection has served only to intensify that conviction. The diffi-

culty with the case as laid is that it exhibits a loss to the plaintiff produced by entirely legal conduct on the part of the defendant. It is a clear case of *damnum absque injuria*. There was no legal wrong done to the plaintiff by the institution of this procedure nor by its discontinuance. In all this there was no abuse of legal process. That such an action will not lie in such a condition of facts has always been the doctrine of the courts of this state. Over 80 years ago it was so declared, after full examination of the authorities." In *Bergman v. St Paul Ry. Co.*, 21 Minn. 533, the facts were substantially the same as in the case at bar, and the Supreme Court, in affirming the judgment of the lower court sustaining a demurrer to complaint, say: "If the plaintiff is entitled to recover, it must be by virtue of some contract, express or implied, or of some positive rule of law conferring upon him a right of action, or upon the ground that defendant has been guilty of tort. Certainly there is no contract here, nor is there any positive rule of law upon which plaintiff can base a right of action. Neither is there anything in the complaint tending to show any tortious or malicious conduct on the part of the defendant. On the contrary, defendant's proceedings are expressly admitted to have been duly and regularly taken as provided by law, and there is nothing whatever to raise a suspicion that defendant's motive or purpose in instituting, conducting, or dismissing the proceedings was not entirely proper. In other words, the complaint does not set up a cause of action in tort, nor assume to do so." *Felten v. City of Milwaukee*, 47 Wis. 494, 2 N. W. 1148; *San Jose Rd. Co. v. Wayne*, 83 Cal. 566, 23 Pac. 522; *U. S. v. Dickson* (C. C.) 127 Fed. 774; *Mayor of Baltimore v. Musgrave*, 48 Md. 272, 30 Am. Rep. 456; 7 Enc. Pl. & Pr. 686; 15 Cyc. 978. The judgment of the trial court is affirmed, with costs.

BARTCH, C. J., and STRAUP, J., concur.

KARREN v. RAINEY (KARREN, Intervener.)
(Supreme Court of Utah. Oct. 26, 1905.)

1. GIFTS—SUFFICIENCY OF EVIDENCE.

In a suit to quiet title, evidence held sufficient to support a finding that plaintiff gave the premises in question to defendant and her husband as owners in common, and that in pursuance of such gift defendant and her husband went into possession of the land and made improvements.

2. SPECIFIC PERFORMANCE—PAROL GIFTS—POSSESSION AND IMPROVEMENTS.

A parol gift of land, when followed by possession and the making of valuable and permanent improvements by the donee, may be enforced in equity.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 222.]

3. APPEAL—GROUNDS OF OBJECTION—STIPULATIONS IN JUDICIAL PROCEEDINGS.

Where parties to a suit to quiet title stipulate that a certain person, if present, would

disclaim any interest in the land, they cannot urge on appeal that he is a necessary party, because of some interest he may in fact have in the property.

4. TENANCY IN COMMON—ACTION BY CO-TENANT.

Under Rev. St. 1898, § 2919, providing that all persons holding as tenants in common, or as joint tenants, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of their rights, a tenant in common with defendant is not a necessary party to a suit to quiet title.

5. APPEAL—MATTERS REVIEWABLE—QUESTIONS NOT RAISED BELOW.

Where plaintiff and intervenor, in a suit to quiet title, without objection joined issue with defendant both in their pleadings and proof, they could not complain on appeal that defendant's counterclaim included a greater quantity of land than that described in the complaint.

Appeal from District Court, Cache County; J. F. Chidester, Judge.

Action by Hyrum Karren against Telitha Dean Rainey. George Karren intervened. From a judgment for defendant, plaintiff and intervenor appeal. Affirmed.

Plaintiff brought this action to quiet title to 40 acres of land; the same being described in his complaint as follows: The S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 6, township 14 N., range 1 E. of the Salt Lake meridian, Cache county, Utah. Defendant denied plaintiff's title, and by her amended counterclaim alleged that on October 9, 1893, Fred Karren, a son of plaintiff, and defendant intermarried, and that on October 11, 1893, plaintiff and his wife, Martha Karren, made a marriage gift to defendant of a piece of ground, 40 rods wide by 160 rods long, containing 40 acres, the same being the west half of the 40 acres described in plaintiff's complaint and the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of said section 6, the said plaintiff and Martha Karren then and there being the owners of said land; that under such marriage gift she and said Fred Karren entered into possession of said land and made improvements thereon, consisting of a dwelling house, granary, fences, and the planting of trees of the aggregate value of \$1,000, and thereafter resided upon and occupied the same under claim of right; and that she was and is the owner and entitled to the possession of an undivided one-half interest in and to said land. Defendant concludes with a prayer for judgment that she "be decreed to be the owner of the said land, and that plaintiff be required to execute and deliver to her a good and sufficient conveyance for the conveying of an undivided one-half interest in said premises, and for general relief." By way of reply to this counterclaim, plaintiff admitted that on the 11th day of October, 1893, he was the owner in fee and entitled to the possession of the land described in said counterclaim. By way of further defense, he alleged that prior to February 23, 1903, he was the owner in fee

of the north half of the land described in defendant's counterclaim, and that on said date he conveyed to Edward Leavit, his son-in-law, who, in turn, conveyed the land to George Karren (plaintiff's son); that by the terms of said conveyances plaintiff retains a vendor's lien upon said land, subject to a mortgage of \$600 executed by said George Karren and wife to the Utah Mortgage Loan Corporation, and that, aside from said vendor's lien, plaintiff has no interest in said 20 acres of land; and that the 20 acres so sold by plaintiff are the 20 acres claimed by defendant in her counterclaim not embraced within the land described in plaintiff's complaint. For a further defense to the counterclaim, plaintiff denied the alleged gift, and alleged that all improvements upon the land described in said counterclaim were placed thereon at his cost, and that defendant had no occupation or possession of said land, except as the wife of said Fred Karren, and that on the 17th day of September, 1900, a divorce was duly granted said Fred Karren against defendant, and that by reason of said decree defendant is estopped from asserting or claiming any ownership in the property described in her counterclaim. George Karren, plaintiff's grantee, filed a petition in intervention and claimed to be the owner of the north 20 acres of the land described in the counterclaim as a purchaser in good faith for value, subject only to the mortgage of \$600 in favor of said loan corporation and a vendor's lien in favor of plaintiff for \$600. Defendant, by her answer to said petition, alleged the marriage gift, the making of the improvements and the occupation of the premises set forth in her counterclaim, and that intervenor had knowledge of all of said facts. In the year 1900 trouble arose between defendant and her husband, and in September of the same year a decree of divorce was entered in favor of the latter. Neither alimony was allowed nor property awarded to defendant in the divorce proceedings, and no order was made therein respecting the property in controversy. On February 23, 1903, Hyrum Karren and wife conveyed by deed to Edward Leavit, who was their son-in-law, the north half of the 40 acres of land in question, and on said date said Leavit and his wife conveyed by deed the land to George Karren, who mortgaged the same to the Utah Mortgage Loan Corporation for \$600, of which \$600 was paid to plaintiff, Hyrum Karren. Leavit and George Karren at the time of said transfer had actual notice of defendant's claim to an undivided half interest in the property. The court decreed that neither the plaintiff nor the petitioner in intervention had any interest in the premises described in defendant's counterclaim, and that defendant was the true and lawful owner of an undivided one-half interest as tenant in common with said Fred Karren in said premises, and ordered and adjudged that plaintiff forthwith

execute and deliver to the defendant a deed conveying to her an undivided one-half interest therein as tenant in common, and that she have and recover from plaintiff and intervenor the sum of \$600, together with her costs.

J. Z. Stewart, S. R. Thurman, and Hurd & Wedgwood, for appellants. P. E. Keeler and F. K. Nebeker, for respondent.

McCARTY, J., after making the foregoing statement of the case, delivered the opinion of the court.

There is a sharp and irreconcilable conflict in the evidence on all material points, and questions of fact raised by the issues. Respondent testified: That at a wedding reception given her and her husband, Fred Karren, on October 11, 1893, Hyrum Karren, plaintiff herein, came and spoke to her as follows: "Well, Litha, I didn't bring a wedding present to-night. My wedding present to you and Fred is 40 acres of land in Lewiston. I gave the other two boys 40 acres of land, and that will be my wedding present to you and him." That about two weeks later, and after she and her husband had moved to Lewiston, plaintiff explained to her how the land lay and where it was with reference to the location of the land he had given the other boys. Quoting her own testimony on this point, she says: "He told me George's 40 was next to him, and then Vess's, and then he said the 40 he gave me and Fred was down on the west side of the quarter section. * * * It was always understood between Hyrum Karren and myself and husband that that was our 40 down there. * * * From the time of the conversation with plaintiff in October, 1893, up to the time trouble arose between myself and husband no person other than Fred Karren and myself claimed any interest or ownership in this land in controversy." That in 1896 plaintiff asked respondent and her husband why they did not build on the east 40 of the quarter section referred to, and they answered that they would rather build on their own 40 acres that he had given them and live on their own land. That at another time (June, 1896), when he had not been feeling well, he said (quoting witness' own language): "He thought he would go to a notary public and have the deeds made out to each one of us who owned the land." That in 1896 respondent and her husband erected a dwelling house and made other improvements on the land. That respondent personally assisted in the work, carrying adobe, helped build fences, set out trees, and did the cooking for the mechanics who worked on the building, and after the house was completed she and her husband moved into it as their home. That from October, 1893, to the time difficulty arose between herself and husband, July, 1900, Hyrum Karren said nothing to her with reference to his

desire to revoke the gift which he made to her in October, 1893. That the improvements placed on the land by herself and husband was of the value of \$1,000. Four other witnesses testified that they were present at the wedding reception referred to, and heard Hyrum Karren make the statement respecting the marriage gift attributed to him by respondent. The carpenters who built the house and made other improvements on the land in question testified that they were paid for work by Fred Karren, and it also appears from the record that he bought and paid for the lumber and other material used in the construction of the building. Evidence was also introduced of alleged statements made by Mrs. Karren, wife of appellant, which tended to show, and, if true, did show, that she concurred and joined with her husband, Hyrum Karren, in making the gift of this land to respondent and her husband. Appellant Hyrum Karren and his wife both denied making the statements attributed to them respecting the gift of this land, and denied that they ever gave the land or intended to give it to respondent and her husband or to either of them. Appellant also testified that he paid for the improvements that were made on the land in controversy; that after the wedding reception referred to until the fall of 1899 he and his sons, including Fred Karren, worked the entire farm of 160 acres in common, and in the fall a division was made of the products, each taking one-fourth; that he paid the taxes on the entire 160 acres, including the land in controversy; and that the boys, including defendant's husband, paid the taxes on the improvements, houses, etc., in which they were living. On this point respondent testified that Hyrum Karren and his three sons not only farmed the 160 acres in common, but, in addition thereto, farmed 200 acres of land in Trenton, and that in the fall of each year they all, Hyrum Karren and his three sons, got together, figured up the expenses, including taxes, and each one paid his proportion of the amount. Hyrum Karren further testified that in 1895 there was a family gathering at his home at which his three sons were present, and it was agreed and understood between them that appellant would transfer to each of his sons by a good and sufficient deed 40 acres of his land, the deeds to be delivered to his wife, Mrs. Hyrum Karren, and kept by her until each of the boys should deposit \$1,000 in the bank in favor of appellant, when each would receive his deed (this testimony was corroborated by members of his family and one other witness); that in pursuance of said agreement appellant made deeds conveying the different parcels of land to his three sons, including Fred, which were delivered to Mrs. Karren, who locked them up in her trunk; that subsequently Fred Karren, by means unknown

to appellant, Hyrum Karren, or his wife, got possession of the one in which he was named as grantee, but afterwards returned the deed to appellant, Hyrum Karren, who then and there destroyed it. Respondent was not present at the family gathering, and there is absolutely no evidence in the record that even tends to show that she was advised or had any knowledge of such an event or knew of the terms upon which the deed for the land in question was to be made and delivered to her husband. Respecting her knowledge of this deed, she testified that her husband brought it home in 1899 and returned it to appellant, Hyrum Karren, in the early part of January, 1900. Therefore, according to her testimony, it was three years after the improvements referred to were made before she knew of the existence of the deed from Hyrum Karren to her husband. It will thus be seen, as hereinbefore stated, that there is a substantial conflict in the evidence on all of the material questions of fact raised by the pleadings. We have made a careful examination of the record, and are not prepared to say that the findings and decree are not amply supported by the evidence, or that justice has not been done in this case. The judgment of the court must therefore be affirmed, unless the record discloses some error of law prejudicial to the rights of one or both of the appellants.

It is urged by appellants: That respondent and her husband did not take possession of the 40 acres of land in question in pursuance of the gift, nor was their possession such as the law requires in order to vest title in the donee under a gift, and, further, that whatever right respondent may have acquired, if any, by reason of the gift and possession, was that of the inchoate right of a wife, and not an undivided one-half interest as a tenant in common. There is evidence in the record which tends to show that respondent and her husband had a conversation with appellant, Hyrum Karren, in which they, in answer to a question asked by him, stated that they preferred to build on their own 40 acres that he had given them, so that they would live on their own land, and that immediately thereafter they erected a dwelling house on the land, and on July 13, 1896, moved into the house and resided there continuously until September 10, 1899, when they left temporarily for a few months only and came back again in July, 1900. That during all the time from the date of the alleged gift in October, 1893, until the commencement of this action respondent claimed an interest in the land. We think the evidence is sufficient to support the finding of the trial court that the gift was made to defendant and her husband, Fred Karren, as owners in common, and that in pursuance of such gift they went into possession of the land and made the improvements hereinbefore referred to. Therefore it necessarily follows that the

decree of the court awarding respondent an undivided one-half interest in and to the premises in dispute must be upheld. *Freeman v. Freeman*, 8 Am. Law Reg. (N. S.) 29; *Drum v. Stevens*, 94 Ind. 181; *Samuelson v. Bridges* (Tex. Civ. App.) 25 S. W. 636; *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665; *Galbrath v. Galbrath*, 5 Kan. 411; *Lobdell v. Lobdell*, 36 N. Y. 327; *Sower's Adm'r v. Weaver*, 84 Pa. 267; *Syler v. Eckhart*, 1 Bin. 378; *Smith v. Yocum*, 110 Ill. 142; *Bohanan v. Bohanan*, 96 Ill. 594. The doctrine that a parol gift of land, when followed by possession and the making of valuable and permanent improvements by the donee, can be enforced in equity is so well settled that a further citation of authorities seems unnecessary.

Appellants complain because Fred Karren was not made a party to the action. At the trial the parties to the action stipulated that Fred Karren, if present, would testify to certain facts which it is unnecessary here to enumerate. It is sufficient, however, to say that the evidence which appellants stipulated Fred Karren would give if present, would amount to, and, in fact, would be a disclaimer on his part to any right, title, or interest in the land in question. After having thus stipulated that Fred Karren, if present, would disclaim having any interest in the land, appellants cannot now be heard to say that he is a necessary party because of some interest he may in fact have in the property. Besides, section 2919, Rev. St. Utah 1898, provides that "all persons holding as tenants in common, or as joint tenants, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party. In all cases one tenant in common or joint tenant may sue his co-tenant." It seems that under this provision of the statutes, while Fred Karren may be a proper party, yet it is not absolutely essential that he be brought in in order for the court to determine the title to the land as between respondent and appellants.

Appellants further contend that it was error for the trial court to include in its findings and decree a specific performance of the north half of the 40 acres of land described in respondent's counterclaim, for the reason that this particular part of the land included in the gift was not brought in issue or even referred to in the complaint filed herein by Hyrum Karren. This contention is entirely without merit. Hyrum Karren filed an answer to defendant's counterclaim in which he denied all the material allegations relied on for a recovery in said counterclaim, and the case was tried by appellants upon the theory that the entire tract of the 40 acres of land was involved and properly before the court for adjudication. Having thus, without objection, joined issue with respondent both in their pleadings and proof, appellants cannot now be heard to complain that respondent's

counterclaim includes a greater quantity of land than that described in the complaint. A party cannot thus, when the court has jurisdiction of the parties to the action and the subject-matter involved, be permitted to experiment with the court in the trial of a case, and, if judgment is in his favor, claim the benefits resulting therefrom, and, if adverse to him, to successfully challenge in this court for the first time the regularity of the proceedings.

Complaint is made that, under the findings and decree as they now stand, appellant, Hyrum Karren, will not only be compelled to pay the \$600 awarded plaintiff in the judgment, but will be forced to pay the mortgage held by the Utah Mortgage Loan Corporation on the north half of the land in controversy. In order that there may be no uncertainty in the decree on this point, the judgment will be modified, and the appellant, Hyrum Karren, will be directed and required therein to make and deliver to respondent, as provided in said decree, a good and sufficient deed to said land, such conveyance to be subject to said mortgage.

The decree in all other respects, including judgment for the \$600, is affirmed, with costs.

BARTCH, C. J., and STRAUP, J., concur.

STATE v. ROLAND.

(Supreme Court of Idaho. Nov. 28, 1905.)

1. EMBEZZLEMENT—WHAT CONSTITUTES.

Where it is shown that R. procured a horse from J. to be returned the next day, and rode him to a distant point, then sold him and converted the proceeds to his own use, he is guilty of embezzlement.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, § 17.]

2. CRIMINAL LAW — TRIAL — REMARKS OF JUDGE.

Where it is shown that remarks of the trial judge, made in the presence of the jury in ruling on the admissibility of evidence, were not prejudicial to the defendant, or did not indicate to the jury the feeling of the court as to the guilt or innocence of the defendant, no error is committed.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3125.]

3. EMBEZZLEMENT—QUESTION FOR JURY.

Where it is shown that the contract for possession of the alleged embezzled property is made in one county, and it is disposed of in another county, and the court fully and fairly instructs the jury as to the law of the case, leaving that question entirely to them, it becomes a question of fact solely for their determination, and this court will not disturb their verdict, unless it is shown by the record that their verdict is not justified or supported by the evidence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1706.]

4. CRIMINAL LAW—TRIAL—INSTRUCTIONS.

Where the court instructs fully and fairly on every issue involved in the prosecution, it is not error to refuse requests of defendant cover-

ing the same issues, but couched in different language.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

William David Roland was convicted of embezzlement, and appeals. Affirmed.

G. W. Tannahill and G. Orr McMinimy, for appellant. John J. Guheen, Atty. Gen., for the State.

STOCKSLAGER, C. J. Appellant was charged with the crime of embezzlement in the district court of Nez Perce county, was convicted, and was sentenced to serve a term of one year and six months in the penitentiary of the state. This appeal is from the judgment, and from an order overruling a motion for a new trial. The information charges that on the 15th day of November, 1905, at the county of Nez Perce, in the state of Idaho, the aforesaid William Roland, then and there being, committed the crime of embezzlement as follows: "The said William Roland, on the 14th day of November, A. D. 1905, in the county of Nez Perce, in the state of Idaho, was intrusted with one bay horse of the value of seventy dollars by Charles F. Jackson, said horse being then and there the property of said Charles F. Jackson; that by the terms of the said trust said William Roland was to use said horse for his own benefit for a part of one day, and return said horse to Charles F. Jackson on the 15th day of November, A. D. 1904. That said William Roland did not return said horse to said Charles F. Jackson according to the terms of said trust, but did, on the 15th day of November, 1904, in said county of Nez Perce and state of Idaho, willfully, unlawfully, feloniously, and fraudulently convert said horse to his own use, and embezzle the same contrary to his said trust. * * *"

Counsel for appellant assign 30 errors occurring on the trial, but in their brief say that the case may be considered under three heads: The information failed to state facts sufficient to constitute an offense, for the reason that the information failed to charge such fiduciary relation as required by the statute to constitute the crime of embezzlement. The information further failed to charge and allege facts sufficient to admit of proof of the alleged conversion of the horse in Latah county, and the admission of this evidence over the objection of defendant was indefinite and uncertain as to the date of the alleged commission of the offense, charging the offense to have been committed on November 15, 1905, and that the defendant was intrusted with the horse on November 15, 1904. After the jury had returned a verdict of guilty, and prior to sentence, counsel for defendant filed a motion in arrest of judgment, which sets up that the information

is insufficient upon which to base any judgment, and that such insufficiency consists in this: (1) That it does not appear therefrom the circumstances under which the alleged offense was committed, or the time and place, with sufficient certainty to advise the defendant of the nature of the offense, and the information is insufficient to give the court any jurisdiction of the offense, the person of the defendant, or the subject-matter of the action. (2) That the information is ambiguous, unintelligible, and uncertain, and that such uncertainty consists in this: that it does not appear therefrom whether or not the offense was committed in November, 1905, or November, 1904, and affirmatively appears therefrom that the offense is charged to have been committed on the 15th day of November, 1905. (3) That it does not appear therefrom, or from the evidence, that the offense was committed in Nez Perce county, state of Idaho. (4) That the information as a whole is insufficient upon which to base a judgment.

It is clearly apparent that a clerical error exists in the information wherein it is charged that the crime was committed on the 15th day of November, 1905. It is shown that on the 15th day of March, 1905, the information was filed, and alleges that prior thereto defendant had had a preliminary examination, and was held to answer in the district court to the charge of embezzlement. Section 7687, Rev. St. 1887, says: "No indictment is insufficient, nor can the trial, judgment, or other proceeding thereon, be affected by reason of any defect or imperfection in matter of form, which does not tend to the prejudice of a substantial right of the defendant upon its merits." What possible right of the defendant was in jeopardy by reason of the error in the information? He was informed by the information that he was charged with embezzling the property of the complaining witness, and that he had disposed of such property in Moscow and converted the proceeds to his own use without the consent of the owner. The time was fixed elsewhere in the information, and it was certainly apparent to any one who examined the information that November 15, 1905, was intended for November 15, 1904. This being true, with the section of the statute above quoted, we are disposed to hold that it was harmless error, as it could not have prejudiced the rights or interests of the defendant in any particular.

It is also urged by counsel that the information is indefinite and uncertain as to the time of the commission of the alleged offense, and did not state facts sufficient to apprise the defendant of the nature of the offense alleged and the time of its commission or the circumstances under which it is alleged to have been committed, and is a fatal variance between the allegations of the information and the proof; the evidence showing that the horse was taken in Nez Perce

county and ridden to Latah county, and disposed of in the latter county. If we correctly read and construe the information, this contention must fail. Defendant was informed by the allegations of the information: That he had been intrusted with a certain horse by Charles F. Jackson in Nez Perce county, Idaho. The date is fixed as November 14, 1904. That he was to use said horse a part of one day, and return him to Charles F. Jackson on the 15th day of November, 1904. That he did not return the horse according to the terms of the trust, but on the 15th day of November, 1904, in said county of Nez Perce, willfully, unlawfully, feloniously, and fraudulently converted the horse to his own use, and embezzled the same. It occurs to us that this information was amply sufficient to inform the defendant what he had to meet in court upon his trial. In support of this contention that the information is defective, in that it is indefinite and uncertain, etc., counsel for appellant call our attention to *Duncan v. State* (Tex. Cr. App.) 70 S. W. 548. In this case it is said: "The charging part of the indictment is that appellant did then and there have possession of a mule, then and there the property of Joe Taylor by virtue of his contract of hiring with said Joe Taylor, and did then and there unlawfully, and without the consent of the said Joe Taylor, the owner thereof, fraudulently convert said horse to his, the said Richard Duncan's, own use." The court said, "A party could not have possession of a mule by virtue of a contract of hiring, and be convicted for converting a horse." We are certainly in full harmony with the conclusion reached by the Texas court above quoted, but no such defect exists in the information under consideration. Our attention is also called to *State v. Swensen* (Idaho) 81 Pac. 379. We find nothing in this case that lends aid to appellant in his contention that the information is defective.

It is next insisted by counsel for appellant that the rights of appellant were prejudiced by certain remarks of the trial judge in ruling on the admission of certain evidence. The eighth assignment relates to the excluding of the offer made by defendant as to what he would show by the cross-examination of witness Vosberg: "Q. We want to prove the condition Mr. Roland was in at the time, and where he was." In passing on the competency of this question the court said: "You are asking something that might put the witness in a wrong light, and the court is here to protect the witnesses generally." It would not seem that it would matter materially where Mr. Roland was, or what may have been his condition at the time he may have made statements of any character. It is next shown that the following question was asked of the witness Departee: "Did you ever know of him running a gambling den in the Red Light Saloon in Moscow?" The county attorney objected to this question, and the court said: "You need not answer the

question. There is no materiality about it. It is not proper."

The next assignment relates to a question of defendant's counsel to the same witness: "Did you know what his occupation was?" This question related to witness Robert L. Vosberg, to which the county attorney objected. In passing upon this question the court said: "We are not trying other people. We are trying the defendant. It is not necessary to go further. It is admitted he married this man's wife. There is no contention about that." It is shown by the record that Vosberg married the former wife of appellant, and defendant was evidently trying to show bias or prejudice of witness Vosberg against appellant. This could not be shown by the questions above referred to. The fact that he may have been engaged in an unlawful business was not sufficient to discredit his evidence. This court has expressed itself frequently on the danger of comment of any kind by the trial court on the admission or rejection of evidence, or any expression from which jurors might infer the feeling of the court as to the guilt or innocence of the accused. We do not find in any of the expressions of the court anything from which jurors could infer what the opinion of the learned judge was as to the guilt or innocence of the accused. Neither do we find error in the ruling of the court on the admissibility of the evidence.

This brings us to a consideration of the instructions given by the court, and the refusal to give certain requests of counsel for appellant. It is earnestly insisted by learned counsel for appellant that the evidence shows, if any crime was committed, it was committed in Latah county, and hence the court had no jurisdiction to try the case in Nez Perce county. We have read the evidence of all the witnesses, as well as the instructions of the court bearing on this question, and it seems to us that the determination of this question was left entirely to the jury to determine. By their verdict they said the crime was committed in Nez Perce county, and we do not see any reason why their verdict should be disturbed. The court instructed the jury very fully and fairly on every material issue involved, and, where that is true, there is no error in refusing requests by defendant covering the same issues. The judgment of the lower court is affirmed.

AILSHIE and SULLIVAN, JJ., concur.

DENNING v. CITY OF MOSCOW.

(Supreme Court of Idaho. Nov. 10, 1905.)

1. PROHIBITION—WHEN ISSUES.

Where it is shown that the city authorities are acting within the scope of the authority given therein by statute, the writ will be denied.

2. SAME—LEVY OF TAX.

The writ will not issue to prohibit the officers of a city from levying and assessing city property subject to assessment for the payment of certain bonds, and certify such levy and assessment to the county tax collector for collection "as other taxes are collected," under the provisions of subdivision 10, § 12, p. 34, Sess. Laws 1903, and section 86, p. 209, Sess. Laws 1899.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prohibition, § 33.]

(Syllabus by the Court.)

Action by Stewart S. Denning against the city of Moscow for writ of prohibition. Denied.

Stewart S. Denning, for petitioner. Jas. H. Forney, for respondent.

STOCKSLAGER, C. J. The plaintiff filed his application for a writ of prohibition. The facts are agreed upon, and we are asked to construe certain provisions of the Acts of the Legislature, Seventh session, and of the Eighth session. The facts, as agreed upon, are: That S. S. Denning is the owner of a certain lot of real estate situated within the corporate limits of the city of Moscow; that the said lot of land has been duly assessed, and a tax has been levied thereon by the city council of said city of Moscow for the purpose of constructing, maintaining, and operating a sewerage system; that, if the said city council shall certify the sewerage assessments to the county tax collector of Latah county, state of Idaho, thereby the said assessments will be increased upon property of the said S. S. Denning to the extent of 1½ per cent., and upon all other property within the corporate limits of the said city of Moscow to the extent of 1½ per cent. costs of collection; that this application is made for the purpose of ascertaining from this honorable court whether such assessments shall be collected by the proper officers of said city of Moscow, or whether the said city council shall certify all such assessments and taxes as are now due to the tax collector of Latah county and collect same in the same manner as other city taxes are collected. It is hereby further stipulated that the bonds heretofore mentioned were to be paid in five equal annual installments, and that no installment has yet been levied; that the city has paid all of its installments upon its municipal property, and that the city is not now, neither have they ever been, indebted, under subdivisions 3 or 4, § 12, p. 32, Laws 1903, by expending from the general funds any money in consideration of the benefits accruing to the general public by reason of such sewerage improvement, nor have any ordinances ever been passed since the passage of the construction ordinance "providing for the payment of the costs and expenses thereof by installment, instead of levying the entire tax for special assessments for such costs at any one time." The writ was not issued; the stipulation in its last clause asking that the case be heard as to

whether or not the writ shall issue. The action is against the city of Moscow to prohibit the mayor and city council from certifying an assessment and levy to the assessor and tax collector of Latah county for the purpose of paying the first installment of certain sewerage bonds issued under the provisions of an act of the Legislature in 1903.

Counsel for plaintiff in his brief says: "There is but one question presented, and that is: What is the proper mode of assessing, levying, and collecting the several installments on the bonds in accordance with the act of 1903?" It is shown by the application that during the year 1902 the city council of the city of Moscow duly levied and assessed certain taxes for sewerage improvements, and for the purpose of constructing, maintaining, and operating a sewerage system within the corporate limits of the city of Moscow; that there is now due and unpaid on said sewerage assessments the sum of \$28,000. Counsel for plaintiff insists that by the provision of the law of 1903 there are two schemes, either of which may be followed for the payment of the indebtedness contracted in the building of the sewer as against the property benefited. Subdivision 10 of section 12 (page 34) of the act provides that "All such assessments shall be known as special assessments for sewerage assessments and shall be levied and collected as separate taxes in addition to the taxes for general revenue purposes to be placed on the tax roll for collection subject to the same penalties for collection and in the same manner as other city, town or village taxes." Section 11 of the act provides "that whenever the mayor and council shall cause any sewerage work or improvement to be done under the provisions of this act the expense is chargeable to the property within the boundary lines within the sewerage district laid out under the provisions of this act, they may in their discretion provide for the payment of the costs and the expense thereof by installments, instead of levying the entire tax for special assessments for such costs at any such time and for such installments they may issue in the name of the city, town or village improvement bonds of the district, which shall be known and designated as special assessment sewerage improvement bonds." Subdivision 12 of section 12 (page 37) provides: "Such bonds when issued to the contractor constructing said work or improvements in payment thereof, or when sold as above provided, shall transfer to the contractor, or other owner or holder, the right or interest of such city, town or village in or with respect to every assessment, and the lien thereby created against the property of the owners assessed who shall not have availed themselves of the provisions of this act in regard to their property, as aforesaid, shall authorize said contractor, and his assigns and the owners and holders of said bonds, to receive, sue for

and collect every such assessment embraced in any bond by or through any of the methods provided by law for the collection of assessments for local improvements. And if the city, town or village shall fail, neglect or refuse to pay such bonds or to properly collect any such assessments when due the owner of any such bonds may proceed in his own name to collect any such assessments and foreclose the lien thereof in any court of competent jurisdiction, and shall recover, in addition to the amount of such bonds and interest thereon, five per cent, together with the costs of such suit." Subdivision 15 of section 12 (page 38) provides that "the holder of any bond issued under the authority of this act shall have no claim therefor against the city, town or village by which the same is issued in any event, except for the collection of the special assessment made for the work or improvement for which said bond was issued; but his remedy in case of nonpayment shall be confined to the enforcement of such assessment."

After calling our attention to the above quotations of the Session Laws of 1903, counsel for plaintiff asks the question: How far is the city liable upon those bonds for the bondholder? If the city should be negligent in making the assessment and levy, how long should this negligence continue before the bondholder can bring an action against the city, or a writ of mandate against the city council, compelling them to make the assessment and levy? We have carefully reviewed the law of this case to which our attention has been called, and, so far as the only question we deem of importance at this time is concerned, we do not find much embarrassment in determining it; that is, is the city, through its officers, properly proceeding to collect the revenue with which to meet the obligations of the city on the outstanding bonds? It seems that the city of Moscow has certified the sewerage taxes to the county tax collector to be collected as "other taxes are collected." It is conceded by counsel for the city that there is no provision in the act of 1903 permitting the city to state when their respective assessments are due, or to become due; that is, there is no authority granted by said act authorizing the city of Moscow to fix the time when these respective installments shall become due. But our attention is called to section 86, p. 209, 5th Sess. Laws 1899. This section reads: "The council or trustees of each city or village shall at the time provided by law, cause to be certified to the county tax collector the percentage or number of mills on the dollar of tax to be levied for all city or village purposes by them on the taxable property within said corporation for the year then ensuing as shown by the assessment roll for said year, including all special assessments and taxes assessed as hereinbefore provided, and the said tax collector shall

place the same on the proper tax lists to be collected in the manner provided by law for the collection of state and county taxes." There is no attempt in the act of 1903 to repeal the above provision of the act of 1899, neither do we find anything in the law of 1903 that in any way conflicts with that provision of the act of 1899. It may have attempted to provide another remedy for the bondholder, but it did not relieve the city authorities from the duty of providing revenue for the payment of its outstanding obligations. Construing the two acts together, we think the duty of the city authorities is plain, and that they are only acting as the law requires, when they certify the sewerage taxes to be collected, to meet the obligations of the city, to the county tax collector to be collected "as other taxes are collected." The writ is denied.

SULLIVAN and AILSHIE, JJ., concur.

(11 Idaho, 433)

STATE v. WETTER.

(Supreme Court of Idaho. Nov. 24, 1905.)

1. CRIMINAL LAW—APPEAL—WAIVER OF OBJECTIONS.

Where an information charges murder, and a demurrer is filed which is overruled by the court, and no error is predicated on such ruling in this court, it will be treated as waived.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2954, 2964.]

2. SAME—REFUSAL OF CONTINUANCE.

Where an application for a continuance is filed and overruled by the court, it will only be reversed in this court where it is shown that there was an abuse of discretion in the court below.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3045.]

3. SAME—DEPOSITIONS—REFUSAL OF LEAVE TO TAKE—DISCRETION OF COURT.

Where there is an application to take depositions outside of this state, and such application is denied by the lower court, and it further appears that the evidence sought to be procured would not change the result of the trial, the action of the lower court will not be disturbed. The granting or refusal of such application being within the discretion of the trial court, it will only be disturbed where it is shown that there has been an abuse of such discretion.

4. SAME—OBJECTIONS TO EVIDENCE.

Where a witness is asked a question that in itself is immaterial, and no foundation is laid by which it may become material, a ruling sustaining the objection will be sustained.

5. SAME—DEFENSE—INSANITY.

Where the defense is insanity, it is always brought into the case by the defendant, and until he furnishes such evidence of insanity, at least sufficient to raise a question of doubt in the minds of the jurors, the prosecution may rest upon the legal proposition that all men are supposed to be sane and legally responsible for their acts.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 742, 1286.]

6. SAME—APPEAL—REVIEW.

Where it is shown that the instructions, taken as a whole, correctly state the law and are uniformly fair to the defendant, and that from

the entire record no possible benefit could flow to the defendant from granting a new trial, the judgment will be sustained.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2212.]

(Syllabus by the Court.)

Appeal from District Court, Idaho County; E. C. Steele, Judge.

Rudolph Wetter was convicted of murder, and appeals. Affirmed.

W. N. Scales, for appellant. John J. Guheen, Atty. Gen., Edwin Snow, and F. S. Wettach, for the State.

STOCKSLAGER, C. J. The prosecuting officer of Idaho county filed an information in the county charging the defendant with the crime of murder. The charging part of the information follows: "That the said Rudolph Wetter, on or about the 19th day of July, 1904, at the county of Idaho, state of Idaho, then and there being, did then and there, willfully, deliberately, premeditatedly, unlawfully, feloniously, and with malice aforethought kill and murder one Christ Long, a human being, by then and there willfully, deliberately, premeditatedly, unlawfully, feloniously, and with malice aforethought, shooting at, in and upon the body and person of the said Christ Long, with a certain gun, to wit, a rifle, the same then and there being a deadly weapon, and then and there loaded with powder and leaden ball and then and there held in the hands of the said Rudolph Wetter, and the said Rudolph Wetter did then and there, willfully, deliberately, premeditatedly, unlawfully, feloniously, and with malice aforethought, wound, kill, and murder him, the said Christ Long."

Counsel for appellant demurred to the information: First, "that said information does not state facts sufficient to constitute a public offense; second, that said information does not substantially comply with the requirements of sections 7677, 7678, 7679, of the Revised Statutes of Idaho of 1887." This demurrer was overruled, and an exception saved, but counsel for appellant does not urge the ruling of the court as error; hence we infer after more mature deliberation he abandoned it, at least we will treat it as waived. It is also shown that at the time fixed for defendant to plead his counsel filed a motion to set aside the information. This motion was overruled, to which ruling an exception was saved. Counsel for appellant does not urge this ruling as error; hence it will be treated waived also.

On the 9th day of September W. N. Scales, counsel for appellant, filed a motion supported by his affidavit for a continuance of the case until a future term of the court. In this affidavit it is shown that the preliminary examination was had on the 1st and 2d days of August, 1904, and the defendant held to answer, and that on the 5th day of September thereafter the county attorney filed an in-

formation charging defendant with murder in the first degree, and on the same day filed a second information, charging the defendant with a like offense. The affidavit then states that one of the defenses to be interposed, and which will be a substantial and material part of the defense, will be that at the time of the alleged offense defendant was insane and not responsible for any act committed at that time; that affiant has been informed that some of the near relations of the defendant have been or are insane; that affiant has been informed that a brother of defendant is insane and was confined in the insane asylum in California. Then the affidavit states that affiant had addressed a letter to the "Superintendent Insane Asylum, Asylum Station, California," in which affiant had requested said superintendent to inform him whether said brother of defendant was confined in said asylum, the cause of such insanity, how long he had been there, what form it assumed, whether he was cured, and where he now was; that affiant informed said superintendent of the great importance of the information sought and the necessity for a prompt response; that said letter was duly mailed; that afterward it was returned with the San Francisco and another postmark, for better direction; that affiant has been informed that said address was correct. Affiant was also informed that said brother was admitted to the insane asylum under the name of Jos (or Thomas) C. Brainbridge; that thereafter defendant received a letter, addressed on the inside "Dear Brother," and signed "Your sister, Amelia," therein giving her address as New Hope, Pa.; that said letter bore the postmark "Grangeville, Idaho, Sept. 1st, 1904," and "New Hope, Pennsylvania, Aug. 22, 1904," and was handed thereafter to affiant, in which appears this, "I had hoped Charley was the only one of the family who would show any signs of insanity." Affiant has never had any communication with any member of the family, did not know their address, and the last-mentioned letter seems from its reading to have been written on account of information received from one Mrs. Campbell, post office, Resort, that the defendant was in trouble. From what affiant has heard and from said letter, he is thoroughly convinced that the defendant has near relatives, or a near relative, insane, or who has been insane. Then it is stated that affiant will be unable to ascertain the facts in regard to the insanity of the near relatives of defendant in time for trial at the present term of court; that defendant has no relatives in Idaho, as far as affiant knows or believes; that there is no witness or person in this state that this affiant knows or has known of by which he can prove anything about the insanity of the relatives of defendant; that such testimony will be absolutely necessary and material in the defense of the defendant; that affiant is convinced that, if this action is postponed

until the next regular term of this court, he can either have a personal attendance of some person who will testify in regard to the insanity of the near relatives of the defendant, otherwise he can obtain a deposition of such person or persons, and a deposition of the superintendent of the insane asylum in which said brother was detained; that affiant cannot obtain at the present term of court the facts necessary to make a fair and just defense of the defendant, and without the evidence indicated herein the defendant cannot safely go to trial; that affiant cannot state the exact facts which he will be able to prove in regard to the insanity of the near relatives of the defendant, nor can he ascertain them from the defendant, who has been, as affiant is informed, long absent from his home, and knows nothing of his own knowledge about the same, nor can affiant give the names of the witnesses by whom he can prove the same, but affiant is certain that, if this cause be postponed, he can prove that the brother of the defendant is or has been insane, and possibly other near relatives of defendant, can show the form such insanity assumed, and all necessary facts in connection therewith; that affiant is informed that the home of defendant was in the state of Pennsylvania; that his relatives live there, and much of the evidence which he expects to procure in regard to such insanity must come from said state.

This motion was overruled on the 9th day of September, 1904, and at that time the court fixed the time for trial for September 19, 1904. On the 10th day of September another motion was filed, which counsel for appellant terms a renewal of his motion of the 9th, and supports it by his own affidavit and that of appellant. The affidavit of Mr. Scales contains no new matter as to the alleged insanity of defendant. It sets out that he has not sufficient time to prepare for the defense of defendant; that the place of the alleged offense is about 70 miles from Grangeville, his residence, and the county seat, in the mountains; "that it will be necessary to take depositions of witnesses out of the state of Idaho in regard to the insanity of the near relatives of defendant or to have their personal attendance, neither of which can be done in time to try the above entitled cause at this term of the above entitled court." The affidavit of defendant shows that he has a brother, Charles A. Wetter, who is insane, the nature and form of which insanity he does not know; that he has a father, mother, and sister living in Pennsylvania, post office, Furlong; that he has no relatives in the state of Idaho; that there is no person in the state of Idaho by whom he can prove anything about the insanity of his said brother; that said brother was confined in the insane asylum in the state of California; that the "Charlie" referred to in the letter of his sister mentioned in the affidavit of W. N. Scales is that brother; that, if

this action is postponed for the term, he can and will have the depositions for personal attendance of his father, mother, or sister, giving the facts and circumstances of the insanity of said brother, and possibly other members of the family; that he can and will have, at the next term, the deposition of the superintendent of the Insane Asylum in California, in which his brother was confined; that since the alleged offense affiant has been deprived of his liberty, and has had no opportunity to prepare his defense, and is not prepared at this time to go to trial; that affiant has no money, but in a letter of his said sister referred to she in substance offers to aid said affiant in any way she can, but affiant did not receive said letter until during the present month. This motion was overruled. The next step shown by the record was an "application for examination of witnesses." It was for an order of the court that a commission be issued to take the testimony of Rebecca Wetter, Ramsey C. Wetter, and Amelia Magill, all of Furlong, state of Pennsylvania, to be used on behalf of defendant at his trial. This application is supported by the affidavit of defendant and W. N. Scales, his counsel, in support of the two applications for continuance. In his affidavit defendant recites the facts of the filing of the information on September 5, 1904, and the plea of not guilty September 8th, then recites that he desires the testimony of his father, mother, and sister, and reiterates that they reside at Furlong, Pa., and will testify as to the fact of the insanity of the brother of defendant, the form of such insanity, and all facts and circumstances in connection therewith; that such testimony is necessary and material in behalf of defendant in the trial of his case.

On the 14th day of September this application was heard by the court, and the following order made: "The above entitled matter coming on to be heard on the 14th day of September, 1904, at the hour of 9 o'clock a. m., on the motion and application of the defendant for the court to grant a commission for the taking of depositions of witnesses alleged to be residing outside of the state, it appearing to the court that the defendant in his showing, in support of his motion and application, has failed to make said showing until said cause was set for trial, and that the time is too short to procure any of said depositions, and witnesses have been subpoenaed on behalf of the state, and a great many of whom reside a long distance from here, and already a big expense in securing them has been incurred, and that the granting of said commission would be useless for above reasons, and the showing is too indefinite and uncertain as to what the defendant expects to prove by said witness. It is therefore ordered that said motion and application to take depositions is hereby denied. Edgar C. Steele, Dist. Judge."

It is next shown that on the 10th day of September, 1904, defendant caused to be issued a subpoena for William De Moss and others, and that said subpoena was placed in the hands of the sheriff of Idaho county on the same day for service, and was returned on the 16th day of September, 1904, with witness De Moss not served. Defendant files a motion for continuance based on the affidavit of W. N. Scales, his counsel, and the affidavits of Mr. Scales and defendant in support of other motions for continuance heretofore referred to. After stating all the facts relative to the action of the court in denying his former motions for continuance, Mr. Scales testifies that on the 10th day of September, 1904, he telegraphed to the sister of defendant at Furlong, Pa., asking her to come to Grangeville, Idaho, where this trial is to be held, and on September 16, 1904, received a letter from said sister, Mrs. Amelia Magill, in which she stated: "It is impossible for any of the family to come out, owing to lack of money." Also this: "Personally, we have no doubt as to Rudolph's [meaning the defendant] insanity." Affiant says that inclosed in said letter was a letter to Mr. Wetter from A. Stanley Dolan signed as "Acting Medical Superintendent," the letter head on which said letter was written bearing the name "Southern California State Hospital." The letter is attached and made a part of the affidavit. "Affiant is satisfied that, if time is given him, he can get the depositions of the officers of that asylum to be used in this action, showing the insanity of defendant's brother, with the facts and circumstances and form thereof. Affiant had learned today that Peter Corlskin, of Meadows, Idaho, has known defendant well and intimately and will testify to the good character of defendant, and at least that he considered the defendant 'off' at times, but the exact nature of his testimony affiant has been unable to learn, as the defendant gave him no information as to this witness, and affiant learned it from one of the witnesses now present, Mr. Goodman; that De Moss, one of the witnesses for the defendant, and for whom a subpoena was issued, has not been found, and affiant is informed that he is now in Walla Walla, Washington; said De Moss was a partner of defendant and lived with defendant in the same cabin, as defendant informed affiant, and was present just before defendant committed the alleged offense, and knows what occurred just prior to said alleged offense; that affiant has not been able to learn what said De Moss will testify to on account of the limited time which he has had to prepare the defense of defendant, and defendant has not been able to inform affiant as to what said De Moss will testify to, and defendant cannot safely go to trial without said witness." The letter above referred to is as follows: "Mr. Wetter, Borough of New Hope, Banks Co., Pa.—

Dear Sir: Charles A. Wetter, who is a patient in this hospital, has repeatedly written to his friends and received no reply. He is very much distressed and quite despondent from this fact. Will you please answer him? He was committed here under the name of Brainbridge. I enclose a letter addressed to me by him, which shows how he feels regarding this matter. A. Stanley Dolan, Acting Medical Supt." The above letter is dated November 3, 1898, and from Patton, Cal. On the 19th day of September this motion was denied.

It has seemed best to give almost verbatim the showing made by the defendant in his affidavits for a continuance of the case until a future term of the court, for the reason that his learned counsel insists that the court erred in not granting a continuance, and also in refusing his application to take the depositions of witnesses in Pennsylvania. An examination of the record convinces us that, unless there is error in the orders of the court overruling defendant's motions for continuance, his application to take depositions, or his instructions to the jury on the question of insanity, the judgment must be affirmed, as the record abundantly shows that, unless the defendant was insane at the time of the commission of the homicide to such an extent that he was not responsible for his acts, the verdict of the jury was entirely justified. Indeed, counsel for defendant rests his entire argument on the alleged errors of the court in refusing to permit him to show that a brother of defendant had been committed to the insane asylum in California, at some time in the past, and the instructions of the court on the law where the plea of insanity is interposed.

It is first argued by counsel for appellant that defendant was unduly forced to trial, and without sufficient time to prepare his defense. A careful reading of the affidavits in support of the applications for a continuance does not convince us that there is much merit in this contention. It is only shown that a continuance of the hearing of the case would result in establishing the fact that a brother of defendant had at some time been committed to an insane asylum in California. It is not shown or intimated the nature or cause of such insanity, or whether it was hereditary. Unless hereditary, it would certainly be of but little assistance to defendant in his defense on the plea of insanity. In the order of the court denying defendant's application to secure the evidence of the close relatives of defendant in the state of Pennsylvania it is stated that this "application was not made until after the cause was set down for trial, * * * and the showing is too indefinite and uncertain as to what the defendant expects to prove by said witnesses." It will be observed that at no time or place in the

record is it shown just what defendant expects to prove by his eastern relatives, excepting that a brother was confined in the asylum of California, and a possibility that it may be shown that other instances of insanity might be traced in the past history of defendant's ancestors. Even if all these facts should be conceded by the prosecution, still, upon the trial evidence of witnesses who were intimately associated with defendant at and about the time of the alleged homicide, who heard what he said, observed what he did, his condition just prior to and immediately following the commission of the alleged crime, his threats and the reasons he gave for the commission of the act, all these would be considered by the jury in their efforts to determine the condition of defendant's mind, and whether or no he was in that condition mentally that he did not know he was committing a crime against the laws of nature and man. The mere fact that insanity may exist in his family is not of itself sufficient to excuse the defendant from the responsibility he owes to his fellow men, neither would it avail him if he were able to prove by the witness Peter Corlakin that he was "off" at times.

The question to be determined in cases of this character is, was the defendant at the time of the homicide so mentally unbalanced that he was not responsible to God or man for the commission of the act? If he mentally knew it was wrong to take the life of a human being, and under these conditions did commit the offense charged to him by the information with malice, hatred, or revenge, he is morally and legally responsible for the act and should suffer the consequences. He might at times be "a little off," and yet entirely responsible at the time of the commission of the crime charged to him. It might be that insanity existed in his family from its earliest history, and yet that would not excuse him. It would only be a circumstance in his favor, to be considered with other evidence as to his past history, his language, acts, and conduct at the time of the homicide and prior thereto. In fact, anything in his past life showing any indication of insanity should and would be considered by the jury. It would be a very dangerous precedent to say that because insanity existed in his family he should have immunity. Further than that, it should be considered in connection with other evidence in the case showing the condition of defendant's mind at and about the time of the homicide. It is true it would be a strong circumstance to show that he was not so mentally and morally depraved as to take the life of two human beings and attempt the life of the third, but, nevertheless, it would still be incumbent upon him to show that legal insanity, and not moral depravity, prompted the act. Human life is very sacred in the eyes of the law, and, whilst courts

should always guard with the utmost diligence the rights of all parties charged with crime, at the same time they should be watchful of the rights of the people and not permit parties charged with homicide to go unpunished on the plea of insanity, unless there is a foundation in fact, reason, and justice to believe that the insanity was of such a character that the party pleading it was so mentally unbalanced that he was not responsible for his conduct. We do not wish to be understood as holding that hereditary insanity, or the insanity of a brother or sister, or the insanity of any near blood relation of the party charged, may not be shown; to the contrary, we are of opinion that such evidence is entirely competent, and when introduced should be carefully considered by the jury. The question is, was the showing sufficient under the facts in this case to warrant the court in granting a continuance of the case or granting an order to take depositions, which would have necessitated a continuance until another term of the court? It will be observed that there is no positive statement that hereditary insanity exists in the family of the defendant. There is a positive statement that a brother of defendant had been confined in an insane asylum in California. This may have been an isolated case in that family. There are numerous causes for this dreaded malady, and by no means always traceable to heredity. Intoxication and self-abuse are frequently responsible for insanity. In this case learned counsel for the state in his oral argument in this court saw fit to refer to the defendant as having "crowbar" insanity, a speeche with which we are not familiar, but doubtless he based it on the evidence of defendant who testified that at some time a crowbar had fallen on his head and thereafter it had affected his mind at times. Counsel for appellant cites Lawson's Criminal Defenses, vol. 2, p. 465; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162, by that eminent jurist and chief justice, Cooley. We are in full accord with all that is said in that opinion, but the facts in that case and the one at bar are entirely different.

It is earnestly urged by counsel for appellant that he was not given sufficient time within which to prepare his defense. It is shown that the alleged homicide was committed on or about the 19th day of July, 1904. The preliminary examination was held on the 1st day of August, 1904. The information was filed September 5th, and the time for trial fixed for September 19th thereafter. It will thus be seen that counsel had from the 1st day of August until the time of the trial to correspond with the relatives of defendant in Pennsylvania. The only information he could get was that they were unable to be present at the trial for "lack of money," as stated by the sister of defendant. It seems that the family knew that a brother

of defendant had been committed to an insane asylum in the state of California in the year 1898, or was an inmate of said institution at that time, as shown by a letter of the acting superintendent to the father of defendant. It may be that the learned trial judge was satisfied that a continuance of the case until a future term of court would result in no benefit to defendant from any evidence he might procure from his relatives in Pennsylvania. The evidence taken on the preliminary examination was accessible to him, and from that he may have been thoroughly convinced that any evidence of hereditary insanity in the family of defendant would be of little weight compared with the threats, actions, and conduct of defendant at and about the time of the commission of the homicide, and it is not denied that defendant committed the act. That the granting or refusing to grant a continuance is largely within the discretion of the court has long been settled in this state. In *Territory v. Guthrie*, 2 Idaho (Hasb.) 432, 17 Pac. 39, in an opinion by Mr. Justice Broderick, it is said: "An application for a continuance is addressed to the sound judicial discretion of the court, and appellate courts have uniformly refused to disturb a ruling on such questions, unless it appears that there was an abuse of discretion." Practically the same language is used in *People v. Walter*, decided by our territorial Supreme Court in 1891, 1 Idaho, 386. The last expression of this court to which our attention has been called is in *State v. Rice*, 7 Idaho, 762, 66 Pac. 87. On this subject the syllabus says: "Refusal to grant a continuance being a matter legally within the discretion of the lower court, a judgment of conviction will not be reversed by reason of such refusal, unless it is apparent from the record that such discretion has been abused, and that defendant has been prejudiced thereby." The reason of this rule is so sound and well settled that a discussion would seem unnecessary. It has its origin in the fact that the trial judge is cognizant of all the facts and conditions existing from the earliest stages of the proceedings and is presumed to enforce the law in such a manner that all parties charged with crime shall have a fair and impartial trial. It is equally his duty to see that the law is administered and guilty parties brought to justice and required to pay the penalty of their crimes without unnecessary delay.

It is urged by the Attorney General and his associates that many witnesses could have been produced at the trial who were acquainted with the defendant at that time and for months just prior to the homicide. Indeed, many witnesses were examined who were acquainted with defendant, and who testified as to his threats, actions, and conduct immediately before the commission of the act, and what he said and did thereafter. With all these facts before us, can we say that the testimony of his father, mother, or sister

(who have not seen him for years) that a brother of defendant had been an inmate of an insane asylum, or the testimony of the superintendent of such institution that at one time he had in his care a brother of defendant, or the testimony of Peter Corlskin that he thought at times defendant was "a little off," could overcome the direct and positive statements of witnesses who were in his company and observed his actions, heard his language in the way of threats just prior to the homicide, and what he said after the commission of the act? We are of the opinion that the presence in court of all the witnesses whose testimony defendant asked time to procure would not have changed the result in the least. In *State v. Rice*, supra, in the fifth clause of the syllabus, it is said: "An order denying a continuance upon the ground that a witness whose testimony is desired by the defendant is not ground upon which a reversal can be based, where it appears from the record that the testimony of such witness could not have changed the result of the trial." It is shown by the record that defendant testified that he attributed his trouble to an accident, and not traceable to his parents or ancestors, and that a crowbar had once fallen on his head and ever since he has had severe headaches, accompanied by dizziness. That he fully knew and understood what he was doing is shown by the testimony of Wm. Allen, who testified: "I heard him make threats about ten days before this. He always called Mr. Long 'this Dutchman.' He says: 'If that Dutchman ever comes over here, I'll fix him plenty.' He was sitting in a wheelbarrow and the handle of a revolver was sticking out of his pocket. I could see it all the time. 'I have got a little thing right here that will do the business,' he says, 'I am carrying it on purpose for him.'" Other threats are shown, and it is also shown that after the homicide he met some parties on the trail and said to them: "I have meat over there. I think I have killed a dutchman in the cabin; I don't know whether I got any more, they ran so fast. They were too swift for me." A number of witnesses testified that he had been drinking liquor that day and was intoxicated at the time he started to the cabin, the scene of the homicide. In prescribing the duties of the court in applications to take testimony outside of the state and of the character of the one in this case, section 8181, Rev. St. 1887, says: "If the court or judge to whom the application is made is satisfied of the truth of the facts therein stated, and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony, and the court or judge may insert in the order a direction that the trial of the indictment be stayed for a specified time, reasonably sufficient for the execution and return of the commission." With the discretion given the

trial court to determine questions of this character, with the evidence of defendant himself that he only attributes the condition of his mind at times to an injury, with his threats repeated to different ones and his execution of them, we do not think the trial judge abused the discretion reposed in him by the refusal of the application for continuance or the refusal to grant the order to take testimony.

The next assignment of error is based upon the refusal of the court to permit the defendant to answer the following questions: "Where was your brother the last you knew of him?" The witness prior to the question had testified where he had resided for a number of years; that he had lived in Idaho county about 10 years; was born in Pennsylvania; had no relatives in Idaho; his sister, brother-in-law, father, and mother reside in Pennsylvania; that he had a brother not in Pennsylvania. Then follows the above question. The county attorney objected to the question as immaterial. The objection was sustained. It will be observed that there was no foundation laid for this question. The court was not informed of the purpose or why it was material. Until there is some reason shown why it was material where the brother of defendant was the last he knew of him, it was certainly immaterial, and there was no error in sustaining the objection.

Specification of error No. 6 is based upon the first instruction given by the court, to wit: "Murder is the unlawful killing of a human being with malice aforethought. An unlawful killing means any killing of a human being which is not justifiable or excusable by the law as explained herein. The phrase 'malice aforethought' means a thing done with a wicked and corrupt motive. It is not confined to anger, hatred, and revenge by one against another, although it evidences a thing done through anger, hatred, or revenge. It also evidences any other unjustifiable motive with which the act is done. Hence, malice is not confined to ill will which one individual holds toward another, but it is intended to denote any action flowing from a wicked and corrupt motive. A thing done with a wicked mind, when the act has been attended with such circumstances as evince plain indications of a heart which regards not its social duty, and which is fatally bent on mischief, is done with malice." It is suggested by counsel for the state that this instruction is almost a literal copy of the definition of malice found in Mr. Blashfield's excellent work on Instructions to Juries, vol. 2, instruction 1482, p. 611. An examination of this authority sustains the contention of the Attorney General. Mr. Blashfield cites *Davis v. People*, 19 Ill. 74, 75; *Comm. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. We find no error in this instruction.

The objection most seriously urged by

counsel for defendant to the instructions given by the court relates to the question of insanity, being instruction No. 8. It follows: "Under the plea of not guilty, testimony as to the sanity or the insanity of the accused may be introduced. Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proven to the satisfaction of the jury. To establish a defense on the ground of insanity, it must be clearly proven that at the time of committing the act, the accused was laboring under such a defective reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know the nature and quality of the act, that he did not know he was doing what was wrong. By saying that it must be shown that he did not know he was doing what was wrong the law means moral wrong. A man may want the capacity to distinguish between the various shades of illegality which the law assigns to a particular act, and yet be sane. This is not what is meant by the power to distinguish between right and wrong as one of the tests of sanity, and because an accused has not the mental capacity to know whether an act is legal or illegal, or believes his act to be legal, is no defense. The meaning of the law is that he had not the mental capacity to know that he was doing a moral wrong. If his mind is not so diseased at the time of the killing as to prevent him from knowing the nature and quality of his act, or if he did know the nature and quality of his act, that he was morally doing a wrong, he has sufficient mental capacity to be responsible for his acts. * * * This last I will read again: If his mind is not so diseased at the time of the killing as to prevent him from knowing the nature and quality of his act, or if he did know the nature and quality of his act, that he didn't know he was morally doing a wrong, he has sufficient mental capacity to be responsible for his acts, * * * or if he did know he was doing morally wrong, he has sufficient mental capacity to be responsible for his acts in so far as his insanity is concerned. If the defendant at the time of the killing of Christ Long was insane as above defined, he would not be guilty of either murder in the first degree, or murder in the second degree, or manslaughter, and should be acquitted; and if from the evidence you have a reasonable doubt as to whether the defendant was insane you should acquit the defendant." Whilst this instruction is somewhat vague, and could have been given in fewer words and less argumentative, and with equal force and effect to the jury, still we think there was but one conclusion to be drawn from it, and that was, if he knew the nature and natural effect of his act, he was guilty, otherwise he should be acquitted. On the question of insanity, we refer to State v.

Larkins, 47 Pac. 945, and State v. Shuff, 72 Pac. 665. The authorities are collated in these decisions and the position of this court clearly defined. Of course, that part of the instruction wherein the jury were told that "to establish a defense on the ground of insanity, it must be clearly proven that at the time of committing the act the accused was laboring under a defective reason," etc., was erroneous, and not the law. It is not incumbent on the defendant to "clearly prove" that he was insane; but, on the other hand, when he succeeds in establishing in the minds of the jurors a reasonable doubt as to his sanity, he is entitled to an acquittal. State v. Shuff (Idaho) 72 Pac. 664. The remainder of the instruction correctly states the law on the subject. The erroneous portion of the instruction, however, could not have prejudiced the defendant in this case, for the reason that he utterly failed to show insanity or any indication thereof as existing at the time of the commission of the offense charged. It must, therefore, follow that, having failed to produce any evidence which would tend to raise in the minds of the jurors any doubt as to his sanity, the instruction on this point could not have prejudiced him in any respect.

Judgment affirmed.

AILSHIE, and SULLIVAN, JJ., concur.

SAND POINT WATER & LIGHT CO. v. PANHANDLE DEVELOPMENT CO.

(Supreme Court of Idaho. Nov. 10, 1905.)

1. WATERS — APPROPRIATION — NOTICE OF CLAIM.

One who posted and recorded notice of intention to appropriate waters under Act Feb. 25, 1899 (Sess. Laws 1899, p. 380), and within 60 days thereafter commenced work on his proposed diverting works, and continued the prosecution of such work with reasonable diligence, is entitled to have his appropriation date from the posting of his notice; and the right thus acquired is prior and superior to the rights of any subsequent appropriator claiming either by posting of notice and compliance with the statute, or an actual diversion and application of the water.

2. SAME—TIME OF APPROPRIATION.

One who posts and records notice, and in all respects pursues the successive steps prescribed by Act Feb. 25, 1899 (Laws 1899, p. 380), is entitled to have his right relate back to the date of posting notice.

3. SAME.

In such case the appropriation is initiated by posting the notice, and an inchoate right thereby arises which may ripen into a complete appropriation upon the final delivery of the waters to the place of intended use.

4. SAME—APPROPRIATION—HOW EFFECTED.

A person desiring to appropriate the waters of a stream may do so either by actually diverting the water and applying it to a beneficial use, or he may pursue the statutory method by posting and recording his notice, and commencing and prosecuting his work within the time and in the manner prescribed by the statute; and in the latter case his right will relate back to the date of posting his notice.

5. SAME—DIVERSION—DILIGENCE.

Where an appropriator posted his notice on December 16, 1902, claiming a certain amount of the waters of a stream, and thereafter, and on the 14th day of January, 1903, commenced work on roads, surveys, etc., preparatory to constructing the diverting works, and kept at least one man at the work continuously from that date until date of trial, and expended over \$1,700 on the work from the commencement thereof until February 8, 1904, and had built one mile of wagon road along the course of the stream and had built 3,400 feet of flume, and such work was prosecuted in a mountainous country where the winters are long and rough and the snow fall is heavy, *held*, that the work has been prosecuted with reasonable diligence as required by section 6 of Act Feb. 25, 1899 (Sess. Laws, 1899, p. 381).

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; R. T. Morgan, Judge.

Plaintiff, the Sand Point Water & Light Company, commenced an action against the defendant, the Panhandle Development Company, praying an injunction against the defendant to restrain and enjoin defendant from diverting the waters of Switzer and West Sand creek, or in any manner interfering with them or depriving plaintiff of the use thereof. Judgment for plaintiff, from which judgment and an order denying defendant's motion for a new trial, defendant appealed. Reversed.

Wm. H. Batting, El. M. Heyburn, and Myron A. Folsom, for appellant. Chas. L. Heitman, for respondent.

AILSHIE, J. Prior to hearing this case on its merits, the respondent filed and presented a motion to dismiss the appeal, and also a motion to strike from the transcript the appellant's statement on motion for a new trial. We have carefully examined the record and affidavits used on the hearing of these motions and have concluded that both motions should be overruled, and it is so ordered.

This action was commenced by the respondent corporation to restrain the appellant corporation from diverting and appropriating the waters of Sand creek and Switzer creek in Kootenai county, and to restrain and enjoin the defendants from interfering with or diverting the waters of those streams in any way or manner that would interfere with the rights and appropriation of the plaintiff. The case went to trial upon complaint and answer, and resulted in a judgment for the plaintiff, from which judgment and an order denying a motion for a new trial, the defendant has appealed.

The substance of the trial court's findings of fact is that the plaintiff's grantor was the prior appropriator of the waters of Switzer creek and the west branch of Sand creek, situated in Kootenai county, and that such appropriation dates from September 26, 1903, the date on which respondent's grantor made his application to the State Engineer

for a permit to divert, appropriate, and use the waters of those streams to the extent of 20 cubic feet per second. The court finds that plaintiff and its grantor had performed all the acts and requirements necessary or imposed by the statute for the protection of its appropriation, and had diverted the waters and applied them to a beneficial use in supplying the village of Sand Point and its inhabitants with water for domestic uses and fire purposes. The court also finds that the respondent's appropriation was and is prior to that of the appellant and so ordered and decreed. The appellant contends that the undisputed facts as disclosed by the evidence and appearing upon the record show clearly and beyond question that the court's findings are unsupported by the evidence, and that he should have found that appellant's water right from these streams is prior and superior to the rights of respondent, and that the findings of the court in this respect are wholly unsupported. The facts as they appear from the record upon this point are substantially as follows:

On December 16, 1902, appellant's grantors located a water right on West Sand or Mill creek in Kootenai county, and the location notice thereof was posted and duly filed and recorded in the office of the county recorder of Kootenai county, and thereafter, in due time, was filed in the office of the State Engineer at Boise city. Within a few days thereafter the same parties duly and regularly made two additional locations on these streams. On the 14th day of January, 1903, and about 29 days after making the first location, work was commenced, which consisted in cutting out a trail up the canyon, and making a survey for flumes and ditches. Work was continuously prosecuted from that time until the date of the trial of this cause, with at least one man on the ground all the time engaged in building a road, and a flume and ditch through which to carry the waters of these streams, and the general work incident to the construction of the diverting work for carrying out the purposes for which the appropriation was being made. An itemized statement of expenditures made in carrying on this work appears to have been presented upon the trial showing an expenditure of \$714 for wages, groceries, tools, and supplies, between the 14th day of January, 1903, and the 1st day of September, 1903. It was also shown that an expenditure of more than \$1,700 was made on these works between the 14th day of January, 1903, and the 8th day of February, 1904. At the time of the trial in this case it appeared that the appellant had built about one mile of road up the canyon, for the purpose of reaching the point of diversion on the stream, and conveying material and supplies, and had also erected and constructed a flume 3,400 feet in length. None of these facts are directly disputed by the respondent, but at the trial the respondent

ent placed witnesses upon the stand, who testified that in passing through this country in the neighborhood of this work they had noticed some work had been done, but the witnesses estimated the value thereof as very small—something like \$200 or \$300, perhaps. But it does not appear that these witnesses had made very much examination or pretended to have seen all the works or were at all accurate or positive as to their estimates. It remains, nevertheless, a fact, that they admit that work had been done there, and, in fact, one of plaintiff's witnesses was one of the first men employed by the defendant's grantor, and had made the original survey for the defendant's diverting works. The fact stands upon the record practically undisputed, that on the 29th day of September, 1903, the date on which respondent's grantor obtained his permit from the State Engineer to divert and appropriate the waters of these streams, the appellant was actively engaged in the construction of its diverting works, and had at that time expended from \$700 to \$800 in the prosecution of the work.

It should be observed that appellant's location and the prosecution of its work was made under the act of February 25, 1899 (Sess. Laws 1899, p. 380), while the respondent's right was initiated under act approved March 11, 1903 (Sess. Laws 1903, p. 223). By the latter act a permit is obtained from the State Engineer to divert and appropriate the waters of any of the public streams of the state, while under the act of 1899, notice was required to be posted and a copy thereof filed and recorded with the county recorder, and a duplicate thereof filed with the State Engineer. By section 6, p. 381, of the act of 1899, under which appellant initiated its right, it is provided: "Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works by which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow, rain, or cold weather." Respondent claims that the appellant failed to show that it had prosecuted the construction of its diverting works with the diligence required by section 6, supra, and for that reason, if for none other, the judgment was properly entered against appellant. It seems to us, however, when we consider that this work was being prosecuted in a mountainous section of the state where there is a heavy snow fall and a long winter season with much rough and stormy weather which would interrupt and delay the character of work that was being carried on, that the amount and kind of work which is shown to have been done evidences good faith, reasonable diligence, and a purpose to complete the work and apply the waters to the beneficial use designated. Saying nothing of the record notice which the respondent had, the work upon

the ground and its continued prosecution was ample actual notice to respondent, or any other subsequent claimant to these waters, as to the nature of the claim asserted by appellant.

It seems to us that the real difficulty in this case has arisen from a wrong construction and misapplication of the word appropriate as used in our statutes. Section 8 of the act of February 25, 1899, provides that where an appropriator has complied with the preceding sections in the posting and recording of notices and the commencement and prosecution of work, "the claimant's right to the use of water relates back to the time the notice was posted." Section 7 of the act provides that by a completion of the work "is meant conducting the waters to the place of intended use." A person desiring to appropriate the waters of a stream may do so either by actually diverting the water and applying it to a beneficial use, or he may pursue the statutory method by posting and recording his notice and commencing and prosecuting his work within the statutory time. *De Necochea v. Curtis*, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; *Wells v. Mantes*, 99 Cal. 583, 34 Pac. 324; *Watterson v. Saldunbehere*, 101 Cal. 112, 35 Pac. 432. In the latter case his appropriation will be entitled to date from the time of posting his notice (section 8, p. 381, Sess. Laws 1899; *Wells v. Mantes*, supra; *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 45 Pac. 472, 60 Am. St. Rep. 777, and note thereto; *Works on Irrigation*, pp. 44-46; *Long on Irrigation*, § 37), and any intervening locator or claimant of the waters will be treated as subsequent both in time and right. In such case the appropriation is initiated by the posting of the notice, and an inchoate right thereby arises which may ripen into a legal and complete appropriation upon the final delivery of the waters to the place of intended use. In other words, by pursuing the successive steps prescribed in the statute, and completing his diverting works, and applying the water to a beneficial purpose, the appropriation is completed. The only difference between an appropriation initiated by posting notice and one initiated by diversion and application of the waters is that the appropriator, who claims under notice, is allowed the extra 60 days within which to commence his work, and reasonable time thereafter in which to complete the same.

It appears that the lower court proceeded on the theory that the appropriation, regardless of the posting of notice, dates from the actual diversion of the water, and its application to the use intended, and the court accordingly finds that "the plaintiff did on or before the 14th day of August, 1904, complete its water system and did actually appropriate the waters flowing in the said stream described in the complaint, and has ever since said date actually appropriated and used all the waters in said

stream described in the complaint in supplying the inhabitants of the village of Sand Point with water for domestic uses and fire purposes." This theory is incorrect as applied to appellant, so long as appellant continued to prosecute its work with reasonable diligence. So long as it did so, it was entitled to have its appropriation relate back to the posting of its notice; and, in that event, appellant would be entitled to protection as a prior appropriator as against the respondent. Some importance seems to have also been attached to the fact that the appellant was cognizant of the work being done by respondent, and the large expenditure being made by it in constructing its diverting works and water system, and that it should have made some demonstration or taken some action sooner to prevent respondent further prosecuting its work. This position, however, is without merit. The appellant was also prosecuting its work at the same time and for a similar purpose, but in the meanwhile neither one was actually diverting the water to the detriment or damage of the other, nor was there any apparent reason why appellant could or should have prevented respondent carrying on its work. There is no contention made in this case but that respondent has a valid water right and appropriation, and would be entitled to whatever of the waters of those streams the appellant fails to use or at any such times as the appellant fails to use and apply those waters. The only difficulty is that upon the undisputed facts of the case, respondent's right is subsequent and subordinate to appellant's right. On the facts as presented by this appeal, the trial court should have found that the defendant, the Development Company, had a prior and superior right to that of plaintiff, the Water & Light Company, and that defendant had prosecuted the construction of its diverting works with reasonable diligence.

The judgment is reversed, and cause remanded, with instructions to the trial court to make findings of fact in accordance with the views herein expressed, and enter judgment in accordance therewith. Costs awarded to appellant.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

SCORE v. GRIFFIN.

(Supreme Court of Arizona. Nov. 18, 1905.)

APPEAL—RECORD—EVIDENCE EXCLUDED.

The Supreme Court cannot consider evidence which the trial court had properly excluded.

On rehearing. Reversed.

For former opinion, see 80 Pac. 331.

KENT, C. J. The appellant urges as one of the grounds for a reversal of the judgment in this adverse suit that the appellee had not shown that he had made a valid location

of his claim, in that there was no evidence in the record of the discovery of mineral in place within the limits of the claim. In our former opinion (80 Pac. 331) we based our conclusion that there was sufficient evidence to sustain a compliance with the statutes in this regard largely upon the testimony of the plaintiff that, when his claim was located by him (the two claims being nearly identical in surface area), there was gold and silver bearing rock showing upon the surface of his claim. Upon the rehearing, it was claimed by the appellant that this discovery of the plaintiff was made outside of the limits of the defendant's claim, and hence the plaintiff's discovery there of mineral could not serve to show mineral within the limits of the defendant's claim. A further examination of the evidence shows that the discovery of the mineral by the plaintiff, referred to, was in fact made outside the limits of the defendant's claim. We have made a further careful examination of the evidence, and we fail to find in the record evidence which we can hold shows a discovery of mineral within the limits of the claim of the defendant.

The appellee urges that, as the discovery of the plaintiff, though without the limits of the defendant's claim, showed mineral, and the plaintiff's location notice claimed 1,500 feet "of this vein or lode * * * in a northerly direction along the ledge," which would carry it across the whole length of the defendant's claim, that this is evidence of the existence of the ledge or vein within the defendant's claim sufficient to satisfy the statute. If we might consider this as sufficient evidence of such fact, we are nevertheless precluded from doing so, as the evidence is not before us, since the court below—and rightly, as we held—sustained the objection of the defendant to the introduction of this location notice in evidence, and ordered it stricken out.

We think the defendant has failed to prove that there was a discovery of mineral within the limits of the claim, and that for this reason the judgment of the lower court awarding affirmative relief to the defendant must be reversed, and the case remanded for a new trial.

DOAN and CAMPBELL, JJ., concur.

TREADWELL et al. v. MARRS.

(Supreme Court of Arizona. Nov. 18, 1905.)

1. MINES AND MINERALS—MINING CLAIM—LOCATION—DETERMINATION.

On an issue as to the location of a mining claim, where the monuments are found upon the ground, or their position or location can be determined with certainty, the monuments govern rather than the location certificate; but, where the courses and distances are not defined with certainty by monuments or stakes, the calls in the location notice must govern.

2. SAME—EVIDENCE—SUFFICIENCY.

On an adverse to an application for a patent to a mining claim, evidence considered,

and held insufficient to show that the conflict, as testified to by plaintiffs' surveyor, was based upon a survey or a plat of a claim having the courses or distances of plaintiffs' claim.

3. SAME—EVIDENCE—COMPETENCY.

On an adverse to an application for a patent to a mining claim, plaintiffs claiming a conflict between defendant's claim and plaintiffs', in order to render the testimony of plaintiffs' surveyor competent, it was incumbent on plaintiffs to show that their claim as originally located was in accord with the testimony of the surveyor to the extent of the conflict claimed.

Appeal from District Court, Yavapai County; before Justice R. E. Sloan.

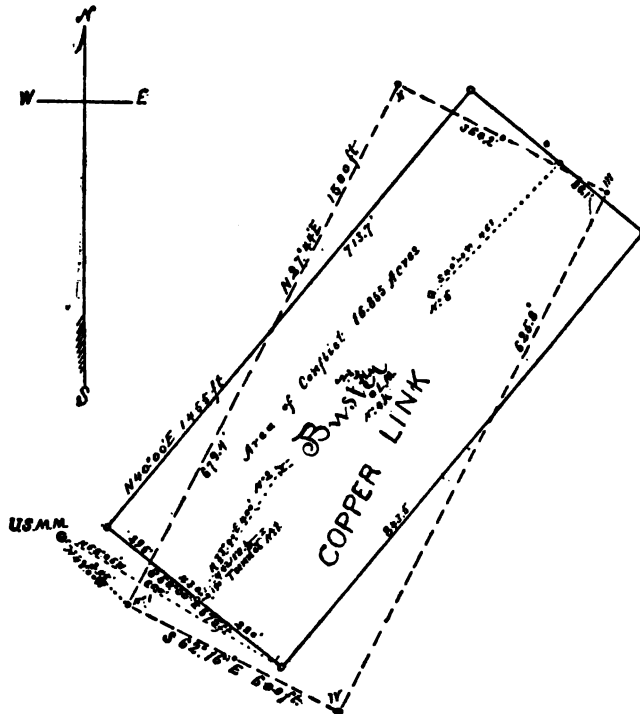
Adverse by George A. Treadwell and another to the application of George O. Marrs for a patent to a mining claim. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

On April 11, 1901, George O. Marrs filed in the United States Land Office at Prescott his application for a patent to the Copper Link mining claim. George A. Treadwell and F. C. Beckwith filed an adverse to such application, and within the time prescribed by law brought this action in support of such adverse. Judgment was given in the court below for Marrs, and from this judgment Treadwell and Beckwith have brought this appeal.

The complaint alleged the citizenship of the plaintiffs, the location of the claim, and the performance of the acts necessary to complete the validity of such location, the acquisition of the claim by the plaintiffs by mesne conveyances, the ownership of the property in the plaintiffs of the claim as

monumented and as shown by the adverse map attached to the complaint, and the performance by the plaintiffs of the annual assessment work on the claim. The complaint further alleged that the pretended location of the Copper Link mining claim by the defendant was null and void by reason of the fact that the ground was not open to location, so far as it conflicted with the Buster claim. The complaint further set up the filing of the adverse, and the bringing of the suit in support thereof, and described the conflict according to the adverse map as follows: "Beginning at the southeast corner of the Buster mining claim, thence north, 50 deg. west, 430.7 feet, to a point of intersection on the west side line of said Copper Link mining claim; thence north, 27 deg. 44 min. east, 679.4 feet, to a point of intersection on the west side of said Buster mining claim; thence north, 40 deg. east, 713.7 feet, to a point of intersection on the north end line of said Copper Link mining claim; thence south, 62 deg. 16 min. east, 364.2 feet, to a point of intersection on the north end line of said Copper Link mining claim; thence south, 50 deg. east, 86.1 feet, to a point of intersection on the east side line of said Copper Link mining claim; thence south, 27 deg. 44 min. west, 625.8 feet, to a point of intersection on the east side line of the Buster mining claim; thence south, 40 deg. west, 843.5 feet, to the place of beginning—containing 16,855 acres."

The adverse map attached to the complaint was as follows:



The testimony of Merritt was the only testimony showing the boundaries and the extent of the conflict. It was admitted that the defendant was a citizen of the United States, and that he had duly performed all the acts necessary to constitute a valid location of the Copper Link claim. The court found that the adverse map was not made from any survey of the Buster claim, either as located on the ground or described in the location notice; that it did not show the boundaries, courses, distances, or extent of the ground included in the Buster claim, and did not show wherein, if at all, the Buster claim, as monumented on the ground, or as described in the location, conflicted with the Copper Link location; and that the plaintiffs' proof failed to sustain the allegations of the complaint of the conflict relied upon, and gave judgment for the defendant for the ownership of, and possession of, the Copper Link claim, and quieting his title thereto, from which judgment the plaintiffs have appealed to this court.

H. M. Hubbard and Robt. E. Morrison, for appellants. Herndon & Norris, for appellees.

KENT, C. J. (after stating the facts). It is contended by the appellee that the location certificate of the Buster claim was insufficient both in law and in fact, and that the appellants could acquire no rights thereunder. The trial court held the certificate to be sufficient on its face, and found against the appellee in his contention that the evidence introduced upon the trial showed that the statements of the certificate as to the position of the claim were untrue in fact.

We do not deem it necessary on this appeal to pass upon the correctness of either of the court's rulings in this respect, as we are of the opinion that the record and the evidence in the case did not warrant a judgment in favor of the plaintiffs. This is an adverse suit, in which the plaintiffs seek to establish their right to possession of that portion of the Buster claim in conflict with the Copper Link. The only testimony that showed the boundaries, area, and extent of such alleged conflict, and upon which the court could base a judgment of right of possession therein in favor of the plaintiffs, was the testimony of the surveyor, Merritt. This testimony the trial court ordered stricken out. Without this testimony, the plaintiffs could not recover, and the correctness of the court's ruling in this respect is the controlling question determinative of this appeal.

The situation before the court was this: The plaintiffs were the owners of the Buster claim, having acquired it some 17 years after its location. In the supposition that they were correctly tracing the boundaries of the claim, and approximately the position of the old monuments, shortly after acquiring the claim, they erected two new center end

monuments and four corner monuments; the course and direction of the claim as so monumented being north, 40 deg. east, and south, 40 deg. west. Eight years thereafter, the defendant filed his application for a patent, and the plaintiffs their adverse, and commenced this, their adverse, suit, in which they alleged a conflict based upon the position of the Buster as supposed and as monumented by Treadwell for them. After the adverse suit was brought, but prior to the trial, the plaintiffs discovered that the Buster as monumented by them did not conform with the calls of the location certificate of the claim, either as to direction or extent, or with the old monuments as the claim was originally located. On the trial the plaintiffs admitted that they must be held to have abandoned that portion of the Buster called for in the location certificate which lay south of the new south end line as shown by the monuments erected by them on the supposed south end line of the claim, to wit, some 550 feet; but claimed that they were entitled to that portion of the Buster as shown by the original monuments to be within the area of the conflict as alleged in the complaint. The theory of the plaintiffs was that the evidence showed that the original north center end monument, instead of being 750 feet north, 40 deg. east, from the initial monument, as shown by their adverse map and survey, was in fact 200 feet north, 40 deg. east, and that the original south center end monument, instead of being 750 feet south, 40 deg. west, as shown by their adverse map and survey, was 1,300 feet south, 40 deg. west; and they claimed the right to the possession of the ground where it conflicted, comprised in a claim, the north center end monument of which was 200 feet north, 40 deg. east, of the initial monument, and the south center end monument of which was 750 feet south, 40 deg. west, or the area as shown by the portion of the claim in the excluded conflict map, which is southwest of the heavy line drawn across the claim. This conflict they sought to prove by the testimony of Merritt, the surveyor. The trial court heard this testimony under objection, and subsequently ordered it stricken out. The erection of the monuments by the plaintiffs through their agent, Treadwell, had no effect in changing the rights of the plaintiffs, or in changing the position and location or boundaries of the claim, except in so far as it showed an abandonment of the southerly portion of the claim. No new location certificate was filed, and no amendment of the old was attempted. The claim remained, therefore, as originally located. But the adverse and the conflict, as pleaded, was based upon a survey and adverse map made by the surveyor from the monuments as erected by Treadwell. Manifestly, then, such survey and map, and the evidence based thereon, showing a conflict, could in no event be competent, unless the claim as originally located

was as to direction and course identical with the direction and course as monumented by Treadwell.

The answer was a general denial, and contained allegations that the original monuments of the Buster claim had been removed by the plaintiffs prior to the location of the Copper Link, so that the boundaries of the Buster claim could no longer be traced upon the ground; that the claim had been abandoned by the plaintiffs, and that the land embraced within the boundaries of the Copper Link was open to location at the time of its location by the defendant. It alleged the acts necessary to constitute a valid location of the Copper Link claim by the defendant, the ownership thereof, and contained certain other allegations, not necessary to be set forth, and prayed for affirmative judgment for the defendant.

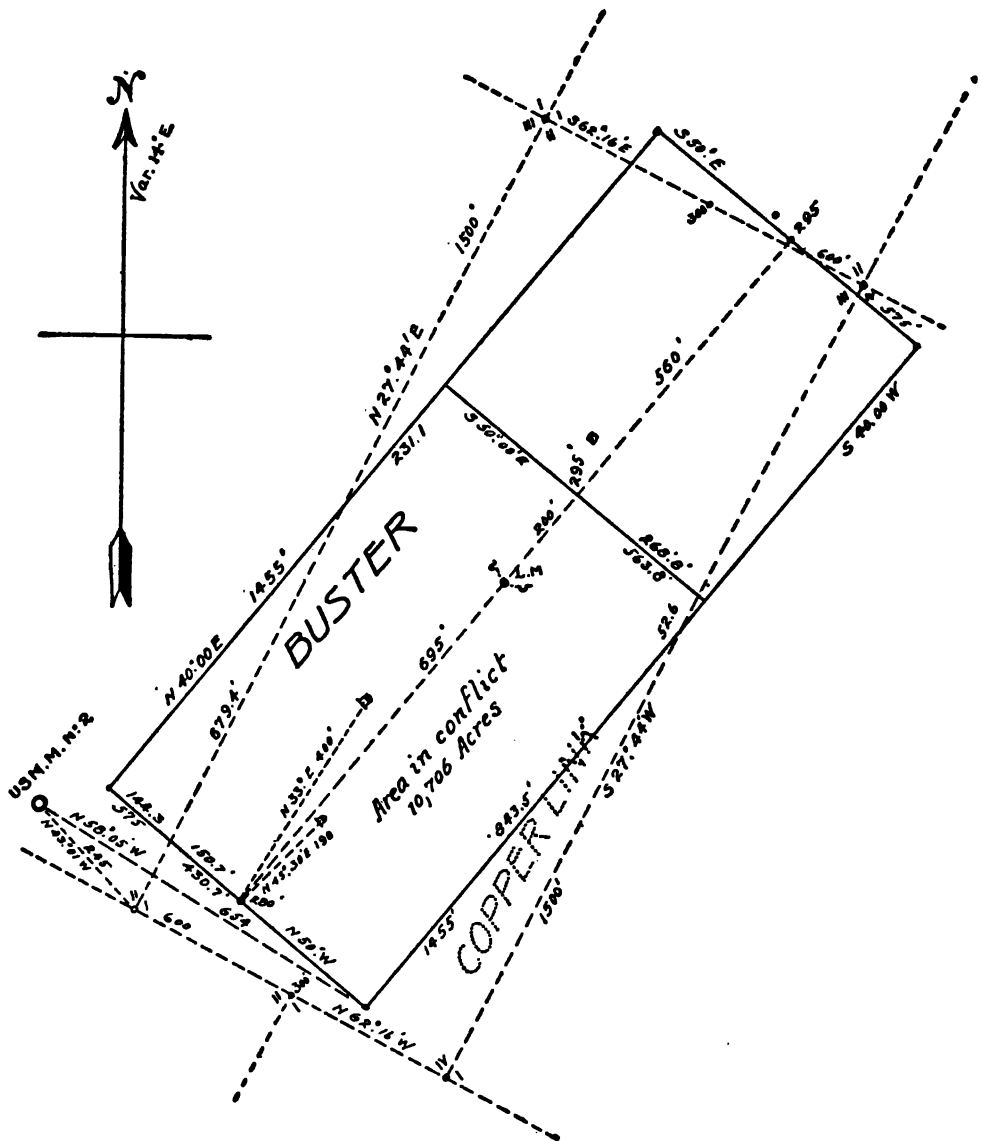
The evidence introduced upon the trial showed that in September, 1875, the claim known as the "Buster Mining Claim" was located by J. M. Roberts, T. W. Boggs, and D. R. Poland, who erected the necessary monuments on the ground to mark the boundaries, and posted and recorded a location notice, as follows: "Buster lode notice of location. This ledge is located on a copper ledge or claim, commencing at a monument 200 feet north this notice, and runs 1,300 feet south to a monument, 1,300 feet from this notice, with 300 feet on each side of the vein. This ledge is in the Bradshaw Mountain, and about two miles from the Peck mine, and between the canyon of Turkey creek and Crazy basin, and was located by us September 24, 1875, all in Yavapai county, Arizona Territory. [Signed] J. M. Roberts, T. W. Boggs, D. R. Poland. This notice recorded November 20, 1875, at 12:30 o'clock p. m., at the request of D. R. Poland, and recorded in Book C-3 of Mines, records of Yavapai county, Arizona Territory, at page 448. William Wilkerson, County Recorder." The title of the locators to the claim passed to the plaintiffs by purchase in 1892. Soon after the purchase by the plaintiffs, Erwin D. Treadwell, a son of one of the plaintiffs, as their agent, went upon the ground, together with Boggs, one of the original locators, and was informed by Boggs that a large stone monument at a point near the summit of what was known as "Buster Hill," was the location monument, and, as Treadwell understood, also the center monument of the Buster claim. Treadwell shortly thereafter, relying upon the information given him by Boggs, starting from this monument as the center monument of the claim, made search for the other monuments of the claim for a distance of 750 feet north and south from such initial monument, but found none which he regarded as connected with the Buster claim. He thereafter, for the purpose of outlining the Buster claim, in order to make new locations, on either end of the claim built a monument approximately 750 feet in a

northeasterly direction along the vein from the center monument, and another approximately 750 feet in a southwesterly direction from the center monument, and about in line with the center monument of the claim. His courses were north, 40 deg. east, and south, 40 deg. west, respectively. He then built four corner monuments on the north and south end lines, approximately 300 feet distant in each direction from the north and south end center monuments, and then located several other claims contiguous to, and limited by, the boundaries of the Buster as he understood them. The plaintiffs remained in possession of the property, and spent money thereon continuously from that time until 1899. After the filing of this adverse suit, it was discovered for the first time by Treadwell and by the plaintiffs that the location notice of the Buster claim called for a claim starting from a point 200 feet north of the initial monument, and not 750 feet, as supposed by Treadwell, and running south 1,300 feet, and not 750 feet, and that the monument pointed out by Boggs to Treadwell, instead of being in the center of the claim, as originally located, was located as being 200 feet from the north end, and 1,300 feet from the south end, and that the call of the location notice was for a claim running north and south, and that the monuments, therefore, erected by Treadwell did not correspond to the calls of the location notice. In March, 1901, Treadwell found a monument about 200 feet in a northeasterly direction from the initial monument pointed out to him by Boggs. In June, 1901, a survey and the adverse map was made on behalf of the plaintiffs by the surveyor, Merritt, from the monuments erected by Treadwell, as pointed out by him to the surveyor, and the conflict, as set out in the complaint, calculated therefrom. The testimony further showed that the claim as surveyed and platted by Merritt did not conform to the original Buster location, either as originally monumented or described in the location notice, but as surveyed and platted was the ground monumented by Treadwell in 1893. As so surveyed and platted, it included ground in its northerly end which was neither included in the location notice, nor included in the original boundaries of the claim as defined by the original monuments.

Over the objection of the defendant, the plaintiffs attempted to prove by the testimony of the surveyor, Merritt, a conflict, not as set forth in the complaint, or as shown by the adverse map, or the boundaries as monumented by Treadwell, but based upon the assumption that the north center end monument of the Buster claim was 200 feet north, 40 degrees east, from the initial monument, and the south end monument 750 feet south, 40 degrees west, and contained 10 and a fraction acres, as against 16 and a fraction, as shown by the adverse map and plat. The testimony was subsequently stricken.

en out by the court, on motion of the defendant, and a map showing such conflict, from which the surveyor testified, and which was made in 1903, just prior to the second trial of the case, was also excluded. This conflict map followed the lines of the adverse map, and was the same as the latter, except that the north end line of the Buster was shown by a new line, supposed to intersect a point 200 feet north, 40 deg. east, from the initial monument. The map so excluded follows:

der to make the survey of Merritt and his testimony as to the conflict based thereon competent evidence, it was incumbent upon the plaintiffs to show that the claim as originally located was in accord with such survey to the extent of the conflict claimed. The claim as surveyed by Merritt ran north and south, 40 deg. east and west, respectively. The location notice calls for a claim running north and south; manifestly, not the same. The plaintiffs contend that this location certificate ought not to be construed, however,



Passing by, without determining it, the question whether an attempt to prove such a conflict was not such a departure as in any event would render such proof inadmissible, we think the trial court rightly excluded the evidence introduced to show the conflict. The Treadwell monuments being valueless, in or-

as calling for the north and south end monuments as due north and south, but should be construed as permitting the location of these monuments, the one 200 feet north, 40 deg. east, and the other approximately 1,300 feet southerly, but in a line 40 deg. west from a north and south line; claiming that the evi-

dence shows the existence at each of said points of the original north and south end monuments. The well-settled rule in that respect is that, where the monuments are found upon the ground, or their position or location can be determined with certainty, the monuments govern, rather than the location certificate; but where the course and distances are not with certainty defined by monuments or stakes, the calls in the location notice must govern and control. In the case before us, however, the plaintiffs must not only show the existence and location of these monuments in order for them to control as against the location certificate, but, in order to enable them to be entitled upon their adverse to the possession of the ground alleged to be in conflict, they must establish the position of these north and south end monuments to be in fact the one 200 feet north, 40 deg. east, and the other to be south, 40 deg. west, of the initial monument; for if these monuments are not so in fact located, then the course and distances and boundaries of a claim based upon them, which would be the true Buster claim, would not correspond with the course and distances and boundaries of the claim as surveyed and platted by the surveyor, Merritt, and his testimony as to the conflict would not describe the true conflict between the Buster and the Copper Link.

It becomes necessary, therefore, to examine the testimony given with respect to the existence and location of these monuments. The only testimony in regard thereto is the testimony of the witnesses Boggs, Treadwell, Powers, and McDonald. The witness Boggs, who was one of the locators of the claim, testified: " * * * Another [monument] was built a short distance northerly from there [the initial monument]. They stepped it off. It looked like 400 or 500 feet, and in a southerly direction another monument was built about 1,000 or 1,200 feet; I cannot tell exactly." The witness Treadwell, the agent of the plaintiffs, testified: " * * * After that survey [in 1900], I was on the ground at a point about 200 feet in a northeasterly direction from the center monument, and saw a monument there in line with the center monument and with the monument at the north center end of the Buster, erected by me. I should judge. This was also about in line with the south center end monument erected by me, and the center monument, but you could not see between them. The course we took was south, 40 degrees west. The last monument I have described was about 200 feet in a northeasterly direction from the center monument. The monument that Mr. Boggs pointed out to me, * * * I understood him to point it out as the center monument, and also the location monument. * * * In the fall of '93 I placed some monuments on the property. I did it, in the first place, to outline the Buster, in order to make the locations on either end, as I was

requested to make two locations. * * * I went 750 feet northeasterly from the monument pointed out by Mr. Boggs, because I understood from him that that was the center monument of the claim. There was no location notice in the monument advising where to go. I looked for one, and I am sure it was not there. I had nothing to guide me in placing the monuments, except what I was informed by Mr. Boggs. I don't think Mr. Boggs told me where to find the other monuments—what course and distance to go. He gave me the general course and the way the ledge ran. I went 750 feet northerly, 40 deg. east, because that was the general course of the formation. I followed the ledge, and was guided by that in taking the course. * * * It was in March, 1901, that I saw the monument of which I have spoken, about 200 feet northeasterly of the location monument. I don't know whether it was there in June, 1900. I did not see it. I went over the ground. * * * I went with Mr. Merritt. I asked him to make the survey, and he obtained his own location notice. I did not particularly look for monuments upon the ground in accordance with that notice with Mr. Merritt. I pointed out the monuments I had erected, and asked him to make a survey of these monuments." R. C. Powers, a witness, testified: "In June, 1900, I was a deputy U. S. mineral surveyor, and in that month made a survey of the Buster. * * * I remember going in a northerly direction from this location monument on the mountain, looking over the ground up to the 750-foot point. I cannot recollect that I found any kind of monuments between that location monument and the 750-foot monument at that time. * * * There were no intermediate monuments." McDonald, a witness, testified: "Within the last two years I found a monument about 1,200 or 1,400 feet from the location monument, in a southwesterly direction from the location monument. * * * It was an old monument. I also found about 200 feet northeast, and in line with the initial monument, the remains of an old monument, the rocks considerably imbedded in the ground, and grass grown up around them. These three monuments were practically in line. I can't remember just when I saw these. It was just before the first adverse came to trial. It was when we discovered that the location notice only called for 200 feet to the north, and we started a search for these monuments, discovering this old one in the center." Boggs, on the former trial of the case, testified: "The monument about 200 feet in a northeasterly direction was not very large. It was made out of stone. We could hardly see it. The brush had grown up. I saw these three monuments when I went out with Mr. Middleton, about two years ago. Just after the trial, I think, these three monuments looked to be about where the original monuments were placed

by me in '75, as near as I could recall.
 * * * I didn't go any farther, only went down that 200 feet to the north monument, and walked down there with him and back.
 * * * I saw Mr. McDonald and Mr. Middleton go over to a monument in a south-westerly direction from the location monument. I thought it was about 1,000 or 1,200 feet distant."

The testimony of the surveyor, Merritt, which was stricken out by the court, showed that in making his survey he did not go to either of the monuments now claimed to be the original north and south end center monuments of the claim. In describing the conflict, however, he starts from a point 200 feet north, 40 deg. east. He stated that after the survey, and just prior to the second trial of the case, he went upon the ground, and ran a line from the initial monument 200 feet north, 40 deg. east, but he does not state that he found any monument there; and nowhere in the case is there any testimony to show either that the north end monument is in fact situated at a point 200 feet north, 40 deg. east, from the initial monument, or that the south end center monument is in fact situate at a point 1,800 feet, or any other number of feet, south, 40 deg. west; nor is there any testimony that any surveyor has run a line from the initial monument to either of these monuments, or surveyed them; nor any testimony to show that they, or either of them, are in a line 40 deg. east and west, respectively, from the north and south line, or what is the correct course or distances of them, or either of them, from the initial monument.

The trial court held as a fact that the testimony did not show that the monuments seen by the witnesses, as described by them, were the original monuments of the Buster. If the determination of the case depended upon this alone, we should feel inclined to hold that the testimony was sufficient to show that the north center end monument, as described by the witnesses, was one of the original monuments of the claim; but we are entirely in accord with the trial court in its holding that there is no evidence to show that these monuments were located, the one 200 feet, or any other distance, north, 40 deg. east, and the other south, 40 deg. west, of the initial monument. Without this proof, there was nothing before the court to show that the conflict as testified to by Merritt was based upon a survey or a plat of a claim which had the course or distances or area of the Buster. No judgment describing the true conflict, or awarding possession to the plaintiffs, could be based upon his testimony, and the trial court was right in striking it from the record.

The judgment of the district court will be affirmed.

DOAN and CAMPBELL, JJ., concur.

SHERMAN v. WARD.

(Supreme Court of Arizona. Nov. 18, 1905.)

1. APPEAL—DECISION ON FORMER APPEAL—STARE DECISIS.

The decision of the Supreme Court of the United States rendered upon a former trial of the action is binding as to every question of fact or of law arising upon the record which may have been decided therein.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4358-4368.]

2. CONTRACT—ACTION FOR BREACH—EVIDENCE.

In an action by a mortgagee for damages for breach of a contract obligating defendant to account for mortgaged cattle which were sold to third persons, evidence reviewed, and held insufficient to support a judgment for plaintiff; there being an absence of proof as to the number of cattle disposed of and as to their value.

Appeal from District Court, Maricopa County; before Chief Justice Kent.

Action by John M. Ward against Moses H. Sherman. From a judgment for plaintiff, defendant appeals. Reversed.

C. F. Ainsworth, for appellant. Joseph H. Kibbey, for appellee.

SLOAN, J. On November 28, 1894, the appellee, John M. Ward, brought suit against the appellant, Moses H. Sherman, and one David Hardenberg, to recover the sum of \$1,500 upon a certain promissory note in writing for the sum of \$12,500, executed by said Hardenberg, and the payment of which was guarantied on the back thereof by appellant. The defendant Hardenberg was not served with process. The appellant, Sherman, was served, and on the 16th day of May, 1899, filed his answer and counterclaim, in which he admitted the making of the note and the indorsement on the back thereof guarantying the payment, and further set forth that the note sued upon was given as a part of the purchase price, and was secured by a mortgage on the Sunflower Cattle Ranch, in Maricopa county, together with a large number of cattle thereon, tools, etc.; that Hardenberg, the principal on the note, had failed and neglected to pay any part of the same, and had failed to pay certain other notes given by said Hardenberg to said Ward in payment of said property; that on or about the 1st day of October, 1894, the Sherman-Hardenberg Cattle Company, then and there the successor in interest of said Hardenberg, entered into a certain contract in writing with said Ward, wherein it was agreed that, upon the turning over by Hardenberg to Ward of all the property purchased and mortgaged, as aforesaid, remaining on hand, the latter would cancel the mortgage thereon, and return the note sued upon, as well as the other notes remaining unpaid, and relieve the said Sherman-Hardenberg Cattle Company and said Hardenberg and Sherman from any and all responsibility in connection with the same; that, in pursuance of said agreement, the said

property was turned over to Ward, who took possession thereof, and refused to cancel the mortgage or return the notes; that said Ward remained in possession of said property, and disposed of cattle and other portions of the same for large amounts, more than sufficient to pay off all the notes so guaranteed by Sherman, and the expenses of such sales and the management of said ranch and cattle. An accounting by Ward was prayed for, as well as a money judgment for the balance which might be found upon said accounting to remain of the money realized from said sales over and above the costs and expenses of the management of the ranch and of such sales. Upon the issues so raised, a trial was had in the district court, and judgment rendered in favor of Sherman and against Ward upon the counterclaim. In support of this judgment, the trial court found: that the agreement set forth in the answer and counterclaim was executed by the parties named therein; that, in pursuance of the same, the Sherman-Hardenberg Cattle Company, on or about October 1, 1894, turned over to Ward all the property it then possessed, but that Ward failed and refused to carry out his part of the contract, in that he did not surrender or cancel the notes or satisfy or discharge the mortgage, but, on the contrary, brought suit on one of said notes for the collection of a sum that he claimed to be due thereon. From these facts the trial court held that Ward was a mortgagee in possession, and that Sherman was entitled to the accounting prayed for in his answer, and upon said accounting entered judgment in favor of Sherman and against Ward for \$17,173.50, and decreed the cancellation of the notes and mortgage. From this judgment an appeal was taken to this court, which affirmed the same, upon the ground that the assignment of errors was insufficient. An appeal was taken from the judgment of this court to the Supreme Court of the United States, which reversed the judgment of this court, and remanded the cause, with instructions to us to reverse the judgment of the district court, and remand the cause to that court for further proceedings in conformity to the view expressed in the opinion. 192 U. S. 168, 24 Sup. Ct. 227, 48 L. Ed. 391. In accordance with the mandate of the Supreme Court, the cause was remanded by us to the district court, where a new trial was had, and judgment was rendered in favor of Ward and against Sherman upon the promissory note sued upon and set forth in the complaint in the sum of \$1,500, together with interest thereon and costs. From this judgment, appellant appeals.

Before considering the assignments of error raised by the appellant, it is proper that we consider the opinion of the Supreme Court of the United States reversing the judgment rendered upon the first trial of the action, for the reason that every question

of fact or of law arising upon the record which may have been decided therein is *stare decisis*, and not open to review in this or any subsequent proceeding, and our sole duty is to give effect to the judgment of the Supreme Court, and to carry out its mandate. In *re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414; *Murphy v. Utter*, 186 U. S. 95, 22 Sup. Ct. 776, 46 L. Ed. 1070. In the opinion the Supreme Court unqualifiedly holds that there was no rescission of the contract set forth in the answer of the appellant, either by reason of Ward's failure to surrender the notes or cancel the mortgage, or by reason of his bringing suit upon one of the former; and that, therefore, Ward is not to be considered as a mortgagee in possession, and that Sherman does not have the standing of a redemptioner, and has no right to an accounting of the proceeds of the ranch and other property, or of the conduct of the business by Ward. The practical effect of this holding appears to us to be that full effect must be given to the agreement, and that, if not fully executed, it is still binding upon the parties. The Supreme Court found as a fact that the agreement had been fully executed by Ward, but that the Sherman-Hardenberg Cattle Company had failed and defaulted in the performance of its duty under the terms of the contract, in that certain cattle were not delivered to Ward, but had been sold to other parties prior to the turning over of the ranch to Ward, and after the 1st day of September, 1894; that this was a violation of the terms of the contract, in that in one clause thereof it was agreed that the company should account to Ward for all stock cattle which it might dispose of to third parties subsequent to September 1, 1904. The court further found that Ward's failure to surrender and cancel the notes and mortgage was excused through the failure of the company to account for the cattle it sold and not delivered by it under the contract.

Bearing upon the question as to whether the bringing of this suit by Ward on one of the notes was a repudiation by him of the agreement, the court used this language: "But it is said that Ward himself repudiated the agreement because he brought suit on the first of the notes. There may have been a technical mistake in the form of the action, but there was no repudiation of the agreement, as is shown by the fact that the complaint only asked judgment for \$1,500, and that Ward filed with the complaint an affidavit for an attachment, in which he averred that the payment of the sum due was 'not secured by any mortgage or lien upon any real or personal property, or any pledge of personal property.' But equity will not destroy rights on account of a mere technical mistake of counsel. It may be conceded that Ward should have brought an action in form

for the value of the cattle not delivered, but it is manifest that that value was all that he was seeking to recover." This language of the opinion has given us, as manifestly also the trial court, some difficulty in ascertaining its full purport. Logically, it seems to us that if Ward should have brought an action in form for the value of the cattle not delivered, that he ought not to be permitted to recover upon a complaint setting forth a cause of action based upon a promissory note. We are not, however, concerned with the logic of the opinion, but with its intent and purport, as indicating the duty of the trial court and of this court in giving effect to what was decided. The declaration that bringing the action in the form of a suit upon the note is but a "technical mistake," which ought not to be permitted to destroy rights, and the further declaration that it is manifest from the record that the plaintiff was seeking to recover the value of the cattle not delivered, would indicate that in the judgment of the Supreme Court the suit should be regarded, not as one to recover upon a promissory note, but one for damages for a breach of the clause in the contract obligating the company to account for the cattle which it did not deliver to Ward, but which it sold to third parties subsequent to September 1, 1894. This is the construction we are forced to put upon the opinion, and it is from this view point that we will consider the record upon this appeal.

The principal assignment of error made by the appellant is, in substance, that the evidence does not support the judgment. Upon the trial the plaintiff introduced in evidence the note sued upon, and, being called as a witness, testified that he did not consider the note put in evidence had been paid, but that \$1,500 of it remained unpaid. On cross-examination he identified the contract referred to in the answer of appellant, and stated that all the property mentioned in the contract had been delivered to him, except certain cattle sold to one Bouvier and one Dr. Jones by Hardenberg after September 1, 1894; that he did not deliver up the notes for cancellation on account of information which he received from his son that Hardenberg had been selling cattle, and that he arranged with C. F. Ainsworth, the attorney for Sherman, to keep the notes until the cattle sold by Hardenberg had been accounted for. H. C. Ward, a son of appellee, also testified, corroborating the testimony of appellee relating to the circumstances connected with the retention of the notes. Upon the introduction of this evidence and testimony, plaintiff rested. C. F. Ainsworth then testified in behalf of appellant, and contradicted in essential particulars the testimony previously given by Ward, whereupon the defendant rested. While there is thus evidence tending to show that there were cer-

tain cattle disposed of by Hardenberg after the 1st day of September, 1894, and before the turning over of the ranch and cattle to Ward, there is no proof as to the number of these, nor is there any proof as to their value. Unless, therefore, the suit can be regarded as one brought for the balance due upon a promissory note (and under the opinion of the Supreme Court we cannot so regard it), there is a failure of proof to sustain the judgment, and it must therefore be reversed, and the cause remanded for a new trial.

DOAN and CAMPBELL, JJ., concur.

BAIL et al. v. HARTMAN.

(Supreme Court of Arizona. Nov. 18, 1905.)

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—ADJUDICATION BASED ON INFORMAL PETITION.

The bankruptcy act provides that petitioning creditors must have provable claims amounting in the aggregate to the sum of \$500 before they may institute bankruptcy proceedings against a debtor. The form prescribed by the Supreme Court of the United States for a creditors' petition requires, in addition to the general allegation that the petitioners have provable claims to the amount of \$500, a statement setting forth with particularity the nature and amount of each of such claims. *Held*, that a petition making the general allegation as to the amount of the claims, but omitting to state the nature and amount of each claim, does not render a judgment based thereon void, and thus open to collateral attack.

2. SAME—SUBPŒNA.

Where the subpœna in involuntary bankruptcy proceedings, served on a member of the bankrupt firm, in effect notified him that a petition in bankruptcy had been filed by the petitioning creditors, and that it prayed for an adjudication of bankruptcy against the firm, it was sufficient to put the member of the firm served upon notice of the proceeding, whatever informality there may have been in the form.

3. SAME.

Under Bankr. Act, § 5, subd. "c" (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3424]), providing that "the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property," a subpœna served on a member of a bankrupt firm gives jurisdiction of the firm and its property.

4. APPEAL—REVIEW—QUESTIONS WAIVED BY APPELLANT.

An assignment of error, not argued by counsel in their brief, will not be considered.

5. SAME — REVIEW OF FINDINGS OF TRIAL COURT.

Where there is sufficient evidence to support a finding of fact, the weight of the evidence will not be reviewed.

Appeal from District Court, Pima County; before Justice Davis.

Action by Francis M. Hartman against Adolph Bail and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Hereford & Hazzard, for appellants. Francis M. Hartman, for appellee.

SLOAN, J. The appellee, Francis M. Hartman, as trustee in bankruptcy of the copartnership firm of Benbrook & Donovan, brought suit in the district court of Pima county to recover from the appellants, Adolph Bail and E. P. Drew, the possession of certain personal property, or the value thereof. The appellee in his complaint alleged that the property sought to be recovered was an asset of said copartnership firm of Benbrook & Donovan, and that the defendants, within four months prior to an adjudication of bankruptcy against said firm, made in the district court of the First judicial district, had obtained a preference over other creditors of said firm of the same class by bringing suit against said firm, and by attaching said property under said writ of attachment. The appellants, by way of plea in abatement, set up that the plaintiff in the suit had no right or authority to maintain the same as trustee in bankruptcy of said firm, for the reason that the district court was without jurisdiction to enter its judgment declaring the said firm of Benbrook & Donovan bankrupts, in that: First. Because the petition in bankruptcy proceedings was insufficient in law in the particular that it did not state the residence of the creditors nor of the signers of the petition, and in the further particular that it did not state whether said creditors were individuals, partners, or corporations. Second. Because no summons or subpoena was ever ordered served, or was served, upon said firm of Benbrook & Donovan, or any member thereof, requiring said firm, or any member thereof, to appear and answer the petition, and no appearance was made in said proceedings by said firm of Benbrook & Donovan. Third. Because the petition did not fully describe or set forth the claims of the petitioning creditors, or state the amounts of the same. Fourth. Because the petition did not appear to be verified by the petitioning creditors, or any one in their behalf authorized in law to verify the same. Fifth. Because the petition did not show or allege that the firm of Benbrook & Donovan was not engaged in the business of farming. Appellants also, in bar of the action, pleaded that the adjudication of bankruptcy against the firm of Benbrook & Donovan by the district court was void for want of jurisdiction, and the appointment of appellee as trustee in bankruptcy of the property of said copartnership firm was therefore invalid for the same reason. The appellee demurred to the plea in abatement, on the ground that it was insufficient in law to constitute a defense to the action. The demurrer to the plea in abatement was sustained by the trial court. A trial was had upon the general issue, and judgment rendered for the appellee, from which judgment this appeal is taken.

Upon the trial, the record in the bankruptcy proceedings in the district court against the firm of Benbrook & Donovan, over the ob-

jections made by appellants, was introduced in evidence. This record discloses that a petition signed by Fred Barman & Bro., Willard Bros., and Sideman, Lachman & Co., was filed in the district court of the First judicial district on the 19th day of September, 1902. The petition set forth that J. H. Benbrook and R. J. Donovan, for the six months next preceding the date of filing the petition, had been residents of Tucson, Ariz., and engaged in business therein as partners under the firm name and style of Benbrook & Donovan, and that they, each of them, and the partnership owed debts in an amount exceeding \$1,000; that the petitioners were "creditors of said firm, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of \$500." The petition further alleged the insolvency of Benbrook & Donovan, and each of the members of said firm, and that, within four months preceding the filing of the petition, the firm had committed an act of bankruptcy in suffering and permitting, while insolvent, one Adolph Bail, a creditor of said firm, to obtain a preference over other creditors through legal proceedings, and in not having, at least five days before a sale or disposition of the property affected by said preference, vacated or discharged such preference; and further, that the said firm committed an act of bankruptcy within said four months by transferring, while insolvent, to said Adolph Bail, as such creditor, a certain stock of goods, with intent to prefer said Adolph Bail over other creditors. The petition further alleged that the said firm was not engaged in tilling the soil, nor was either of the members thereof a wage earner. The petition contained the usual prayer for the issuance of a subpoena directed to said firm, and for an adjudication by the court of bankruptcy against the partnership. The petition was verified by the oaths of Fred Barman, J. Willard, and M. J. Sideman. Upon the filing of the petition, an order was made by the court setting a time within which said firm should appear in said court and answer the petition, and a further order was made that a copy of the petition, with a writ of subpoena, be served upon said firm of Benbrook & Donovan at least five days before the day set for the hearing of the petition. Under this order, a subpoena directed to J. H. Benbrook and R. J. Donovan was issued, commanding them personally to appear upon the day named in the order, and answer to the petition filed by said petitioning creditors. It further appears from the record that this subpoena was served upon R. J. Donovan by the United States Marshall on September 20, 1902. No appearance was made by either member of the firm of Benbrook & Donovan, nor any appearance made on behalf of said firm. On the 11th day of October, 1902, the petition was heard by the court, and a judgment entered declaring said firm of Benbrook & Donovan bankrupts.

The first assignment of error is based upon the ruling of the trial court admitting in evidence the record of the bankruptcy proceedings, and the overruling of appellants' objections to the same upon the grounds: First, that the petition was insufficient in matters of substance; second, that it was not properly verified; and, third, that no proper service of subpoena was had on the firm of Benbrook & Donovan.

Considering these objections in their order, the omission of the petition to state the nature of the petitioners' claims and to give the amount of each is the only defect in the petition which presents any matter which calls for serious consideration. The bankruptcy act provides that petitioning creditors must have provable claims amounting in the aggregate to the sum of \$500 before they may institute bankruptcy proceedings against a debtor. The rules prescribed by the Supreme Court of the United States contain no additional requirement than that prescribed in the act as to what the petition shall contain. The form, however, prescribed by the Supreme Court for a creditors' petition requires, in addition to the general allegation, that the petitioners have provable claims to the amount of \$500 against the defendant debtor, and a statement setting forth with particularity the nature and amount of each of such claims. A failure to state the nature and amount of the claims held by the petitioning creditors in such a petition would doubtless render it subject to direct attack. Such an omission, however, does not seem to us to render a judgment based upon such petition void for want of jurisdiction, and thus open to collateral attack. The Supreme Court of the United States in *West Co. v. Lea*, 174 U. S. 599, 19 Sup. Ct. 839, 43 L. Ed. 1098, in referring to the rules prescribed in the court's general orders under the bankrupt act, said: "These rules are but intended to execute the act, and not to add to its provisions by making that which the statute treats in some cases as immaterial a material fact in every case." The material fact, under the bankrupt act, which must be alleged and proven, is that the petitioning creditors have provable claims against the debtor in an amount aggregating \$500. A statement giving the nature and amount of each claim is but an amplification of this general fact. We hold, therefore, that the petition contained a sufficient showing of facts under the bankruptcy act, and the general orders of the Supreme Court to confer jurisdiction upon the district court to enter judgment in the bankruptcy proceedings.

Even if we are not to assume, from the similarity of names, that the verification of the petition was made by members of the firms constituting the petitioning creditors, still any defect in such verification, by reason that it may not have been made by the proper parties, is a formal matter, and not jurisdic-

tional. In *re Chequasset Lumber Co.* (D. C.) 112 Fed. 56; *Green River Deposit Bank v. Craig* (D. C.) 110 Fed. 137; *Leidigh v. Stengel*, 95 Fed. 637, 37 C. C. A. 210.

The third ground of objection to the jurisdiction of the district court in the bankruptcy proceedings would be well taken if the record disclosed that no service was had upon the bankrupt firm. A judgment of the bankruptcy court is open to collateral attack for want of jurisdiction over the person of the alleged bankrupt where the record discloses that no service was had upon him, and no appearance was made in the proceedings by him, from which it may appear that he voluntarily submitted himself to the jurisdiction of the court. *Chapman v. Brewer*, 114 U. S. 168, 5 Sup. Ct. 799, 29 L. Ed. 83; *New Lamp Chimney Co. v. Ansonia Brass Co.*, 91 U. S. 656, 23 L. Ed. 336. Mere irregularity of service or in the form of the notice given by a summons does not, however, render a judgment of a court of general jurisdiction void, so as to subject it to a collateral attack. *Black on Judgments*, § 263.

The subpoena issued in the bankruptcy proceedings was served on R. J. Donovan, a member of the firm of Benbrook & Donovan. It, in effect, notified him that a petition in bankruptcy had been filed by the petitioning creditors, and that it prayed for an adjudication of bankruptcy against the firm of Benbrook & Donovan. Whatever informality there may be in the form of the subpoena, it nevertheless contained sufficient to put the member of the firm served upon notice of the proceeding. The bankrupt act, in section 5, subd. "c" (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3424]), provides that "the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property." The record shows that the district court acquired jurisdiction over the person of Donovan, and, under the foregoing provision of the bankrupt act, it thereby acquired jurisdiction of the firm of Benbrook & Donovan and its property.

The second assignment of error, relating to the ruling of the trial court in refusing to strike certain portions of the amended complaint, is not argued by counsel for appellant in their brief, and is therefore not considered by us.

The third assignment is based upon the alleged insufficiency of the evidence to sustain the finding of the court that the appellants, in obtaining a transfer of the property sued for from the firm of Benbrook & Donovan, intended thereby to obtain a preference over other creditors of said firm, and that said firm of Benbrook & Donovan intended thereby that such preference should be made. It was the special province of the trial court to determine all questions of fact. A reading of the record shows that there was sufficient

evidence to sustain the finding, and we therefore cannot disturb the judgment of the trial court upon that ground.

Finding no reversible error in the record, the judgment is therefore affirmed.

KENT, C. J., and DOAN and CAMPBELL, JJ., concur.

(9 Ariz. 316)

TERRITORY ex rel. DEVINE, Treasurer, v. PERRIN.

(Supreme Court of Arizona. Nov. 18, 1903.)

1. PUBLIC LANDS—FOREST PRESERVATIONS—RELINQUISHMENTS BY OWNER WITHIN RESERVATIONS—VESTING OF TITLE IN GOVERNMENT.

Act Cong. June 4, 1897, c. 2, 30 Stat. 36, provides that an owner of land within a forest reserve may relinquish the same, and select in lieu thereof a tract of vacant land. An owner of land within a forest reserve executed a deed of relinquishment. *Held*, that the title vested in the government on the filing of the deed for record; the title not being dependent on the selection of the land granted in lieu thereof.

2. TAXATION—LANDS SUBJECT TO.

An owner of land within a forest reserve executed a deed of relinquishment, as authorized by Act Cong. June 4, 1897, c. 2, 30 Stat. 36, authorizing an owner of land within a forest reserve to relinquish the same in lieu of the right to select vacant land. The deed was recorded January 31, 1903. The Secretary of the Interior approved the abstract of title and the selection of the lieu land in April, 1903. *Held*, that the land within the forest reserve was not assessable against the owner for the year 1903, though Rev. St. 1901, par. 3833, makes a tax a lien on the property assessed, which attaches on the 1st Monday in February of each year, since an assessment is not completed until the duplicate assessment roll is certified, as required by title 62, c. 5, which cannot be earlier than the 3d Monday in August of each year.

Appeal from District Court, Coconino County; before Justice Richard E. Sloan.

Action by the territory, at the relation of Thomas Devine, treasurer and ex officio tax collector of Coconino county, against Edward B. Perrin. From a judgment for defendant, plaintiff appeals. Affirmed.

Edward M. Doe, for appellant. Joseph H. Kibbey, for appellee.

CAMPBELL, J. This is an action brought by the territory of Arizona, at the relation of the treasurer and ex officio tax collector of Coconino county, against Edward B. Perrin. The action is brought under the provisions of Act No. 92, of p. 143, of the Legislative Assembly of 1903, to enforce against certain lands the taxes levied thereon for the year 1903. The appellee was in April, 1902, and for some years prior thereto had been, the owner of the lands upon which taxes were sought to be imposed. Said lands were embraced within the odd-numbered sections within the general limits of the Atlantic & Pacific Railroad land grant, and, while not owned by the United States, were within the exterior limits of what was then and is now the San Francisco Mountain Forest Reserve, a forest reserve

theretofore duly established by the President of the United States. During the month of December, 1901, and up to the month of April, 1902, appellee had correspondence with the Secretary of the Interior of the United States, looking to the acquisition by the United States of the land held by the appellee, that the same might be incorporated in and become a part of the forest reservation. He made a proposition to the Department of the Interior, offering to relinquish to the United States the lands in question, and to select in lieu thereof vacant unappropriated public lands within certain prescribed limits, and in the manner provided by the act of Congress of June 4, 1897, 30 Stat. 36, c. 2. There were certain outstanding contracts granting the right to cut timber from a portion of the lands involved, and at the instance of the Secretary of the Interior the appellee agreed to use his good offices in securing from the holders of these timber privileges compliance with rules and regulations to be prescribed by the Interior Department. Forms of deeds of relinquishment were submitted by the appellee to the Secretary of the Interior, and approved by that officer. The proposition made was accepted by the Secretary of the Interior in April, 1902, and subsequently, in the same month, the President of the United States, at the request of the Secretary of the Interior, issued his proclamation incorporating into the reserve the lands of appellee. It was a part of the agreement entered into with the Secretary of the Interior that the appellee should as soon as practicable execute to the United States deeds of relinquishment of said lands. These deeds were so executed, and on the 31st day of January, 1903, were caused to be recorded in the office of the recorder in the county in which the lands are situated, and abstracts of title to the said lands were furnished to the Secretary of the Interior at his request. Thereafter, in April, 1903, the Secretary of the Interior approved the said abstracts of title and the deeds of relinquishment, with the exception of a small part of the land conveyed, which at the time this action was tried in the court below had not yet been approved. After the agreement reached by correspondence and the proclamation of the President, appellee in no wise attempted to exercise any claim or control over the lands, but they were and remain under the complete control of the Secretary of the Interior, and are and have been in all respects treated as a part of the forest reservation.

It is contended by the appellant that, although the deeds of relinquishment were filed and recorded on January 31, 1903, the government took no title to the lands until the deeds and abstracts were approved by the Secretary of the Interior, and the selection of the lands in lieu of those relinquished were made by the appellee and approved by the Land Department of the government, and, as such selections and approvals were not made until

after the 1st Monday in February, 1903, the lien for taxes for the year 1903, by virtue of the provisions of paragraph 3833 of the Revised Statutes of Arizona of 1901, attached to the lands on the 1st Monday in February in that year. The provisions of the act of June 4, 1897, under which the lands were relinquished to the government, provides: "That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent." It will be observed that the act itself makes no provision as to the manner in which the relinquishment to the government shall be made. The whole subject is left under the control of the Land Department of the government. *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 23 Sup. Ct. 692, 24 Sup. Ct. 860, 47 L. Ed. 1064.

There is nothing in the act of Congress which makes the vesting of the title in the United States of the relinquished lands dependent upon the selection of the lands granted in lieu thereof. The appellant urges that, this being an exchange of lands, the title does not vest in the government until the selection of the lieu lands has been made and approved. We are unable to agree with this contention. In our view of the statute, the legal title vested in the United States immediately upon the filing for record of the deeds of relinquishment, subject, perhaps, to be divested should the Secretary of the Interior disapprove the abstracts of title. The consideration for the grant is the right, under the law, to select other lands in lieu of those relinquished. After the deed is recorded and delivered, the grantor cannot, by any act of his, incur the title as against the United States. He has no right to the land which he can enforce.

We have carefully examined the opinion of the Supreme Court in the case of *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, supra, relied upon by appellant, and find nothing therein in conflict with these views. The question there presented was the time when the title vested to lands in lieu of lands relinquished, and the court held that such title vested only after the approval of the selection by the Land Department of the government.

There is another reason why this action must fail, at least as to the greater part of the lands involved. The Secretary approved the abstracts of title, and, so far as the record discloses, the selection of the lieu lands, in April, 1903. Under the provisions of the laws of Arizona, the tax rate is not fixed until the 3d Monday in August of each year, and the levy and assessment is not completed until the duplicate assessment roll is

prepared and certified, as provided by chapter 5, tit. 62, Rev. St. 1901. When in April, 1903, the Secretary of the Interior approved the abstracts of title to the lands, and, so far as the record shows, the lieu selections were made and approved, all had been done that even the appellant contends should be done to vest the full legal and equitable title in the United States. Lands acquired for public purposes during the period between the first and final steps of taxation are exempt from taxes levied during the year in which they are acquired. *Bannon v. Burnes* (C. C.) 39 Fed. 892; *Gachet v. City of New Orleans*, 52 La. Ann. 813, 27 South. 348; *Buckhout v. City of New York*, 176 N. Y. 363, 68 N. E. 659. And this is true even where, as in this territory, the Legislature has declared that a lien for taxes shall attach at a date prior to the time when the first steps are taken to subject the real estate to taxation. There can be no real or effective lien until the amount of the taxes are ascertained and assessed. "In the nature of things, no tax or assessment can exist, so as to become an incumbrance on real estate, until the amount thereof is ascertained and determined." *Black on Tax Titles*, § 189; *Dowdney et al. v. Mayor, etc.*, 54 N. Y. 186. And see *Gillmor v. Dale* (Utah) 75 Pac. 932. Under such provisions of law, when the rate of taxes is fixed and the amount determined and levied, the lien for such amount relates back and attaches as of the date specified in the statute. *McLaren v. Sheble*, 45 Mo. 130; *Reeve v. Kennedy*, 43 Cal. 643; *Cochran v. Guild*, 106 Mass. 29, 8 Am. Rep. 296; *Gillmor v. Dale* (Utah) 75 Pac. 932. In the case at bar, the lands having become the property of the United States at the time the taxes were levied and assessed, and no longer subject to taxation, the acts of the taxing officers were void and of no effect.

For the foregoing reasons, the judgment of the lower court is affirmed.

KENT, C. J., and DOAN, J., concur.

VALLEY BANK OF PHOENIX v. BROWN. (Supreme Court of Arizona. Nov. 18, 1905.)

1. PRINCIPAL AND AGENT—UNAUTHORIZED ACT OF AGENT—RATIFICATION.

The ratification by a principal of an act of an agent previously unauthorized is not binding on the principal unless made with full knowledge of the facts, though he may have omitted to make inquiries, and the facts might have been learned by the use of diligence on his part.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 627-633.]

2. BANKS—LOANS FOR DEPOSITOR—RATIFICATION—KNOWLEDGE OF THE FACTS.

Evidence in an action against a bank by a depositor to recover the amount of a loan made out of his deposit by the bank without authority examined, and held to warrant a finding that the depositor did not ratify the act of the bank because of want of knowledge of the facts, authorizing a recovery against the bank.

3. SAME—ACTION AGAINST AGENT FOR UNAUTHORIZED ACT — EVIDENCE — ADMISSIBILITY.

Where a depositor repudiates a loan made by the bank out of his deposit, without authority, and sued the bank for the amount thereof, evidence showing that the goods agreed to be taken by the bank as security for the loan were perishable was admissible.

Appeal from District Court, Maricopa County; before Chief Justice Edward Kent.

Action by Elizabeth O. Brown against the Valley Bank of Phoenix. From a judgment for plaintiff, defendant appeals. Affirmed.

C. F. Ainsworth, for appellant. J. M. Jamison, for appellee.

CAMPBELL, J. Plaintiff below, appellee here, was a depositor of the defendant bank. In December, 1902, the bank, by its president and manager, drew a check for \$1,000 against plaintiff's deposit, and loaned that sum to one L. D. McClure, taking a promissory note payable to plaintiff, due in one year, and bearing interest at the rate of 10 per cent. per annum. McClure was a retail druggist, carrying on business in the city of Phoenix. As collateral security for the loan, he pledged a warehouse receipt for whisky in bond in Kentucky, and agreed to set apart a portion of his stock of goods, to be held by one F. H. Lyman, his attorney, as receptor. The warehouse receipt was of small value. The goods to be set aside inventoried \$1,042.07. A large part of them were of a perishable character. Mr. Lyman receipted for the goods, and saw some of the goods segregated from the stock, but was not requested by the bank to check them over, nor did he do so, nor was he requested to exercise more than a nominal control over them; the actual custody and control remaining in McClure. There was a verbal agreement between McClure and the bank to the effect that, should McClure desire to use any of the goods mentioned in the inventory, he could pay the bank the schedule price and take them. About one month after the loan was made, plaintiff was called to the bank, and told by the president that he had loaned \$1,000 of her money to McClure on "gilt-edged" security. This was the first knowledge she had of the transaction. She was not told the nature of the security, nor the manner in which it was held. Thereafter McClure paid the interest monthly to plaintiff, who receipted to him for the same. During the month of March, 1903, the cashier of the bank suggested to plaintiff that she had better look over the securities connected with her loan, and handed the papers relating to them to her. These papers, with the exception of the receipt given by Lyman, are not in evidence. She did not examine the papers, but returned them at once to the cashier, who assured her that the securities were perfectly good. All of the papers re-

mained with the bank. Sometime thereafter, plaintiff attempted to negotiate a purchase of real estate, and told the broker of the McClure note. The broker, in response to her suggestion, and with a view to accepting the note if satisfactory in part payment, examined the note and securities, and declined to accept it; merely telling her that the note was not satisfactory. Shortly before the note became due, McClure failed in business. Investigation disclosed that of the goods supposedly set aside as security for plaintiff but a small portion remained. During this investigation plaintiff learned for the first time the precise nature of the goods pledged, and the conditions under which they were held. Shortly after learning the facts, she notified the bank that she repudiated the act of the bank in making the loan, tendered the interest she had received, offered to indorse the note to the bank without recourse, and demanded payment of the \$1,000. The bank refused payment, and this action was brought.

The principal question requiring our attention is, did the plaintiff ratify the action of the bank in making the loan under such circumstances as to be binding upon her? The principles of law involved are clear. "No doctrine is better settled, both upon principle and authority, than this, that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded in mistake or fraud." *Owings v. Hull*, 9 Pet. 607, 9 L. Ed. 246. Speaking through Chief Justice Bigelow in the case of *Combs v. Scott et al.*, 12 Allen, 493, the Supreme Court of Massachusetts say: "Ratification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of the principal. No legal obligation rests upon him to sanction or adopt it. No duty requires him to make inquiries concerning it. Where there is no legal obligation or duty to do an act, there can be no negligence in an omission to perform it. The true doctrine is well stated by a learned text-writer: 'If I make a contract in the name of a person who has not given me an authority, he will be under no obligation to ratify it, nor will he be bound to the performance of it.' 1 *Livermore on Agency*, 44. See, also, *Paley on Agency*, 171, note o. Whoever, therefore, seeks to procure and rely on a ratification is bound to show that it was made under such circumstances as in law to be binding on the principal, especially to see to it that all material facts were made known to him. The burden of making inquiries and of ascertaining the truth is not cast on him who is under no legal obligation to assume a responsibility, but rests on the party who is

endeavoring to obtain a benefit or advantage for himself. This is not only just, but it is practicable. The needful information or knowledge is always within the reach of him who is either party or privy to a transaction which he seeks to have ratified, rather than of him who did not authorize it, and to the details of which he may be a stranger. We do not mean to say that a person can be willfully ignorant, or purposely shut his eyes to means of information within his own possession and control, and thereby escape the consequences of a ratification of unauthorized acts into which he has deliberately entered; but our opinion is that ratification of an antecedent act of an agent which was unauthorized cannot be held valid and binding where the person sought to be charged has misapprehended or mistaken material facts, although he may have wholly omitted to make inquiries of other persons concerning them, and his ignorance and misapprehension might have been enlightened and corrected by the use of diligence on his part to ascertain them." See, also, *Storey on Agency*, § 243; *Wheeler v. Northwestern Sleigh Co. (C. C.)* 39 Fed. 347; 1 Am. & Eng. Enc. Law, 1190.

The trial court found as a fact that the plaintiff was not informed as to the character or value of the securities, and, after a careful consideration of the evidence, we are not prepared to say that it was not justified in so finding. A lack of such knowledge is a material circumstance, and a ratification without it is not binding, unless the ignorance resulted from willfulness and not mere carelessness. The inventory or other papers concerning the collateral held by the bank, with the exception of Mr. Lyman's receipt, are not in evidence, and we cannot say how much information plaintiff would have acquired had she examined them. We think the evidence shows the plaintiff to have been careless, but not willfully ignorant.

Evidence was introduced to show that many of the goods agreed to be set apart as security were of a perishable character. The appellant contends that this evidence was not admissible. We think it was admissible. See *Bank of Owensboro v. Western Bank*, 76 Ky. (13 Bush) 526, 26 Am. Rep. 211.

The record discloses no error, and the judgment appealed from will be affirmed.

SLOAN and DOAN, JJ., concur.

ANTHONY WILKINSON LIVE STOCK CO. v. McILQUAM.

(Supreme Court of Wyoming. Dec. 10, 1905.)

1. ADJOINING LANDOWNERS—USE OF PREMISES—INJURIES TO PROPERTY—DAMNUM ABSQUE INJURIA.

An owner of land has absolute dominion over his own lands, and may make any legiti-

mate use of them which he sees fit, and any injury resulting to adjoining landowners from such use is damnum absque injuria.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adjoining Landowners, §§ 60-66.]

2. SAME — FENCES — INJURIES — INTENT OF ERECTION.

The purpose or motive of a landowner in erecting fences on his land is immaterial on the question of his liability to an adjoining landowner by reason of the erection of such fences, so long as their erection is lawful, and does not invade or interfere with some right of the adjoining owner.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adjoining Landowners, §§ 60-63, 74-81; vol. 37, Cent. Dig. Nuisance, §§ 2, 6.]

3. PUBLIC LANDS—RIGHT OF PASTURAGE—NATURE OF RIGHT.

The privilege or right of pasturage upon the public uninclosed lands of the government which are not reserved or set apart for other public uses is common to all who may wish to enjoy it, and is not peculiar to any particular persons, nor is a prior right gained by priority of use; nor is such right dependent on, or enlarged by, the ownership of neighboring lands.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 23.]

4. SAME—TITLE OF LICENSEE.

The use of public uninclosed lands for pasturage of cattle confers no title on the person so using them, but the government may at any time withdraw its consent to such use.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, §§ 23-25.]

5. FENCES — RIGHT TO ERECT—NECESSITY OF INCLOSURE.

While an owner of land who permits the same to remain open and uninclosed may thereby subject it to use for grazing purposes by the cattle of an adjoining owner, yet he may at any time prevent such use by the erection of a fence on one or more sides of his premises; and it is not necessary for him, if he chooses to erect a fence on only one or two sides of his land, to completely inclose his land by erecting fences on the other sides, and thereby segregate it from the public domain.

6. NUISANCES — PUBLIC NUISANCES—SPECIAL INJURY.

The injury or damage resulting to one landowner from an unauthorized or illegal assertion by another landowner of a right to the exclusive possession of public lands is an injury suffered in common with all members of the public whose live stock graze in the vicinity of such public lands, and, if a nuisance, is a public nuisance, which cannot be enjoined by the individual landowner, unless he shows some special injury peculiar to himself, differing in kind, and not merely in extent and degree, from the general injury to the public.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, §§ 163-169.]

7. SAME.

The fact that one owns land in the vicinity of public land, to which an exclusive right is wrongfully asserted by another, does not of itself render the injury to him special, or different from that suffered by the public generally, so as to entitle him to an injunction.

8. INJUNCTION—ADEQUACY OF LEGAL REMEDY.

In the absence of defendant's insolvency, the remedy at law is adequate to redress any injury suffered by plaintiff on account of any overt act of defendant in excluding plaintiff's cattle from open and uninclosed public lands.

Error to District Court, Laramie County; Richard H. Scott, Judge.

Action by John J. McIlquam against the

Anthony Wilkinson Live Stock Company. There was a judgment in favor of plaintiff, and defendant brings error. Reversed.

John W. Lacey and C. W. Burdick, for plaintiff in error. W. R. Stoll, for defendant in error.

POTTER, C. J. The plaintiff below, John J. McIlquam, seeks in this action to enjoin the construction and maintenance of certain fences, which, it is alleged, will exclude plaintiff's cattle from certain alleged unappropriated public lands of the United States, and which the defendant below, the Wilkinson Live Stock Company, is alleged to have constructed or threatened to construct, and also to restrain the defendant from otherwise interfering with the pasturing and grazing of said cattle upon such public lands. The fences complained of are built, or are proposed to be built, upon lands owned or leased by the defendant, the Wilkinson Live Stock Company, in township 17 N., range 64 W., in Laramie county. It appears that the plaintiff is the owner of the N. W. $\frac{1}{4}$ of section 10 in that township and range, and also the following tract in township 18: The E. $\frac{1}{2}$, and the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 34, and the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 26; that he makes his home on section 34; that for 12 years he has been engaged in the ranching and cattle business, allowing his cattle, consisting of 400 to 500 head, to run at large, pasture, and graze upon the uninclosed public and other lands in that vicinity, their range having been chiefly the lands lying south and west of said section 10 in township 17, and embraced in four or five adjoining townships. The defendant is the owner and is in possession of all the odd-numbered sections in township 17 and the odd-numbered sections in township 18 from 25 to 35, both inclusive, and has leased and is in possession of section 16 and 36 in township 17 and section 36 in township 18. Plaintiff's land in township 18 is inclosed by his own fences, and his land in section 10 in township 17 is inclosed, together with the S. W. $\frac{1}{4}$ of that section; the W. $\frac{1}{2}$ of that section being in one inclosure. Two gaps were, however, left by plaintiff in the fence inclosing his land in that section—one in the fence on the west line of the section, near the center of that line, and one near the middle of the fence on the south line—which gaps afforded a means of ingress and egress for cattle. Defendant had constructed an east and west fence upon its own land, but close to the dividing line between sections 12 and 13, 11 and 14, 10 and 15, and 9 and 16. It had also built a fence on section 3, which inclosed that section, or, at least, which had that effect, in connection with plaintiff's fences inclosing his land in the adjoining sections 10 and 34. Defendant had also inclosed by fence, with the permission of the entryman, the W. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of section 10,

and it was proposing to build a north and south fence along the east side of section 9, near the dividing line between that section and section 10, which proposed fence would practically connect with defendant's fence on section 16 on the south and section 3 on the north.

The following map or plat shows the situation of the fences constructed and proposed to be constructed by defendant, as well as the various tracts of land owned or controlled, as aforesaid, by the respective parties. Defendant's lands are designated by the letter "D," and the plaintiff's lands by the letter "P." The fences of defendant built or in contemplation, which are complained of, are shown by broken lines. The letters "A" and "B" in section 10 indicate approximately the location of the gaps in plaintiff's fence inclosing the W. $\frac{1}{2}$ of that section. It will be observed that the fences on sections 9 and 15 will prevent the access of cattle thereon, respectively, from plaintiff's land in section 10.

30 D	D 29	28	D 27	D 26	D 25
D 31	32	D 33	D 34	D 35	D 36
6	D 5	4	D 3	2	D 1
D 7	8	D 9	D 10	D 11	D 12
18	D 17	D 16	D 15	14	D 13
D 19	20	D 21	22	D 23	24
30	D 29	28	D 27	D 26	D 25
D 31	32	D 33	34	D 35	D 36

The remaining sections shown on the plat are public lands of the United States, but it appears that most of them had been embraced in so-called "oil fillings" or "oil locations," made by various persons, who are alleged to have made them solely for the benefit of defendant; and it is alleged by plaintiff, and the trial court found, that the lands were not oil lands, and that the oil fillings or locations were fraudulent and void, and were made at the instigation of defendant, for the purpose of preventing plaintiff's cattle from grazing and pasturing upon the lands embraced therein. The lands lying west and south of defendant's fences, including, as we understand, the lands in the adjoining townships, are uninclosed; and it

was not found by the learned district court, nor do we find the evidence to disclose, that any fence constructed by defendant inclosed government land, nor that the proposed fence on section 9 would have any such effect. Though there is a finding that defendant had declared its purpose to construct fences upon the government land covered by the so-called "oil flings," we think it hardly warranted by the evidence; and no such declared purpose seems to be relied upon in this court. Certainly, no act of defendant was shown toward the erection of any such fences nor the inclosing of such lands. The evidence as to any such proposed fencing is too indefinite and uncertain to authorize equitable interference. It appeared, however, that the defendant, prior to the commencement of the suit, had served plaintiff with a written notice to the effect that defendant was in possession of the lands covered by the so-called "oil flings," and requiring the plaintiff to keep his cattle off of those lands.

The trial court made special findings of fact and law, which were excepted to. It was found, among other things, that one of the purposes of the defendant in erecting the fences shown on the plat, and in causing the fling of the oil claims, as aforesaid, was to prevent access of plaintiff's cattle over and across the lands of defendant to the government lands lying south and west of the same, and that the fence was erected the better to enable the defendant to exclude such cattle from the government lands; that the oil flings were made for the purpose, also, of appropriating to defendant's own and exclusive use the government lands covered thereby, and that defendant claimed the right, by virtue thereof, to the exclusive possession of such lands. It was alleged in the petition that defendant had driven plaintiff's cattle off from some of those lands, but that allegation was found not to be sustained; on the contrary, it was found that plaintiff had forcibly cut a fence of defendant, and, through a gap thus made, had driven his cattle across one of defendant's sections to and upon a government section.

The court found, as a matter of law, that both plaintiff and defendant were licensees, with equal right to range their cattle upon the unappropriated public lands of the United States, and that, so long as defendant fails to fence its own lands separate and distinct from the government lands, the latter constitutes a part of the open range, and that defendant has no right to impede or prevent the use of the lands for such purposes, except as might result from the inclosing of its lands, separate and apart therefrom, to which it has possessory or legal title, by a lawful fence; and that its fences shown on the plat would not constitute a lawful inclosure. Upon the findings the court entered a final decree, perpetually enjoining defendant, as follows: "From building or connecting any fence or fences with the other fences or the

defendant upon the defendant's own lands in such manner as to exclude the cattle and live stock of the plaintiff from pasturing, feeding, grazing, or roaming upon sections 2, 4, 6, 8, 12, 14, 18, 20, 22, 24, and the east half of the east half of section 10, in township 17 north, of range 64 west, or other government lands, or any portion of the same, so long as they remain government lands; and the said defendant is hereby perpetually enjoined from claiming any right to the above-named sections, or to section 32, or the south half of the south half of section 30, in township 18 north, of range 64 west, or any portion of the same, by reason of any oil flings which the defendant may have heretofore made, or caused to be made, for the purpose of excluding the plaintiff's cattle from pasturing, ranging, or feeding upon said sections, or any part of the same, or for the purpose of applying any portion of the same to the defendant's own use, to the exclusion of plaintiff's cattle from the same. Nothing herein contained shall be construed as preventing or restraining the defendant from inclosing its own lands by a fence; such inclosure not to contain any government land." From that judgment, the defendant brings the cause to this court on error.

As defendant's section 3 and the W. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of section 10 are separately inclosed, the fences thereon, respectively, are not affected by the decree. But it seems to be understood that the other fences of defendant, shown on the accompanying plat, do come within the operation of the decree. At any rate, the injunction, so far as it relates to fencing, must be sustained, if at all, upon the basis that such fences produce the supposed injurious results intended to be remedied by the decree; and it is here argued that the fences above referred to do or will exclude plaintiff's cattle from the neighboring public lands, and that is no doubt the theory upon which the injunction was finally awarded by the learned district court. It is not contended that defendant's fences will inclose such public lands, and in that manner exclude plaintiff's cattle therefrom; indeed, it is an established fact in the case that all the lands west and south of defendant's fences are uninclosed, and constitute a part of the open range. But the argument is that plaintiff's cattle will be so excluded because the fences in question will cut off plaintiff's land in section 10 from all access to such lands, and thus prevent plaintiff's cattle from reaching those lands from his land and returning thereto. It appears that a small stream rises near the southeast corner of section 9, which empties into Horse creek north of the lands shown on the plat, after flowing through the W. $\frac{1}{2}$ of section 10, and sections 3, 34, 27, and 28, and that plaintiff's cattle have usually gone to that stream for water, and convenience, if not necessity, requires that they have access to plaintiff's land in section 10 for that purpose; and the

gaps in the fence surrounding plaintiff's land in that section were provided to afford such access. There are no natural watering facilities upon the open and uninclosed lands west and south, except in Horse creek, on a county road, four or five miles west from plaintiff's premises. Plaintiff's sole objection, therefore, to defendant's fences is that they will prevent his cattle from going back and forth between the government lands and his land in section 10, which provides their only available or convenient water supply. The open and uninclosed lands upon which plaintiff's cattle have usually ranged are presumably accessible from every other direction, there being no contrary showing; and it requires no argument, therefore, to show that defendant's fences will not prevent the cattle of plaintiff or those of other persons from pasturing and grazing upon such lands. Plaintiff, however, demands not only the right to allow his cattle to roam at large upon those uninclosed lands, but that they be permitted uninterrupted freedom of travel across defendant's lands to his premises in section 10; and the obstruction of such travel forms the gravamen of his complaint in this case.

There is no showing, nor even any contention, that the plaintiff has acquired, in any manner, a right of way for himself or his cattle across or over any of defendant's said lands upon which its fences are, or are proposed to be, constructed. The only right which he asserts is that of pasturage upon the public domain. It is true that his counsel insists that all of defendant's acts, taken together, contribute to plaintiff's alleged injury, viz., the fencing and alleged unlawful oil claims, and the alleged unauthorized assertion by defendant of its possession of the lands embraced within the oil claims. But, whatever may have been the effect of the oil filings, and defendant's claims thereunder, the right to erect and maintain the fences cannot be thereby affected. If the defendant may lawfully construct and maintain the fences in controversy on its own lands, it is not perceived that such right would be lost, or the fences become any the less lawful, because the defendant may perhaps have asserted a greater right than it possessed to the lands covered by the oil claims. In the first place, therefore, we shall consider what the rights of plaintiff and defendant are, respectively, concerning the fences, and whether the former may enjoin their construction or maintenance in this action.

The insufficiency of the evidence to show a purpose or threat on the part of defendant to inclose or construct fences upon public lands has been adverted to. But the theory of the decree does not seem to be an actual or threatened unlawful inclosure of public lands by the defendant, nor is the decree confined to the enjoining of such an inclosure. It goes further than that. It was broadly stated as a conclusion of law that, "so long as the

defendant fails to fence its own lands separate and distinct from the government land, the latter constitutes a part of the open range, and defendant has no right to impede or prevent the use of the lands for such purposes, except as might result from the inclosure of its lands separate and apart therefrom, to which it has possessory or legal title by a lawful fence." And the defendant was enjoined "from building or connecting any fence or fences with the other fences of the defendant upon the defendant's own lands in such manner as to exclude the cattle and live stock of the plaintiff from pasturing, feeding, grazing, or roaming upon" certain named government sections, unless by such a fence or fences the defendant should inclose its own lands, without including government land. The mere fact that, without inclosing government land, defendant's fences might in some manner exclude the cattle of plaintiff therefrom, would apparently bring such fences within the operation of the decree; and, in view of the facts, the significance of the words "in any manner," as employed in the decree, is not to be misunderstood. Though the situation of defendant's fences would not interfere with the bringing of cattle upon the government lands from any other direction, or their grazing and pasturing thereon, it would doubtless interfere with cattle going upon such land from plaintiff's premises in section 10, and hence they could not be maintained under the decree, unless, indeed, the defendant should, by a lawful fence, separately inclose its own land. The effect of the decree, therefore, is to require the defendant to allow its lands which are not entirely and separately inclosed to remain a part of the open range, subject to the trespasses of plaintiff's cattle, or at least to refrain from erecting the ordinary barrier to keep out such cattle. Indeed, counsel for plaintiff in his brief states that the plaintiff had the unquestionable right to turn his cattle loose upon his own land, and let them roam at large upon defendant's sections 9, 15, and 16, and upon all government sections and other sections in the same locality, though he asserts, also, that the plaintiff's object was not to hold or herd his cattle upon either of sections 9, 15, or 16, but his object and desire was that his cattle might roam over and pasture upon government land; and in that connection he argues that the object of defendant in building the fences in question was not to prevent plaintiff's cattle from passing over or feeding upon its said sections, but to prevent them from going upon the neighboring government sections covered by the oil filings. But, as before observed, it is clear that if that was the object of the defendant, the only effect of its fences would be to prevent the cattle of plaintiff from going upon such government land from plaintiff's own premises, by crossing the lands of defendant.

Cases arising out of the unlawful inclosure

of government lands are not applicable to the case at bar, nor do we find any analogy between those cases and the case here under consideration. Defendant has not inclosed government land, and none of its fences will prevent or obstruct free passage or transit over or through the public lands in question, or the right of any person to peaceably enter upon the same, and settle thereon, or enjoy them in any manner authorized by law. To authorize the interference of equity, therefore, to restrain such fencing, it must appear that it invades some legal or equitable right of the plaintiff. Like every other landowner, the defendant has absolute dominion over its own lands, and it may make any legitimate use of them it sees fit, and, should injury to adjoining landowners thereby result, it will be *damnum absque injuria*. 1 Cyc. 769; Wood on Nuisances, §§ 1, 3; 1 Tiffany on Real Prop. § 295; Wiley v. Connelly (Mass.) 60 N. E. 784; Letts v. Kessler, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177; Western Granite & M. Co. v. Knickerbocker (Cal.) 37 Pac. 102; Ingwersen v. Bailey (Cal.) 50 Pac. 536; Lazarus v. Parmly, 113 Ill. App. 624.

The erection of fences for the purpose of annoying a neighbor has been the source of frequent litigation, and by the great weight of authority it is held, in the absence of contrary statutory provision, that the erection by a landowner upon his own premises of a high or unsightly fence or other structure, which obstructs the light and air or view of his neighbor, is not unlawful, nor a nuisance per se, and that injunction will not lie in such cases, though the motive in building the fences or other structure may have been malicious, and solely to annoy the neighbor, provided the act is not otherwise illegal. In Michigan, which is one of the few states, in the absence of statute prohibiting the erection of so-called "spite fences," holding that a fence erected maliciously, and without any other purpose than to shut out light and air from a neighbor's premises, may be enjoined as a nuisance, the rule is confined to fences which serve no useful purpose, and are erected solely from a malicious motive. But the principle is recognized even in that state that the motives of a party in doing a legal act cannot form this basis upon which to found a remedy. Allen v. Kinyon, 41 Mich. 282, 1 N. W. 863; Kuzniak v. Kozminski, 107 Mich. 444, 65 N. W. 275, 61 Am. St. Rep. 344. And the rule is general that, in determining whether the use of one's property is or is not a nuisance, the motive of the party has no connection with the injury or bearing upon the result. Wood on Nuisances (2d Ed.) § 6. It is immaterial, therefore, what the purpose of the defendant was in the erection of its fences, if it was not unlawful to erect them, and their erection did not invade or interfere with some right of the plaintiff. It was indicated in the argument

on behalf of defendant that the object of erecting the fences was to prevent the trespassing of plaintiff's cattle upon defendant's premises, while the court found that the object was to exclude such cattle from the public lands. It matters not, in our opinion, how much the purpose, if any, to exclude the cattle from going back and forth between the government land and plaintiff's land entered into the construction of the fences, provided it was lawful to build them, and plaintiff was not injured in any of his rights. The case of Slaughter v. Cullup, 22 Tex. Civ. App. 578, 55 S. W. 182, presents some features closely analogous to the one under consideration. There the owner of three sections of land, surrounding on the north, east, and south a section owned by the plaintiff, was proposing to erect fences along the outside boundary of each of his three sections, which would separate the plaintiff's section from another section owned by him in the same immediate vicinity, upon which there was a supply of water, and would also prevent the plaintiff's cattle upon his land and upon the range south of said fences from having free access to such water. It was held that injunction would not lie against such fences. The court said: "Appellee had a right to fence his sections, and unless he included some portion of appellant's lands by crossing at the corner more than the fence rested upon, he had the right to fence it as he proposed." In that case plaintiff's land was protected on the west by a fence of which he was a joint owner, and the defendant was not proposing to build fences entirely around his three sections separately, but only upon one side of each section, which with plaintiff's west fence would bring the latter's section and the defendant's sections within the same inclosure. In the case at bar plaintiff's land is not brought into a common inclosure with land of defendant.

Plaintiff confessedly has no right to require that his cattle be permitted to cross defendant's land adjoining his premises, unless that right flows from the right which he, as well as others, have by the implied license of the government to allow his cattle to graze and pasture upon the public domain, since that is the only right which he either alleges or relies upon. It is important, therefore, to inquire into the nature of that right. It is to be remembered that the plaintiff claims no special privilege in respect to the public lands not possessed by every other person in the same situation. The sole right asserted by the plaintiff is the privilege of free pasturage upon the public domain. The Supreme Court of the United States, in discussing that privilege in the case of Buford v. Houtz, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618, said: "We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the

native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and uninclosed, and no act of government forbids this use. * * * The government of the United States, in all its branches, has known of this use, has never forbidden it, nor taken any steps to arrest it." And again: "Everybody used the open uninclosed country, which produced nutritious grasses, as a public common on which their horses, cattle, hogs, and sheep could run and graze." This privilege or right of pasturage upon the public lands of the government, which are left open and uninclosed, and are not reserved or set apart for other public uses, is common to all who may wish to enjoy it. It is not a special privilege conferred upon one person or a few persons. No individual has any greater right than another to herd his live stock upon such lands, or to allow them to roam at large thereon. The plaintiff and defendant are no more licensees of the government in that respect than any other person who may seek the benefit of the pasturage upon the public lands under consideration in this case. Priority of use as to such pasturage does not create a priority of right. *McGinnis v. Freldman* (Idaho) 17 Pac. 635. By the tacit acquiescence of the government in such use of its public lands, that which might otherwise be a technical trespass is rendered lawful. No title to the lands themselves is thereby acquired. Indeed, generally a license as to realty does not operate to create a title to the land in the licensee, but merely as an exemption from liability for acts which would otherwise be a violation of the rights of the licensor. 18 Ency. Law (2d Ed.) 1127, 1128. The government might withdraw its consent to such use of its lands by the public at any moment. It has done so from time to time as to the public domain in various sections of the country, in reserving the same for other public uses, and prohibiting the pasturing of live stock thereon, or allowing the same only under certain prescribed regulations. *U. S. v. Tygh Valley L. & L. S. Co.* (C. C.) 76 Fed. 693; *Camfield v. U. S.*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260.

Now the right or privilege of pasturage upon open, uninclosed and unreserved public lands does not depend upon the ownership of neighboring lands, nor does such ownership, as we understand, confer any peculiar or greater privileges in respect to such right of pasturage. But the position assumed by the plaintiff seems to be that, because he has secured title to a quarter section in a large unsettled territory, which he desires to use in connection with uninclosed public lands, he may so far demand that his premises be rendered accessible from the public lands as to control by injunction the erection of fences otherwise lawful upon intervening lands, which have passed into pri-

ate ownership. We are aware of no principle upon which that position can be maintained. So long as the private owner permits his land to remain open, no doubt the plaintiff's cattle while running at large might graze thereon without rendering him liable in trespass therefor. But such private owner would clearly be entitled to prevent such incursions of plaintiff's cattle by the building of a fence, and we think there is no rule which in such case requires the landowner, if he fence at all, to thoroughly inclose his land by a lawful fence. Failing to so inclose his land, he might not be able to recover damages for the trespass of cattle occurring in consequence of such failure, but, so far as the mere right to build fences on his land is concerned, he is not prohibited by any law or rule that we are aware of from building a fence along one, or two, or three sides of his premises, or through the center thereof, or upon any other part of his land, if he so chooses, unless by so doing he invades some right of another, or violates some public statute.

We perceive no ground for the distinction in this case made by the decree between a fence separately inclosing defendant's land and a fence upon one side thereof only. We are unable to understand why the defendant may not by a single line of fence upon its own land protect the same from the entrance thereon of plaintiff's cattle, if such a fence is deemed proper or sufficient to afford such protection, or, indeed, whether it be or be not deemed sufficient for that purpose. Since such a fence would violate no statute, and would in no greater degree prevent the access of plaintiff's cattle thereon than a fence entirely surrounding defendant's land, what right has the plaintiff to complain, who has no right or easement in such land of the defendant? Upon what principle may he require, in the protection of his supposed right, that the defendant render it all the more impossible for his cattle to cross the defendant's premises by building a fence, not alone on one side, but on all sides thereof? If the defendant may prevent the cattle of plaintiff from entering upon or crossing its adjoining lands by surrounding it with a fence, there seems to be no reason why he may not do so, or attempt to do so, by a fence on one side only. If the defendant owes no duty to the plaintiff to leave its land open for the passage of plaintiff's cattle, how can the plaintiff complain if defendant chooses to build the single line of fence, rather than to more fully protect its premises by bringing it within a lawful inclosure? Suppose the plaintiff owned in fee-simple title the lands that are now public, upon what principle could he require the defendant to refrain from erecting the fences in question? If the defendant should desire to construct a residence or ranch buildings upon either of sections 9, 15, or 16, and

would be satisfied to build a fence on three sides thereof, it would, under the decree, be prohibited from so doing; but solely on the demand of the plaintiff it would be required to erect perhaps a useless fence, separately and entirely inclosing the section, not because the plaintiff has acquired, or expects to acquire, any interest in or easement on such section, but merely for the reason that he has a right to allow his cattle to graze upon other neighboring sections.

In a case brought by the government to enjoin the unlawful inclosure of public lands, where fences had been erected upon the defendant's land surrounding, with much of his own land, a large number of alternate sections of government land, it was suggested that, though the private owner might have separately fenced in the odd-numbered sections which he owned, and the result would be to practically exclude the government from its sections, that fact did not authorize the making of the inclosure there in question. *Camfield v. U. S.*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260. In such a case some reason for the distinction between separately inclosing one's own sections, and by a single line of fence surrounding a large body of contiguous land, some of which belongs to the government, is apparent. But the situation in the case at bar is altogether different. Here there is no necessity or reason whatever, as it appears to us, for such a distinction. Even where the unlawful inclosure of public lands in violation of the statute is involved, it was said in the case last above cited that, "so long as the individual proprietor confines his inclosure to his own land, the government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor." And in *Potts v. U. S.*, 114 Fed. 52, 51 C. C. A. 678, it was held by the United States Circuit Court of Appeals for the Ninth Circuit that it was error, upon an indictment for unlawfully inclosing public land, to instruct broadly that a fence built by a person upon his own land was unlawful, if, in effect, it inclosed and shut out the public from any part of the public domain; but that the question to be submitted to the jury was whether the defendant intended by his fences to prevent or obstruct any person from peaceably entering upon, or establishing a settlement or residence upon, the tract of public land described in the indictment.

In the case at bar no statute appears to have been violated, and the question is not whether the defendant intended to deprive the plaintiff of some right possessed by him, but whether its acts do in fact invade any such right. If no such right is interfered with, the motive or purpose of the defendant is clearly immaterial.

It follows that, as the fences of defendant already erected, or proposed to be erected,

so far as disclosed by the evidence, will not in any unlawful or improper manner exclude plaintiff's cattle from the public lands, or the plaintiff from the enjoyment of a right of pasturage thereon, there is no ground for an injunction as to fencing. In placing our decision as to the fencing upon the grounds above stated, we do not wish to be understood as holding that the plaintiff's rights are such as would or would not entitle him to maintain a suit to enjoin the actual exclusion by defendant of his cattle from the public domain. By the decree in this case, the defendant is enjoined from claiming any right to the government lands, or any portion thereof, by reason of oil filings previously made, or caused to be made, by defendant for the purpose of excluding plaintiff's cattle from pasturing or ranging thereon, or for the purpose of applying any portion of the same to defendant's exclusive use. Though notice had been served on plaintiff to keep his cattle off of the lands covered by the oil filings, and that the defendant claimed to be in possession of the same, it appears that they were and are open and uninclosed, and it is not shown that plaintiff was in fact at any time deprived of the use of them for the grazing of his cattle, although the oil filings were recorded early in June, 1902, the notice aforesaid was dated September 2d following, and this suit was not brought until two weeks later. Plaintiff failed to establish his allegation that his cattle had been driven from any of such lands by the defendant, and hence, regardless of any other question, it is doubtful whether the plaintiff suffered any injury such as would require or authorize the protection of equity. Again, it may be seriously questioned whether the validity of the oil claims can be properly determined in this action, where the plaintiff asserts no title to or interest in the premises, but a mere license, in common with the public, to pasture his cattle thereon while they remain unappropriated public lands, and the persons in whose names, respectively, the various claims were recorded are not parties, and, moreover, where the court is vested with jurisdiction only in exceptional cases to adjudicate upon contested claims to the public lands under the mining laws, other than to settle a mere question of the right to possession, or to protect the one entitled thereto in that right.

But the case in respect to lands embraced within the so-called "oil filings" can be disposed of upon much broader grounds, and we need express no decided opinion upon the matters above suggested. If the defendant, without right to the possession of the lands aforesaid, should drive the cattle of plaintiff away from the same, for such injury to the latter's personal property he might no doubt maintain an appropriate action. But the injury or damage, if any, resulting to the plaintiff from an unauthorized or illegal assertion of the right to the exclusive posses-

sion of the public lands on the part of defendant would be suffered, not alone by the plaintiff, but by all alike whose live stock graze in that locality, or who seek to enjoy the pasturage afforded by the grasses upon such public lands. The injury, in other words, would be an injury to the public, and, if a nuisance at all, a public nuisance, somewhat like the obstruction of a highway or the interference with public travel thereon. And it is an elementary principle that private persons, seeking the aid of equity to restrain a public nuisance, must show some special injury peculiar to themselves, aside from and independent of the general injury to the public. 1 High, Inj. (3d Ed.) § 762; Wood on Nuisances (2d Ed.) § 645; 21 Ency. L. (2d Ed.) 709; Kuehn v. City of Milwaukee, 83 Wis. 583, 53 N. W. 912, 18 L. R. A. 553; Engs. v. Peckham, 11 R. I. 210; Illinois, etc., Canal Co. v. St. Louis, 2 Dill. 70, Fed. Cas. No. 7,007; Steamboat Co. v. Railroad Co., 46 S. C. 327, 24 S. E. 337, 33 L. R. A. 541, 57 Am. St. Rep. 688; Reyburn v. Sawyer (N. C.) 47 S. E. 761, 65 L. R. A. 930. And an injury, to be special, must differ in kind, and not merely in extent and degree, from that which the general public sustains. Steamboat Co. v. Railroad Co., supra. "By common injury is meant an injury of the same kind and character, and such as naturally and necessarily arises from a given cause, but not necessarily similar in degree or equal in amount. If the injury is the same in kind to all, it is a common injury, although one may actually be injured or damaged more than another." Wood on Nuisances, § 69.

In the case of Kuehn v. City of Milwaukee, supra, an action was brought to enjoin the deposit in Lake Michigan of garbage collected in the city of Milwaukee. The plaintiff was a resident and taxpayer of the city, and had pursued the avocation of a fisherman, occupying as his fishing grounds "a place about twenty or more miles square, situated east of the central part of the shore line of the city," and the garbage which was dumped into the lake was driven by the wind and waves into and upon plaintiff's nets, greatly damaging the same, and killing the fish caught therein. The court said, in denying the plaintiff's right to maintain the suit: "Any citizen of the state has a lawful right, in common with all other citizens, to fish in the waters of Lake Michigan. Because the right is common to the whole public, such waters are a common fishery. Any act which interferes with the enjoyment of that right in any particular locality may be a nuisance; but, if it affects all alike who fish in that locality, it is a public, and not a private, nuisance, and no private individual can maintain an action in equity to enjoin its continuance. This is elementary law, recognized and enforced by all courts."

Plaintiff's ownership of land in the vicinity

of these public lands cannot be held to render the injury to him special or different from that suffered by the public generally, for the reason that such ownership confers upon him no peculiar right to the enjoyment of the public pasturage, nor any greater right, if any, than that possessed by those who own no land to object to the unauthorized assertion of a right to the exclusive possession of such public lands. Not only is the plaintiff without title to or interest in the lands alleged to be public, but he has not sought to enter or appropriate any of them, nor any part thereof, under any of the public land laws. We think it might be difficult, therefore, upon any recognized principle, for the plaintiff to establish a right in himself to enjoin the alleged acts and threatened acts of the defendant as to those lands. Treating the lands as unappropriated public lands, neither the plaintiff nor the defendant could maintain a suit to restrain the other from allowing his cattle or live stock to graze thereon. Buford v. Houtz, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618; McGinnis v. Freidman (Idaho) 17 Pac. 635. If it be conceded that an injunction would lie to restrain the driving of one's cattle from public lands (which question need not be decided), that is not the decree in the case at bar, nor would the established facts authorize an injunction forbidding the driving of plaintiff's cattle from the lands in question, since no such driving, actual or threatened, was shown. The notice served upon the plaintiff contained a threat merely to prosecute him for damages for any trespasses committed upon the lands by his cattle, and it would seem that, for any possible injury resulting from an overt act on the part of defendant to exclude plaintiff's cattle from the open and uninclosed public lands, his remedy at law would be entirely adequate; it not appearing that the defendant is insolvent. Certainly, if the lands are in fact public lands, subject to pasturage by the public, plaintiff may use them for that purpose as well as defendant or any other person, and he could successfully defend against an action of trespass, should it be brought against him on account of that use.

We are therefore of the opinion that there is no ground for the injunction as awarded in this case, either as to the fencing or in respect to the lands said to be covered by the oil claims. The judgment will be reversed, and the cause remanded.

BEARD, J., and CARPENTER, District Judge, concur.

VAN ORSDEL, J., did not sit, having formerly been counsel in the cause, and CHARLES E. CARPENTER, judge of the Second judicial district, was called in to sit in his stead.

CALLAHAN v. E. O. HOUCK & CO.

(Supreme Court of Wyoming. Dec. 16, 1905.)

1. WRIT OF ERROR—PRESUMPTIONS—BILL OF EXCEPTIONS.

Where the certificate of the trial judge attached to a bill of exceptions did not recite that the bill contained all the evidence given in the case, such defect raised a presumption that the bill was not complete, and that portions of the evidence were omitted.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2916, 2917, 3800.]

2. SAME—RECORD—QUESTIONS PRESENTED FOR REVIEW.

Where the certificate to a bill of exceptions did not recite that the bill contained all the evidence, the bill was fatally defective, and would not authorize the review of any errors depending on the sufficiency of the evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2916, 2917.]

3. EXCEPTIONS, BILL OF—AMENDMENT AFTER TERM—MINUTES.

Where a bill of exceptions was filed during a term, after the term has expired the trial court loses control of the record, and the bill cannot be amended or corrected except from memoranda or minutes in the possession of the court or judge, such as would authorize the entry of a nunc pro tunc order amending or correcting any part of the record.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, § 110.]

4. SAME.

Where, in pursuance of time given for that purpose, a bill of exceptions is presented after the term, and is then signed and filed, it becomes a record, subject to amendment and correction in the same manner only as a record after the term.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, § 110.]

5. WRIT OF ERROR—BILL OF EXCEPTIONS—AMENDMENT IN APPELLATE COURT.

When a bill of exceptions is signed and filed, the appellate court has no jurisdiction to correct or amend it; such jurisdiction being vested only in the court where the record was made.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2816-2818; vol. 21, Cent. Dig. Exceptions, Bill of, § 108.]

6. EXCEPTIONS, BILL OF—DEFECT IN CERTIFICATE.

The omission of the certificate to a bill of exceptions to state that the bill contains all the evidence is a defect in the bill itself.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, § 94.]

7. WRIT OF ERROR—WITHDRAWAL OF BILL—LACHES.

Where the failure of a bill of exceptions to contain a certificate that it contained all the evidence was the result of negligence of counsel for plaintiff in error, and, though promptly called to their attention by motion to strike the bill from the files, no steps were taken to have it corrected, nor any showing made either that the bill contained all the evidence or that the trial court had in its possession any record on which the amendment could be made if the bill was returned, the request of plaintiff in error to withdraw the bill for correction, made in response to a motion to dismiss the proceedings in error, will be denied.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2833.]

Error to District Court, Natrona County; Charles E. Carpenter, Judge.

Action by John Callahan against E. O. Houck & Co., a copartnership. A judgment was rendered in favor of defendants, and plaintiff brings error. On motion to strike the bill of exceptions and dismiss the proceedings. Granted.

Butler & Hagens, for plaintiff in error. Norton & Moody and L. E. Armstrong, for defendant in error.

VAN ORSDEL, J. This action was brought by the plaintiff in error against the defendant in error in the district court of Natrona county for the recovery of a reward. The cause was tried to the court, and judgment was entered for the defendant. The errors assigned cannot be considered unless the evidence is in the record by a proper bill of exceptions. The bill of exceptions was signed by the trial judge and filed with the clerk of the district court on May 13, 1905. The petition in error was filed in this court on May 17th, but the original papers containing the bill of exceptions were not filed here until October 21st. On August 31st counsel for defendant filed a motion to strike the bill of exceptions from the files, for the reason that the trial judge had not certified that it contained all the evidence given in the cause. On September 13th counsel for plaintiff filed a motion suggesting a diminution of the record, and asking permission to withdraw the bill of exceptions, for the purpose of having the certificate of the trial judge amended. The propriety of granting the request to withdraw the bill is the first question that requires consideration.

Nowhere does it appear in the bill of exceptions, or the certificate of the trial judge attached thereto, that the bill contains all the evidence given in the cause. This defect raises the presumption that the bill is not complete, and that portions of the evidence have been omitted. Where the error assigned is that the judgment is not supported by sufficient evidence, a bill of exceptions with portions of the evidence omitted will be no more effectual on appeal than no bill at all. In either case this court will assume that the evidence given in the cause was sufficient to support the judgment. The bill of exceptions in this case is therefore fatally defective, and will not authorize the consideration of any of the errors assigned, all of which depend upon the sufficiency of the evidence. Section 3740, Rev. St. 1899, provides: "The party objecting to the decision must except at the time the decision is made; and time may be given to reduce the exception to writing but not beyond the first day of the next succeeding term." Until the time allowed by the court for the presentation of the bill of exceptions has expired, the bill itself or supplemental bills may be presented by counsel for the consideration of the court. But when the time allowed for the presentation of the

bill expires, counsel loses control of it, and cannot of his own motion make any further changes, but might doubtless suggest to the court any amendments or corrections necessary to make it speak the truth. When the bill of exceptions is signed by the trial judge and filed, it then becomes a part of the record, and can only be amended or corrected in the manner provided by law for the amendment or correction of any other part of the record. *Heinsen v. Lamb*, 117 Ill. 549, 7 N. E. 75. During the term at which the trial occurs and the judgment is entered, the entire record is within the possession and control of the court. The bill of exceptions being a part of the record, and within the control of the district court during the term, if it be presented and signed during the term, may be amended or corrected by the trial judge from his own recollection, or upon his own motion, or upon the motion of counsel, the same as any other part of the record may be amended or corrected during term. After the term has expired, however, if the bill has been signed and filed during the term, the trial court loses control of the record, and the bill of exceptions, as part of the record, cannot then be amended or corrected from the memory of witnesses or the mere recollection of the trial judge, but only upon minutes or memoranda in the possession of the court or judge, such as would authorize the entry of a nunc pro tunc order amending or correcting any other part of the record; and when, in pursuance of time given for that purpose under the statute, a bill of exceptions is presented after the term, and it is then signed and filed, it becomes a record subject to amendment and correction in the same manner only as a record after the term. In the case of *Seig v. Long et al.*, 72 Ind. 18, appellant sought to amend a bill of exceptions after the close of the term in which the bill was signed and filed by incorporating therein the clause, "and this is all the evidence given in the cause." Elliott, J., rendering the opinion, said: "There could be, in the case of such an omission as that described, nothing by which to amend, for at no time was any record made, nor, in truth, was any intended to be made, of the clause now sought to be declared part of the bill. The right to direct any amendment, of the general character of that proposed by appellant, to a bill of exceptions after the close of a term is a very doubtful one, if, indeed, it exists at all, and certainly such an amendment as that here insisted upon cannot be allowed." In *Kirby v. Bowland*, 69 Ind. 200, it was said: "A court may record a fact nunc pro tunc—that is, if the fact existed then, it may record it now—but it cannot record a fact now which did not exist then, and there must be some record, note, entry, or minute of some kind on which to base it connecting it with the case." In Illinois the following rule is announced relating to the amendment of a bill of excep-

tions as part of a record after term: "The amendment must be shown by the production of some note or memorandum from the records or quasi records of the court, or by the judge's minutes, or from some entry in some book required to be kept by law, or in the papers, or on file in the cause. It cannot be determined from the memory of witnesses or the recollection of the judge himself." *Tynan v. Weinhard*, 153 Ill. 508, 38 N. E. 1014; *Supreme Lodge Knights and Ladies of Glenwood v. Annie Albers*, 106 Ill. App. 85. In *Schlessinger v. Cook*, 8 Wyo. 484, 58 Pac. 757, this court, in considering a motion to strike the bill of exceptions from the record; said: "If in fact the order under consideration was made after the term was closed, we think it entirely clear that it was void. When the term ended, the court lost its plenary power over the judgments and records of that term, and they could be changed only in the manner and by the methods provided by law. This is the rule at common law, and is quite generally followed in this country."

Since the bill of exceptions when signed and filed becomes a part of the record, it can only be corrected or amended by the court where such record was made. No such power is vested in the appellate court. *Warner v. Hutchins*, 48 Neb. 672, 67 N. W. 745. Neither will an appellate court permit a bill of exceptions to be withdrawn for the purpose of amendment or correction as a matter of course; and especially is this true where it appears that the failure to incorporate into the bill of exceptions or the certificate attached thereto all that is necessary to make it a true bill is due to the laches of the party seeking relief. *Macfarland v. West Side Improvement Ass'n*, 47 Neb. 661, 66 N. W. 637. The practice is likewise well settled that when and under what circumstances a bill of exceptions will be sent back to the trial court for correction or amendment are matters entirely within the discretion of the appellate court. Counsel for plaintiff in error should remember that this is their own bill of exceptions, and that it was their duty to present to the trial judge for allowance a true bill. The certificate for the signature of the trial judge is as much a part of the bill as the evidence, and it is the duty of counsel who present the bill to see that the certificate is correct. While it is true that a bill of exceptions will usually be returned for amendment or correction when the mistake is due to some act of the defendant in error or his counsel, it is equally well settled that it will not ordinarily be returned when the mistake is due to the laches of the plaintiff in error or his counsel, though upon timely application and satisfactory showing the court might in such case order its return, to avoid a clear miscarriage of justice. In this case the omission in the bill of exceptions of a statement that it contains all the evidence in the cause is the fault

of counsel for plaintiff in error, and not, as contended, an error chargeable to the trial judge. It will be observed by a comparison of the above dates that the motion of defendant in error to strike the bill of exceptions from the files was promptly made. Counsel for plaintiff had notice of the omission in the bill or certificate while the record was still in the lower court, and no steps were taken to have the same corrected. No affidavit or showing of any kind whatever from the trial judge is before us to indicate whether the bill does contain all the evidence, or whether the court has in its possession any minutes, memoranda, or record upon which the amendment sought could be made if the bill of exceptions were returned. We are left by counsel for plaintiff to surmise what, if anything, could be accomplished by the return of this record. This court is not responsible for the neglect of counsel in the preparation of their cases, and will not indulge needless or unnecessary neglect, such as appears in this case. Here the mistake is not due to the appellee nor his counsel, nor to the court, but to the laches of counsel for appellant, and no reason is apparent why the request should be granted.

The motion of plaintiff to have the bill of exceptions returned to the trial court for amendment is denied. The motion of defendant to strike the bill of exceptions from the files is sustained. The evidence not having been properly carried into the record, there is no question presented for our consideration. The appeal is therefore dismissed.

POTTER, C. J., and BEARD, J., concur.

CRAMER v. MUNKRES et al.

(Supreme Court of Wyoming. Dec. 16, 1905.)

1. BILLS AND NOTES — ORDERS — PAYMENT — PRIORITY.

Where an order payable to plaintiffs out of the proceeds of certain cattle was to be paid after other claims due to defendant, and at the time of defendant's acceptance the drawer's indebtedness to him on account of a note on which defendant was a surety was regarded as the amount which defendant had paid, and for which he held the drawer's note, that he was afterwards compelled to pay his co-surety on the note half the amount he collected from the drawer could not affect the rights of plaintiffs in the funds in defendant's hands.

2. TRIAL—CONTRADICTORY FINDING.

A special finding will control as against a general finding when they are in conflict; but when two special findings are conflicting, the one supporting the general finding and judgment must control.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 850-859.]

3. BILLS AND NOTES — ORDERS — ACTIONS — PARTIES.

Where an order is subject to the payment of other specified claims, and they have been paid, the holders, having no interest in the fund in question, are not necessary parties to an action on the order.

4. APPEAL — OBJECTIONS NOT RAISED ON TRIAL—DEFECTS IN PARTIES.

Where no objection was made on the trial to the want of a party, and his interest was known to all the other parties, it cannot be urged first on appeal that he was a necessary party.

Error to District Court, Sheridan County; Joseph L. Stotts, Judge.

Action by George M. Munkres and another, doing business under the name of Munkres & Mather, and others, against Newton E. Cramer. From a judgment for plaintiffs, defendant brings error. Affirmed.

E. E. Enterline and Alvin Bennett, for plaintiff in error. W. S. Metz, for defendants in error Munkres & Mather.

BEARD, J. The defendants in error Munkres & Mather commenced this action in the district court of Johnson county, October 11, 1900, against the plaintiff in error, Newton E. Cramer, to recover \$1,000 alleged to be due them from Cramer upon a certain written order. The case was transferred to Sheridan county, and was tried to the court without a jury, and judgment was rendered in favor of Munkres & Mather and against Cramer for \$800, with interest and costs. A motion for a new trial was denied, exceptions taken, and Cramer brings error.

The circumstances out of which the suit arose are substantially as follows: March 10, 1897, one W. H. Holland entered into a written contract with certain parties known as the Gibson Cattle Company, by the terms of which contract the cattle company was to furnish money to buy cattle, and Holland was to buy, run, and care for the cattle in Johnson county. The cattle were to be the property of the cattle company, and when ready for market were to be shipped by Holland in the name of the cattle company. Holland was to bear the expense of caring for, feeding, and gathering the cattle; the freight and commissions for selling the cattle to be borne jointly by the parties, and when the cattle were marketed the cattle company was to retain all money received from sales until the whole amount of the purchase money should be paid, and the residue of the profits was then to be equally divided between Holland and the company. In pursuance of this contract, the company furnished the money, and Holland bought cattle, which were ranged, fed, and cared for in Johnson county. On October 26, 1897, Holland gave an order on the cattle company to the First National Bank of Buffalo, Wyo., for \$1,000, and on January 3, 1898, he gave another order on the company to said bank for \$1,000, both to be paid out of his share of the profits of said cattle business. On March 7, 1898, Holland, being indebted to Cramer, and in need of money to carry out his contract with the cattle company, entered into a written contract with Cramer, by the terms of which Cramer agreed to advance,

from time to time, such sums of money as Holland should need to run and care for said cattle, not to exceed the sum of \$1,000, and Holland assigned to Cramer all of his share of any profits that should accrue to him under his contract with the cattle company as security for the amount then due Cramer from Holland and for such further advances; the principal of the sum then due Cramer from Holland, as stated in the contract, being the amount paid by Cramer, as co-surety with one Redman, on a note of Holland to one Webber for \$2,000, said note having been paid by said sureties, each paying one-half of the amount due thereon. This contract was not in any wise to affect the two orders of Holland to the bank, and it was further provided that, should it become necessary for Cramer to take his time, attention, or services in caring for said cattle, or in any manner protecting them, or in protecting his interest in said contract, he should have reasonable compensation for his services in so doing. On March 4, 1899, Holland and Cramer entered into a supplemental written agreement, by which the amount advanced or to be advanced by Cramer was not limited to \$1,000, but should cover all sums that might be due Cramer, in addition to the \$1,000 provided for in the former contract. April 6, 1899, Cramer and Holland entered into another written contract, by which it was agreed that the cattle should be gathered and shipped as soon as possible, and, if Holland failed to do so, then Cramer should have the right to do so, and to employ the necessary help for that purpose. On the following day, April 7, 1899, still another contract in writing was entered into between them, which provided that any balance remaining after deducting all other indebtedness of Holland to Cramer from Holland's share of the profits arising from the transaction should be applied, first, to the payment of Holland's note to Cramer for \$288, which was secured by a mortgage upon Mrs. Holland's real estate, and, second, Holland's note to Cramer for \$237.58, secured by chattel mortgage on certain horses. Thereafter Holland executed and delivered to defendants in error Munkres & Mather an order in writing as follows: "Buffalo, Wyo. Apr. 13, 1899. N. E. Cramer, Buffalo, Wyoming: Please pay to the order of Munkres & Mather the sum of \$1,000 out of the proceeds of a certain order which you hold against the Gibson Cattle Company. This order is to take rank against said proceeds after the following claims and orders: one to W. H. Simms for about the sum of \$500; orders to the First National Bank of Buffalo for the sum of \$2,000 and interest; the notes and claims due yourself at the present time, with such small amounts as may be advanced by you hereafter, for the express purpose of caring for, gathering, and shipping the O T cattle; and one order in favor of Albert Holland for \$1,000—together with

the specified interest on the various amounts. [Signed] W. H. Holland." Soon after this order was given, it was presented by Munkres & Mather to Cramer, who took it unto his possession, and retained it until the trial of the case in the district court. It is upon this order that the action is based; Munkres & Mather alleging that Cramer had sufficient funds in his hands to pay the same after paying the other amounts specified in the order, but refusing to so do. Cramer denied that he had any funds belonging to Holland, or that should be applied on the order. The pleadings in the case are quite lengthy, and need not be set out here. The main issues in the case were the amount of Holland's indebtedness to Cramer at the date of the order, and what amount of compensation, if any, Cramer was entitled to out of the funds as between himself and Munkres & Mather.

The district court, in addition to finding generally for Munkres & Mather and against Cramer, made special findings of fact and conclusions of law. The court found that Cramer had in his possession more than \$800 of the funds growing out of the contract with the cattle company belonging to Holland after paying all prior and just claims against said fund, and that the sum of \$800 was due to Munkres & Mather on the order sued upon at the time of the commencement of the action, and that there were no just claims against the same, and that Cramer accepted the order sued upon, and agreed to pay it out of the proceeds of the sale of the cattle. The court further found that Cramer had paid a certain judgment rendered against him in favor of W. T. Redman, and that Cramer had earned \$500 in taking care of the cattle under his contracts with Holland. The court refused to allow Cramer credit for the Redman judgment, and we think rightly. Cramer returned, as part of Holland's indebtedness to him, the amount he had paid on the Webber note, and that was the principle of Holland's debt to him, mentioned in the contract, and was the amount that seems to have been in the minds of all of the parties when the order was given and accepted. That was the amount of that particular item of indebtedness, as stated by Cramer a short time before the order was given, and was the amount deducted in the settlement between Cramer and Holland about September 12, 1899. The fact that he was afterward compelled to pay Redman, as co-surety on the Webber note, one-half the amount he collected from Holland on that account could not affect the rights of Munkres & Mather in the funds in Cramer's hands, because at the time the order was given and accepted Holland's indebtedness to Cramer on account of the Webber note was regarded as the amount Cramer had paid, and for which he held Holland's note. In fact, this claim was not made until No-

vember 25, 1902, when a supplemental answer was filed by Cramer, setting up the judgment. Up to the time that judgment was rendered, Cramer had denied all liability to Redman, and claimed that Holland's indebtedness on account of the Webber note was to each of them individually for the sum each had paid.

As to the matter of compensation, it is insisted by counsel for Cramer that, inasmuch as the court found that Cramer had earned \$500 in taking care of the cattle, he was entitled to credit for that amount. If this finding is to be construed to mean that Cramer was entitled to retain this amount as against Munkres & Mather, then it is in conflict with the other special finding that he had \$800 belonging to Munkres & Mather, on their order, against which no just claims existed. A special finding will control as against a general finding when they are in conflict, but when there is a conflict between two special findings, one of which supports, and the other conflicts with, the general finding and judgment, the one that supports the judgment must control. *Warner v. Accident Ass'n*, 8 Utah, 431, 32 Pac. 696; *Larkin v. Upton*, 144 U. S. 19, 12 Sup. Ct. 614, 38 L. Ed. 330; *Redelsheimer v. Miller et al.*, 107 Ind. 485, 8 N. E. 447. But we do not regard the findings as contradictory. The view evidently taken by the district court was that, while Cramer earned \$500 in caring for the cattle, he had waived his claim so far as Munkres & Mather were concerned. There is evidence to the effect that in March, about a month before the order was given and accepted, and at a meeting at which Munkres, Holland, Cramer, and Redman, who states that he was representing the Gibson Cattle Company, were present, when the number and value of the cattle and Holland's indebtedness were discussed, Cramer stated that he had no claim for services, and that all he wanted was his money and interest. Again, in September, 1899, when he had a settlement with Holland, he made a written statement of the account, in which all of Holland's notes were stated, with the interest on each computed, and including \$180.48 book account, and he testified that he did not say a word at that time about compensation for services. There is also the testimony of several witnesses that in the latter part of October or the first part of November, 1899, he stated that he had \$800, or about that sum, in his hands, but as Redman had sued him, he was advised by his attorneys to hold it, to protect against Redman or to fight that suit. There is also other evidence in the record bearing on this question to which it is not necessary to refer. We have examined the entire evidence with care, and, while it is somewhat conflicting, we think it amply supports the judgment, and that substantial justice has been done between the parties.

It is further insisted by counsel for plain-

tiff in error that the cattle company, the bank, and other parties named in the order sued upon were necessary parties to the action. But it is admitted in argument that all of these parties had been paid, and therefore had no interest in the funds in question. As to Holland, he was made a nominal party, but, so far as the record shows, he was not served with summons, but was present, and testified as a witness. He had by the order in suit directed Cramer to pay the amount of the order to Munkres & Mather out of any balance of funds in his hands after satisfying the other claims mentioned. Without deciding whether or not Holland would have been a proper party in this action for the purpose of settling the rights as between Cramer and himself, it is sufficient to say that no objection was made to proceeding with the trial in the district court until Holland was brought in, and, having failed to do so, it is too late after judgment to raise that question; especially as the record discloses the fact that his interest, if any, was known to all of the parties before the case came to trial.

We have gone into the entire record, and find no prejudicial error therein, and the judgment of the district court is therefore affirmed.

Affirmed.

POTTER, C. J., and VAN ORSDEL, J., concur.

BALLARD v. GOLOB et al.

(Supreme Court of Colorado. Nov. 6, 1905.)

1. MINES AND MINERALS—FORFEITURE OF CLAIM—SUFFICIENCY OF NOTICE.

Under Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], authorizing the co-owner of a mining claim, who has made improvements, to give a delinquent co-owner notice by publication for the period of 90 days that his interest will be forfeited if he fails to contribute his share of the expenses incurred, a published notice of forfeiture is invalid as to a co-owner whose name does not appear therein.

2. SAME—PATENTS—TITLES HELD IN TRUST.

Co-owners of a mining claim who procure a patent to be issued to them in their own names, and without mention of other co-owners with them, take title subject to the interests of such other co-owners, and become trustees for them to the extent of their interests.

3. LIMITATION OF ACTIONS—STATUTES IN FORCE.

Mills' Ann. St. §§ 2023, 2024, prescribing a five-year limitation period in favor of persons in possession of land under claim and color of title and in good faith, and who pay taxes thereon, or who claim unoccupied lands under color of title and pay taxes, are expressly repealed by Laws 1893, p. 327, c. 118, which prescribes a seven-year limitation period for the same cases.

4. ADVERSE POSSESSION—PAYMENT OF TAXES—PERSONS MAKING PAYMENT—CO-OWNER OF MINE.

Payment of taxes by certain co-owners of a mining claim, who have acquired a patent thereto, must be regarded as a payment for the

other co-owners for whom they hold the title in trust to the extent of the interests of such other co-owners.

5. ADVERSE POSSESSION.—PAYMENT OF TAXES —COLOR OF TITLE.

Under Mills' Ann. St. § 2023, prescribing a five-year limitation period in favor of persons in peaceful and undisputed possession of land under claim and color of title and who pay taxes thereon, and in favor of claimants of unoccupied land under color of title who pay taxes for five successive years, limitations do not run where the taxes have not been paid for five years by persons having or claiming the property under color of title.

6. LIMITATION OF ACTIONS — STATUTES INVOLVING TRUST—APPLICATION OF STATUTE.

Mills' Ann. St. § 2011, requiring bills for relief on the ground of fraud to be filed within three years after the discovery of the facts constituting the fraud, does not apply to a suit involving a trust, such as one brought by a co-tenant in a mining claim to enforce his interest against his other co-tenants who have procured a patent to be issued to them in their own name.

7. SAME—ACCRUAL OF ACTION.

Under Mills' Ann. St. § 2012, requiring bills for relief in case of the existence of a trust not cognizable by the courts of common law, and in other cases not provided for, to be filed within five years after the accrual of the cause of action, a suit for breach of an express trust, created by the act of certain co-owners of a mining claim in procuring the issuance of a patent in their own names, and without mention of another co-owner, does not accrue until the trust is repudiated and knowledge of such repudiation is brought home to the cestui que trust.

8. EQUITY—LACHES—PLEADING.

Laches as a defense must be raised by answer, and cannot be taken advantage of by demurrer.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Equity, § 498.]

Appeal from District Court, Lake County; Frank W. Owers, Judge.

Action by Chapman Ballard against Joseph Golob and others. From a judgment in favor of defendant, plaintiff appeals. Reversed.

John M. Waldron and R. D. Thompson, for appellant. Thomas, Bryant & Lee and Phelps & Pendery, for appellees Golob and Turnbull.

STEELE, J. Action was brought by Ballard in the district court to recover a one-sixth interest in the Ballard lode, situated in Lake county, for an accounting, and for his proportionate share of the net profits realized from the operation of the said property as a mine. The complaint was filed in the month of June, 1901, demurrer was interposed and sustained, judgment rendered dismissing the action, and the plaintiff has appealed.

We shall set forth the allegations of the complaint in substance only. The plaintiff says that in the month of March, 1879, he, W. D. Larremore, and N. J. Ballard located the Ballard lode, each of said locators having a one-third interest therein; that the location certificate was duly recorded; that

the plaintiff, in the year 1880, executed a deed for a one-third interest in said lode to certain persons who, under contract with him, had sunk the shaft on the lode to a depth of about 200 feet; that prior to the execution of this deed he had acquired, by purchase from his brother, Newton J. Ballard, the one-third interest of said Newton in said lode; that prior thereto Larremore had conveyed his interest in said lode to one Jasper Moon, and that said Moon had conveyed an undivided one-sixth interest in said lode to one Charles F. Gilbert; that prior to the making of the last-mentioned deed from Moon to Gilbert he and Jasper Moon, being the sole owners of said Ballard lode, made application in the United States land office at Leadville for a patent, said application being in the usual form; that shortly after the making of said application he conveyed a one-sixth interest in said Ballard lode to one Charles F. Gilbert, and that he, prior to the application aforesaid, had contributed his proportionate share of what was then estimated would be the necessary expense of making such entry; that in the year 1881 he performed his proportion of the annual labor upon said lode for the year 1881; that he left Leadville in the early part of 1882, and ever since said time has worked in various places in Colorado and New Mexico, and has not been in Leadville or vicinity; that in the year 1880 Jasper Moon died testate, leaving his property to one Charity Moon, otherwise known as "C. P. Moon," his widow; that afterwards, on November 27, 1882, the said C. P. Moon filed a pretended proof of forfeiture in the United States land office at Leadville, Colo., wherein and whereby she made affidavit that after January 1, 1881, and before December 31, 1881, she had laid out and expended \$100 in actual labor and improvements upon said Ballard lode, and that thereafter she had made demand, by publication, upon Charles Walker and one A. Ballard, co-owners of said lode, to pay their portion of said expenditures, accompanying said affidavit with a copy of said notice of forfeiture and proof of publication thereof, duly sworn to by the editor of the newspaper in which said notice of forfeiture appeared. The affidavits and notice of forfeiture are set out at length in the complaint, and show that the notice of forfeiture is directed "To Charles Walker, A. Ballard, or Whom It May Concern," that it was published for 90 consecutive times in the Leadville Daily Herald, that the first publication was on the 18th day of April, 1882, and that the last publication was on the 7th day of July, 1882. He furthermore states that the labor performed in 1881 upon said lode, in addition to that performed by himself, was performed, if at all, at the instance of Wilmot, Kopplemeyer, and Walters, hereafter mentioned, and not at the instance of C. P. Moon. He furthermore al-

leges that the affidavit of the editor of said newspaper is not true, in that said notice was not published for the period of 90 days, as stated therein, and that at no time subsequent to October 24, 1879, did the plaintiff by any conveyance transfer or convey a one-sixth interest in said Ballard lode, which he then and ever since has owned, and that no proceeding or judgment, tax sale, or any other adverse proceeding of any kind has been had or commenced by virtue of which this plaintiff has been divested of his one-sixth interest in said lode; that afterwards, on October 12, 1885, under said proceedings for patent based upon said application of Jasper Moon and himself, a United States patent for said Ballard lode was issued to C. P. Moon, L. H. Wilmot, A. W. Gilbert, and H. G. Kopplemeyer; that he did not know until January, 1899, that his name did not appear as one of the entrymen for said patent, and did not know until then that his name had been omitted from said patent; that said patent was delivered to L. H. Wilmot at Deerfield, Ill., and that it was not recorded in the recorder's office of Lake county until December 24, 1898. He further alleges that after the year 1881 and up to the month of August, 1897, none of plaintiff's co-owners in said Ballard lode were in actual possession thereof, or any part thereof, or performed any labor or expended any money upon its improvement or development; that the only taxes paid on said Ballard lode since said application for patent were the taxes for the year 1888, paid by John Moon, the taxes for the years 1889, 1890, 1891, and 1892, paid by L. H. Wilmot, and the taxes for the year 1893, paid by W. J. Moon; that for the years 1894 and 1895 the said property was sold for taxes, and that in the year 1896 and the year 1897 the taxes were paid by L. H. Wilmot, and the years 1898 and 1899 the taxes were paid by Joseph Golob; that in the year 1897 persons claiming to be the owners of said property made a lease to Turnbull and Golob to said property for the term of four years, and that on January 3, 1898, said Turnbull and Golob entered into the actual possession of said property and continued in the possession of said property until about December 1, 1898, when they received a deed from Wilmot and Kopplemeyer for a five-sixths interest in said Ballard lode. He sets forth other conveyances showing that William J. Moon, Winona Simons, Elvie L. Ould, A. W. Gilbert, and Kate Jones were grantees of certain interests in said lode. He further alleges that upon learning, in January, 1899, that a patent had been issued and that his name had been omitted therefrom, he set about learning what he could as to how this omission of his name had occurred, but, being in very moderate circumstances, it was not until about the month of September, 1900, that he was able to employ an

attorney who was willing to give the matter proper attention; that this attorney was not able to make a trip to Leadville to investigate the matter until about the month of December, 1900; that his attorney went to Leadville in December, 1900, and ascertained that considerable of the needed information had to be obtained elsewhere, and some considerable correspondence had to be carried on, and it was not until the month of May, 1901, that his attorney had obtained sufficient information to advise him as to his rights; that in the month of May, 1901, his attorney, having made careful investigation, thereupon advised this plaintiff that plaintiff was entitled to his said one-sixth interest in said Ballard lode, notwithstanding the issuance of said patent and the several transfers that have been made to said Ballard lode; that thereupon plaintiff's attorney sought out and advised Peter B. Turnbull as to the claims and rights of the plaintiff to said one-sixth interest; that a reasonable time has elapsed for said Turnbull to make answer, but no answer has been received from him by plaintiff or plaintiff's attorney; that plaintiff never saw said publication of notice of forfeiture at the time it was being published, and did not know it had been made until many years thereafter; that at the time said forfeiture proceedings were commenced plaintiff was the owner of a one-sixth interest in the Ballard lode, and that Charles Walker, George C. Stephens, and Isaac Gibson were the owners of record of a one-ninth interest, each, in said Ballard lode. Wherefore he demands judgment for a one-sixth interest in the said lode, for an accounting, and for his one-sixth interest of the net value of the ore extracted.

Separate demurrers were filed. They all set forth the same grounds, and are as follows: "First. That defendants were purchasers for value and without notice. Second. That defendants held and occupied the premises under claim and color of title and paid taxes for thirteen years. Third. That plaintiff's cause of action accrued in 1882, and is barred by the five years' statute. Fourth. That the cause of action, which is to enforce a trust, is barred by the five years' statute. Fifth. Laches and negligence of the plaintiff."

The proceedings instituted did not have the effect of divesting plaintiff of his interest in the Ballard lode. His name does not appear in the notice and affidavits. The law (section 2324, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1426]) requires that the co-owner, who has performed the labor or made the improvements, give the delinquent co-owner personal notice in writing, or by publication for the period of 90 days, that his interest will become the property of his co-owner if he fails or refuses to contribute his share of the expenses incurred. The notice given does not meet the requirements of the law, and it must be held to be invalid as far as

the plaintiff, Chapin Ballard, is concerned. The plaintiff, having been one of the original locators and having succeeded to the interest of N. Ballard by deed of conveyance, was entitled to have patent issued to him for such interest in the lode as he had not theretofore conveyed; and when the patentees procured a patent from the government for the entire lode they took the interest that the plaintiff had in trust for him. At the time the patent was issued Ballard owned an undivided one-sixth interest in the lode, and he was not divested of this interest by the act of the federal officials in issuing patent to others, but the patentees took title subject to Ballard's rights, and became trustees for him to the extent of his interest.

It was said by Mr. Justice Brown, in *Turner v. Sawyer*, 150 U. S. at page 586, 14 Sup. Ct. at page 195 (37 L. Ed. 1189): "It is well settled that co-tenants stand in a certain relation to each other of mutual trust and confidence, that neither will be permitted to act in hostility to the other in reference to the joint estate, and that a distinct title acquired by one will inure to the benefit of all. A relaxation of this rule has been sometimes admitted in certain cases of tenants in common who claim under different conveyances and through different grantors. However that may be, such cases have no application to the one under consideration, wherein a tenant in common proceeds surreptitiously, in disregard of the rights of his co-tenants, to acquire a title to which he must have known, if he had made a careful examination of the facts, he had no shadow of right. * * * A title thus acquired the patentee holds in trust for the true owner, and this court has repeatedly held that a bill in equity will lie to enforce such trust." And this court has held, following the rule announced by Mr. Justice Brown, that "obtaining patent from the government for mineral land by a co-tenant in his own name is not the purchase of an outstanding adverse title by the co-tenant, as that expression is ordinarily used; but, rather, the perfection of the common title, which inures to the benefit of the co-tenants of the patentee, to which the above rule of co-tenancy applies, for the reason that co-tenants stand in that relation of mutual trust and confidence towards each other that the title thus acquired by patent the patentee holds as trustee for his co-owners in the premises." *Mills v. Hart*, 24 Colo. 508, 52 Pac. 680, 65 Am. St. Rep. 241.

Moon, Gilbert, Wilmot, and Kopplemeyer were co-tenants of Ballard, they each held undivided interests in the property, and when they took title from the government in their own name they took a one-sixth interest therein in trust for Ballard. This proposition is not open to dispute, but the defendants claim in their argument upon the demurrer that the complaint shows that they have been in the possession of the property

under claim and color of title made in good faith, and that they have paid taxes thereon for the period of five years, and under the statute of this state they should be adjudged to be the owners of the said property, and that, even though they have not been in the actual possession of the premises, another statute requires that they be adjudged to be the owners of the property because the land was vacant and unoccupied land, and they, under claim and color of title made in good faith, have paid for the period of five years the taxes assessed against the property. These two sections, No. 2923 and No. 2924, respectively, of *Mills' Annotated Statutes*, were passed in the year 1874. They have since been repealed, and the law concerning the subject is found in the *Laws 1893*, p. 327, c. 118. If the forfeiture proceedings did not divest Ballard of his interest in the property, and if obtaining a patent cannot be regarded as an adverse proceeding as between co-owners, then the payment of taxes by the patentees must be regarded as payment for Ballard.

Again, the complaint does not show that the taxes were paid for five successive years by a "person in the peaceable and undisputed possession" of the property "under claim and color of title," as required by section 2923; nor does it appear from the complaint that the taxes were paid for five successive years by "a person having color of title," as provided by section 2924. The complaint, on the contrary, shows that the taxes first paid were those for the year 1888, and that they were paid by John Moon; that the taxes for the following four years were paid by L. H. Wilmot; that the taxes for the year 1893 were paid by W. J. Moon; and that the property was sold for the taxes of 1894 and 1895. There is no allegation in the complaint that John Moon ever owned or claimed an interest in the property, and according to the averments of the complaint W. J. Moon did not acquire an interest therein until the year 1895. Therefore, even though we assume that sections 2923 and 2924 apply to the interests in mining claims acquired through forfeiture procedure under the provisions of the federal statute, the complaint is not demurrable, because it does not appear therefrom that the taxes have been paid for the period of five years by persons having or claiming the property under color of title.

But it said that this is an action brought for relief upon the ground of fraud, and that section 2911 of the statutes requires that such complaints shall be filed within three years after discovery by the aggrieved party of the facts constituting such fraud, and not afterwards. This court, in the case of *Morgan v. King*, 27 Colo. 559, 63 Pac. 422, speaking of sections 2911 and 2912 of the statutes, says: "These two sections must be construed together, and when so read it is evident that, where the relation of trustee and

cestui que trust exists, it was the intention of the Legislature to give to the latter the right to bring an action against the former, which involved a trust, at any time within five years after his right to do so accrued; but in other cases based upon fraud, where the subject-matter of the action did not involve a trust, the action must be brought within three years. In brief, the former section applies to frauds perpetrated by those not bearing a fiduciary relation to the party defrauded, the latter to cases where the trust relation exists between the parties to the action." Under this decision we must hold that section 2911 is not applicable to this case. But it is claimed that, if section 2911 does not apply, section 2912 does. This latter section provides that "bills of relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within five years after the cause thereof shall accrue, and not after." We do not think that it appears from the complaint that this section is applicable. The trust, such as occurred by the taking of a patent to government by one co-owner in his own name, is an express trust and a continuing one, and an action for breach of the trust does not accrue until the trust is repudiated and the knowledge of such repudiation brought home to the cestui que trust. It is alleged in the complaint that plaintiff did not know that his name was omitted from the patent until the year 1899. This is less than five years before the bringing of the suit. It is said that the cause of action accrued long prior to the year 1899, and that, when the interest was conveyed, it was a repudiation of the trust, and that the plaintiff should have brought his action within five years after such repudiation. The entire interest was not conveyed until some time in the year 1897, and five years had not elapsed between the time that those co-tenants who held the interest of Ballard in trust for him undertook to convey it and the time of the bringing of the suit. But the authorities are very clear that, not only must there be a repudiation of the trust, but that the fact of such repudiation must be brought home to the one for whom the property is held in trust. Thus, in *French v. Woodruff*, 25 Colo. 339, 54 Pac. 1015, it was held that "no right of action accrues unless the trust is repudiated in some way, and knowledge thereof brought home to the cestui que trust." So that, as far as the complaint is concerned, there is nothing therein contained which shows that the action was barred by the statute of limitations.

It is urged that, notwithstanding the fact that the action is not barred by the statutes of limitation, the plaintiff has been guilty of such laches and negligence, and that the same appears from the complaint, and that a court of equity for this reason should not entertain his complaint. A great number of

authorities have been cited on this branch of the case, including the case of *Patterson v. Hewitt*, 195 U. S. 309, 25 Sup. Ct. 33, 40 L. Ed. 214, in which case Mr. Justice Brown says: "It thus appears that the right of action accrued to the appellants in April, 1885, and that the suit was not begun until eight years thereafter, in 1893. * * * There is no doubt from the findings that appellants had no share in the subsequent development of the mine or the discovery of the ore in 1890, and that it was through the efforts and perseverance of the defendants and the aid they received from Ferguson that they were put in possession of this valuable property. If appellants had expected a share in this property, they should either have brought a bill promptly to enforce their rights, or at least contributed their proportionate share to the subsequent work and labor and the expenses then incurred. To award them now a deed to their original interest in the property would be greatly unjust to the defendants, through whose exertions the value of the property was discovered and the mine put upon a paying basis. * * * There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which to-day may have no salable value may in a month become worth its millions. Years may be spent in working such property, apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstances persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced." The case was brought from New Mexico, and in that territory there is a statute to the effect that no action for the recovery of lands shall be commenced after a lapse of 10 years. The action was brought within the 10 years. The title was held in trust by one of the owners under certain conditions for the benefit of all the owners. The trust was repudiated in the year 1885, when a conveyance was demanded of the trustee and he refused to convey. After the demand for a conveyance the property was worked and a valuable mine was developed. We are not prepared to say that the plaintiff may not have been guilty of such laches in this case after he knew that his name was omitted from the patent as to preclude a recovery here. In the case of *Van Wagenen v. Carpenter*, 27 Colo. 444, 61 Pac. 698, it is said that a man cannot lose a title which is evidenced by record by a mere silence. Moreover, it has repeatedly been held by this court that, when laches is interposed as a defense to an action, the proper procedure is to raise it by answer. This is upon the ground that the party against whom laches is charged shall have an opportunity to explain, and, while a

very great number of authorities hold when such facts appear in a complaint that it may be taken advantage of by demurrer, we are committed to the other doctrine.

For the reasons given, the judgment is reversed.

The CHIEF JUSTICE and CAMPBELL, J., concur.

34 Colo. 429

STEPHENS et al. v. GOLOB et al.

(Supreme Court of Colorado. Nov. 6, 1905.)

MINES AND MINERALS—FORFEITURE PROCEEDINGS—INSTITUTION BY TRUSTEES.

Where patentees of a mining claim received their patent with knowledge of the interests of certain co-tenants with them in the claim for which the patent was issued, and with knowledge that they received title in trust for such co-tenants, and the grantees of the patentees knew or had notice of the same facts, any attempted forfeiture proceedings instituted by the patentees or their grantees against the co-tenants were ineffectual to defeat the co-tenant's rights.

Error to District Court, Lake County; Frank W. Owers, Judge.

Action by Chapman Ballard against Joseph Golob and others, in which George C. Stephens and others filed a cross-complaint. There was a judgment dismissing the cross-complaint, and cross-complainants bring error. Reversed.

Thomas & Thomas and Norman M. Campbell, for plaintiffs in error. Phelps & Pendery and Thomas, Bryant & Lee, for defendants in error.

STEELE, J. The facts in this case are somewhat analogous to those in the case *Ballard v. Golob et al.*, 83 Pac. 376, decided at this term of the court. That case is decisive of this. George C. Stephens, Isaac Gibson, and Charles Walker are the three persons mentioned in the complaint of Ballard as the persons to whom he conveyed a one-third interest of the Ballard lode in the year 1880. Stephens, Gibson, and the heirs of Walker filed a cross-complaint in the suit of Ballard v. Golob, and set up substantially the same facts as those contained in the complaint, and, in addition, stated that Mrs. Moon, being indebted to them, agreed to do the assessment work for the year 1881 and protect the property during their absence; that before they left Leadville they paid their proportion of all the fees, costs, and expenses which were incurred and necessary to secure the patent for the property; that at the time the patent issued the patentees well knew of said Stephens', Gibson's, and Walker's interest in said premises, and that they received the title to the lode in trust for them; that the taxes paid upon the property by Moon and Wilnot were paid for the co-owners, including the cross-complainants; that they were compelled to leave Leadville in 1880 for the purpose of seeking employ-

ment and earning a livelihood for themselves and their families, and that neither of them again returned to Leadville, except defendant Stephens, who returned in 1881 and left in 1882; that all of the defendants who claim an interest in the said lode by deeds and conveyances from and through parties named in the patent had notice and well knew of the rights and interests of Stephens, Gibson, and Walker in the said lode, and well knew and had notice of the fact that the patentees had received the title to the defendants' interests in said lode in trust for them, and well knew the trust relation existing between the patentees and Stephens, Gibson, and Walker; and that they received conveyances with full notice and knowledge that the same were burdened with said trust. They pray for practically the same relief as that prayed for by Ballard. A demurrer on behalf of Golob and Turnbull was interposed. The demurrer sets forth practically the same grounds as those in the demurrer to the complaint. The demurrer was sustained, the cross-complaint was dismissed, and the cross-complainants appeal to this court.

No attempt was made to secure the interest of Stephens and Gibson through forfeiture proceedings. The notice is directed to Charles Walker. The affidavit of the managing editor states that the notice was published for the period of 90 days, and the proceedings appear to be regular as to Walker, except that in the notice of forfeiture contribution is required to be made within 90 days from date, instead of within 90 days after the publication is completed. But we are not required to pass upon the sufficiency of the notice, because of the allegations in the cross-complaint of notice and knowledge on the part of the patentees and their grantees, as set forth herein.

The decision in the Case of Ballard determines this, and the judgment is therefore reversed.

The CHIEF JUSTICE and GODDARD, J., concur.

34 Colo. 374

RICHARDSON v. WOETMAN.

(Supreme Court of Colorado. Oct. 2, 1905.)

PROCESS—SERVICE—PUBLICATION—ALIAS SUMMONS.

Mills' Ann. Code, § 41, provides that service by publication shall be allowed only after issuance and return of summons not found, not less than 10 days after the issuance thereof. Held, that a delay of five months between the return of the first summons not found and the making of a subsequent order of publication, caused by a successful attempt on defendant's part to quash the first publication, did not invalidate such subsequent order of publication, though made without the issuance and return of an alias summons "not found."

Error to District Court, Arapahoe County; Samuel L. Carpenter, Judge.

Action by George C. Wortman against E. J. H. Richardson. From a judgment for plaintiff, defendant brings error. Affirmed.

This is an action brought to recover certain sums of money alleged to be due defendant in error (plaintiff below) from plaintiff in error (defendant below) upon an agreement for the sale by plaintiff to defendant of certain mining property, and for money alleged to be due for board and lodging furnished to the employes of defendant, and for goods, wares, and merchandise sold to her, and work and labor performed at her request. The complaint was filed November 4, 1901. On the same day a writ of attachment was issued and executed by attaching the interests of defendant in certain mining claims. The writ was returned and filed on November 11, 1901.

On November 4th summons was issued and returned to, and filed in, the office of the clerk of the court with the following indorsement thereon:

"State of Colorado, County of Arapahoe—ss.: I do hereby certify that I received the within summons on the 6th day of November, A. D. 1901, and I further certify on this 18th day of November, A. D. 1901, that I have duly executed the same by making due and diligent search for more than ten days last past for E. J. H. Richardson, the within-named defendant, and after such due and diligent search I cannot find the said E. J. H. Richardson in the county and state aforesaid. Robert J. Jones, Sheriff, by N. Lilburn Watson."

On November 21, 1901, plaintiff filed the following affidavit:

"State of Colorado, County of Arapahoe—ss.: George C. Wortman, of lawful age, being first duly sworn, upon his oath deposes and says that he is the plaintiff in the above-entitled action, that a cause of action exists against the said defendant, E. J. H. Richardson, in favor of this plaintiff, and that said defendant is a necessary and proper party to said action; that said defendant resides out of the state of Colorado, and the post office address of said defendant is Springville, in the county of Erie, and the state of New York. George C. Wortman.

"Subscribed and sworn to before me this 9th day of November, A. D. 1901. My commission expires May 6, 1905. B. L. Pollock, Notary Public."

On November 22, 1901, the clerk ordered that service of summons be made on defendant by publication, and on the same day filed his affidavit that he had mailed a copy of the summons to defendant at her place of residence as given in plaintiff's affidavit. On February 1, 1902, the defendant, appearing specially by her counsel for that purpose only, filed a motion to quash the service of the summons upon her. This motion was sustained on April 2, 1902, upon the ground that the plaintiff's affidavit that the defend-

ant resided outside of the state had been subscribed and sworn to nine days before the sheriff made his return to the summons.

On April 21, 1902, the following affidavit was filed by the plaintiff:

"State of Colorado, County of Lake—ss.: George C. Wortman, of lawful age, being first duly sworn, upon his oath deposes and says: That he is the plaintiff in the above-entitled action; that a cause of action exists against the said defendant, E. J. H. Richardson, in favor of this plaintiff, and that said defendant is a necessary and proper party to said action; that the said defendant has ever since the commencement of the above-entitled action been a nonresident of the state of Colorado, and still resides out of the state of Colorado, and the post office address of said defendant is Springville, in the county of Erie, and state of New York. George C. Wortman.

"Subscribed and sworn to before me this 18th day of April, A. D. 1902. My commission expires July 12. [Seal.] Philip M. Wall, Notary Public."

On the same day (April 21, 1902) the following order was entered of record:

"At this day, it appearing from the affidavit of the plaintiff filed herein that the said defendant resides without the jurisdiction of the state of Colorado, so that personal service of the summons herein cannot be made upon him, it is ordered that service of summons in this case be made upon the defendant by publication of the same once a week for four successive weeks in the Rocky Mountain Herald, a public newspaper published in the city of Denver, county and state aforesaid. Otis B. Spencer, Clerk of the District Court, by E. E. Sommers, Deputy."

And on the same day the clerk filed his affidavit as follows:

"Otis B. Spencer, clerk of the district court of Arapahoe county, being first duly sworn on oath says: That he has this day deposited in the post office at Denver a copy of the summons in this case addressed to the defendant, E. J. H. Richardson, at her place of residence, Springville, Erie county, New York, as given in the affidavit of plaintiff on file herein, and with postage prepaid thereon. Otis B. Spencer, Clerk.

"Subscribed and sworn to before me this 21st day of April, 1902. My commission expires June 22, 1904. [Seal.] Elmer E. Sommers, Notary Public."

On July 3, 1902, defendant, appearing specially for the purpose, filed a motion to quash the second service of summons on the ground that it had not been made in the manner prescribed by the Code. This motion was denied. On September 15, 1902, proof of publication of the service of the summons was made. On October 20, 1902, defendant filed a petition to vacate the order theretofore entered on her former motion to quash and for a rehearing on said motion. On November 3, 1902, this petition was denied,

and 10 days were allowed the defendant within which to plead. On November 18, 1902, defendant having failed to plead, default was entered; and on November 26, 1902, judgment was entered in favor of plaintiff for \$3,787.52 and costs, and the attachment sustained.

Thomas, Bryant & Lee, for plaintiff in error. H. M. Orahood and W. F. Orahood, for defendant in error.

GODDARD, J. (after stating the facts). It is contended by counsel for plaintiff in error that the issuance and return of an alias summons, showing that the same could not be personally served on the defendant at the time of the issuance of the order for publication, was an essential step and a condition precedent, and that the delay of five months between the return of the first summons and the making of the order of publication was fatal to the validity of the order, and rendered the service of the summons void, notwithstanding the affidavit of plaintiff filed at the time the order was made established the fact that the defendant had been a nonresident of the state ever since the commencement of the action, and still resided out of the state, and whose post office address was Springville, in the county of Erie, state of New York.

In the case of Eagle Gold Mining Co. v. Bryarly, 28 Colo. 262, 65 Pac. 52, wherein several actions were consolidated, the procedure for the obtaining of the order of publication was very similar to the steps taken here. There was a delay of more than four months between the return of the sheriff on the summons there issued and the final order upon which publication of summons was made, owing to a successful attempt on the part of the defendant to quash the first publication, as in this case. The orders were made and publication of summons had upon new affidavits filed at the time the order was obtained. Mr. Justice Steele, who delivered the opinion of the court, after quoting section 41 of Mills' Ann. Code, which controls in cases of service of summons by publication, says: "It is apparent from an examination of this statute that the return of the sheriff was not intended by the Legislature to be made the basis of the order for publication, because the service is only to be attempted in the county where the suit is brought, and the information that the defendant is a non-resident is contained only in the affidavit made by the plaintiff." The court there held that, the several steps having been taken in the order required by the Code, the delay between the return of the sheriff and the making of the order of publication was not fatal to the service of the process, and sustained the action of the court below in entertaining jurisdiction of the case.

There is no substantial difference between the facts in that case and those disclosed

in the record before us, and under the rule there announced the court below rightly entertained jurisdiction of this action, and its judgment is therefore affirmed.

Affirmed.

GABBERT, C. J., and BAILEY, J. concur.

34 Colo. 206

COLORADO & S. RY. CO. v. SONNE.

(Supreme Court of Colorado. Oct. 2, 1905.)

1. RAILROADS — INJURIES TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

Plaintiff, injured by being struck by a loose car in a switch yard, was familiar with the tracks and knew the company's method of operating its trains. He attempted to cross the track on which the car was moving without looking or listening for the approach of cars. Had he looked, he could have observed cars on the track for some distance. He knew that switching was being done. Held, that he was guilty of contributory negligence as a matter of law.

2. SAME — CARE REQUIRED OF PERSON ON TRACK.

A person in a railroad yard on the invitation of the company is not relieved from exercising a reasonable degree of care to avoid injury. [Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1236.]

3. SAME—CARE REQUIRED OF RAILROAD COMPANY.

A railroad company owes to a person in its yards on lawful business the duty of having its premises in a reasonably safe condition and to prevent injury to him from any unusual danger; but this obligation does not require it to make the place absolutely safe.

Appeal from District Court, Gilpin County; A. H. De France, Judge.

Action by Peter Sonne against the Colorado & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Rehearing denied November 6, 1905.

Upon the 7th day of September, 1899, appellant, who was defendant below, operated and maintained a railroad and switchyard at Black Hawk, in the county of Gilpin, in this state. Peter Sonne, the appellee, who was plaintiff below, was a teamster living at Central City, and had been driving a team at Black Hawk and vicinity, and frequenting the switch yards of appellant for 18 or 19 years. He was well acquainted with the manner of the conducting of appellant's business in and about the operation of its trains at that point. Upon the morning in question a freight train arrived in Black Hawk, and was engaged in switching up the track west of the depot. Appellee visited the switch yards of appellant that morning for the purpose of obtaining coal from a car standing therein. A passenger train arrived from the east upon its way to Central City, and, as usual, halted at the Black Hawk station. Having ascertained the location of the coal car which he desired to empty, appellee got into his wagon, and drove parallel with the track and toward Central City in the direction in which the switching

was being done by the freight engine. He had some conversation with the engineer of the passenger train, and attempted to cross the track in front of the passenger engine, without looking or listening to determine what was being done to the westward and up the track by the freight engine. As he was driving upon the track his attention was attracted by the cries of alarm of the bystanders. He then, for the first time, looked up the track, and discovered a loose car coming rapidly toward him, and but a rod or two distant. This car struck the wagon, throwing appellee to the ground and severely injuring him. He brought suit in the district court, and recovered judgment, from which judgment defendant below appeals.

Dines & Whitted and O. L. Dines, for appellant. J. McD. Livesay, for appellee.

BAILEY, J. (after stating the facts). There are many questions raised in the record of this case, only one of which we shall consider, because it is decisive, and that is the matter of the contributory negligence of the appellee. We are often confronted with the proposition that because the trial court gave judgment to the successful party it should be decisive of the matter. If this be true, the existence of a court of review is superfluous, and an unnecessary extravagance. The judgment of nisi prius courts should be sustained when it can be done without violating the settled principles of law. The judgment in this case can only be sustained on the theory that the defendant is guilty of negligence in permitting the car to run down its track unattended by a locomotive, and that plaintiff was not guilty of such negligence as contributed to produce the injury complained of. Before he can recover there must be a concurrence of negligence on the part of the defendant, and a lack of negligence on the part of the plaintiff.

One of the well-settled principles of law in this state is that when a party so far contributed to the disaster by his own negligence or want of ordinary care and caution, that but for such lack of care and prudence the injury would not have been sustained, he is not entitled to recover. *Colo. Central R. R. Co. v. Martin*, 7 Colo. 592, 4 Pac. 1118. In this case, while there is evidence that the view was obstructed some distance south of the track by a lime house, which was located about twenty-five feet from the track, and by a pile of cord wood extending out from the lime house about 8 feet, which would obstruct the view of a person who was south of the track, and opposite this building, Sonne was driving close to the track, and parallel with it, and his view was unobstructed because there were 16 feet of open space between the wood pile and the track. If he had looked he could have observed the cars upon the track for some distance. He says, however, that he did not look; that it was not custom-

ary for him to look up the track before he came upon it; that he generally looked straight ahead; that it was not his custom to stop, or to look, or to listen. One cannot rush blindly into danger, even though the danger be occasioned by the negligence of another, and be heard to complain of his injury. He is bound to exercise a reasonable degree of prudence in protecting himself from injury. The duty of self-preservation is one that cannot be ignored. Usually questions of negligence and contributory negligence are matters of fact to be determined by the jury, but where the facts are undisputed, it becomes the duty of the court to determine these questions as a matter of law. *C. B. & Q. R. R. Co. v. McGraw*, 22 Colo. 363, 45 Pac. 383.

This plaintiff was an old resident of Central City. He was a teamster and for a long time had been using this particular crossing. He knew the grade of the tracks and knew that there was switching being done above him, and if, with his experience and knowledge of existing conditions, he saw fit to drive across the tracks without as much as giving a passing glance in the direction from which the car came, it must be concluded that he assumed the risk, and cannot now be heard to complain if his assumption resulted disastrously. He cannot relieve himself of responsibility by the fact that it was not his custom to stop, or to look, or to listen, while approaching the track. If the accident was caused partly by the plaintiff's own negligence, then it was not in a legal sense caused by the negligence of defendant. In such case it was caused by the negligence of both parties. If the result was produced by the commingling of the negligence of the two parties, the plaintiff cannot recover. *Lesan v. Maine Central R. R. Co.*, 77 Me. 85. The conduct of the plaintiff seems well-nigh indefensible. Though he was well acquainted with the yards and knew that an engine and force of men were doing some switching up the track, he drove boldly upon the crossing without either looking or listening for approaching cars. The fact that there was a locomotive standing upon the track east of the crossing did not excuse him from the duty of looking west along the track. It is said that it would have been of no use to have looked westward because of the obstruction caused by the lime house and the wood pile. As has been seen, this obstruction was 16 feet from the railroad track, and plaintiff was driving close to the track, so that his view could not have been obstructed; but, even if it was, it was his duty then to stop and to listen. *C. & S. Ry. Co. v. Thomas (Colo.)* 81 Pac. 801. The noise of this car was heard by Grutzmacher, who was working in a boiler shop 30 or 35 feet from the main track, and by Kruse, who was near the depot, 75 feet further from the car than Sonne. When the attention of Kruse was attracted by the noise and he saw the

car, it was 125 or 150 feet above the wagon crossing, and apparently Sonne would have had no difficulty in seeing or hearing this car if he had made an effort to do so. These bystanders, who were not in as good a position to see or hear the car as Sonne, did hear it and did see it, and endeavored to attract Sonne's attention to the fact of its approach, but evidently failed to do so in time to prevent the injury.

We may assume it to be true that plaintiff was upon the grounds of the defendant upon lawful business, and, in a sense, upon the invitation of the defendant, and that defendant owed him the duty to have its premises in a reasonably safe condition and to prevent damage to him from any unseen or unusual danger, yet this would not relieve the plaintiff from the duty of exercising a reasonable degree of care. The obligation of the railroad company did not require it to make the place absolutely safe. It was not required to make accidents impossible. *Wabash, St. Louis & Pac. Ry. Co. v. Locke*, 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 193. The plaintiff was bound to co-operate with defendant and use ordinary care to prevent the accident. The law is no less stringent and exacting in imposing duties and responsibilities upon travelers or those crossing railways than it is upon the companies operating the roads. While it is the duty of the company to use due care and to exercise caution to prevent an injury to the wayfarer, it is equally the duty of the individual to use due care and to exercise caution to prevent his being injured by the company. Hence, it is said that, "as a matter of law, it is negligence and carelessness for a person to go, to stand, or to be upon the track of the railroad without keeping watch both ways for cars," and that it is the duty of the traveler to look, and to listen for the approach of trains, and observe the surroundings. *Denver & R. G. R. R. Co. v. Ryan*, 17 Colo. 98, 28 Pac. 79.

The plaintiff was guilty of contributory negligence. He failed either to look or to listen for approaching danger while in a position in which he knew, or should have known, that danger was imminent. He is therefore not entitled to recover, and the judgment of the district court will be reversed.

Reversed.

GABBERT, C. J., and GODDARD, J., concur.

MARKS v. HERREN.

(Supreme Court of Oregon. Dec. 4, 1905.)

1. TRIAL — INSTRUCTIONS — REQUESTS — INSTRUCTIONS ALREADY GIVEN.

The question was whether a wife was bound by her husband's lease of her land to de-

fendant, and the court was requested to charge that, if the wife knowingly permitted the husband to hold himself out as her agent as to her land, she would be held to adopt his acts and be bound by his contracts, and that where one is shown to have been an agent, and continues to act as such within the scope of his former authority, a continuance of his authority is presumable. The court charged that the husband could have been an agent of his wife by his generally transacting business of such character in relation to her land, and that if she gave him general authority, which was generally known, it would be presumed to continue until parties that knew of that authority had actual notice of its cessation. *Held* that, in view of the instruction given, there was no error in refusing the one requested.

2. HUSBAND AND WIFE—AGENCY—INSTRUCTIONS.

The use in the court's charge of the words "habitual" and "habitually," to qualify the alleged conduct of the husband in dealing with his wife's land, did not require the husband's acts to be so often repeated as to form a habit, but they meant that, if the wife ratified all contracts assumed to have been made by the husband, his agency might be implied.

Appeal from Circuit Court, Clackamas County; T. A. McBride, Judge.

Action by Sarah E. Marks against E. C. Herren. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action by Sarah E. Marks against E. C. Herren to recover the possession of certain real property. The answer admits plaintiff's ownership of the land, denies her right to the immediate possession thereof, and avers a lease of the premises from plaintiff's husband, who in making the demise acted as her agent. The reply denies the alleged agency, and, the cause being tried, judgment for the restitution of the premises was rendered against the defendant, and he appeals.

A. M. Cannon, for appellant. G. B. Dimick and S. T. Richardson, for respondent.

MOORE, J. The bill of exceptions shows that at the trial the defendant introduced testimony tending to show that John R. Marks, plaintiff's husband, acted as her agent in selling produce received as rent of the demanded premises; that he negotiated a sale of a part of her land; that he managed her real property, which facts were generally known; and that the defendant, being aware thereof, relied upon Marks' apparent authority in renting the premises from him. Based on this testimony the defendant's counsel requested the court to give the following charge: "You are instructed, gentlemen of the jury, that, if the plaintiff knowingly and voluntarily permitted Marks to hold himself out to the world as her agent in the transaction of business respecting her land, she would be held to adopt his acts and be bound by his contracts with any person relying upon the faith of such agency; and it is also a rule of law that where a person is shown to have been the agent of another in the transac-

tion of particular business, and continues to act as such agent within the scope of his former authority, it will be presumed that his authority continues and his action will bind his principal, unless the person with whom he deals has notice that his agency has ceased, or until after a lapse of such a length of time as ought to put a reasonably prudent man on inquiry as to the continuance of such agency. So in this case, if you should find from the evidence that Marks was transacting the business of the plaintiff connected with this real property, such as collecting rents, selling hops, and negotiating sales of the property, then the defendant would have a right to rely upon his authority if he knew of it, and the plaintiff would be bound by his act of leasing the property to the defendant, unless his authority had ceased, and that fact was brought home to the defendant prior to leasing, and your verdict must be for the defendant." The court refused to give this instruction, and the defendant was allowed an exception.

In the general charge the court said: "A party may be held to create an agency in two ways that will bind them: One actually authorizing an agent to do an act, or Mr. Marks could be an agent of his wife by her actually authorizing him to transact this particular business, or generally to transact business of this character in relation to the farm, managing and renting, and collecting rents, and selling property on the farm, and other things of that sort. If she gave him general authority to do that, and his authority was generally known and recognized in respect to similar matters, then it would be presumed to continue until parties that knew of that authority had had actual notice that it had ceased. Or, if she allowed him to hold himself out as the agent and recognize his authority to such an extent as would leave a reasonable, prudent, and careful man to believe that he actually was an agent, if she allowed him to go ahead and transact business of a similar character habitually in such a way as would lead a reasonable and prudent man to believe that he was her agent in this matter, and he actually did believe that and was misled by her previous habitual course of conduct, then she would be bound by his act the same as if she had actually authorized him. But, in order to be bound, in that way, the conduct—by holding a person out as agent—he must have habitually acted in matters of a similar character." The substance of that part of the charge requested, preceeding the application to the case at bar, is taken from Sackett's Instructions to Jurors (2d Ed.) p. 65, § 16, and page 58, § 4. An examination of the excerpt, taken from the general charge, will show that the essential parts of the special instructions requested were given by the court. The rule is well settled in this state that when the trial court is requested to state to the jury the rules of

law applicable to the various issues involved, which requests are substantially embodied in the general charge, no error is committed in refusing to give the special instructions requested. *Conlon v. Oregon Short Line R. Co.*, 23 Or. 499, 32 Pac. 397; *Morrison v. McAtee*, 23 Or. 530, 32 Pac. 400; *La Grande Nat. Bank v. Blum*, 27 Or. 215, 41 Pac. 659. The court having given the substance of the instruction requested, no error was committed in refusing to charge the jury as desired by defendant's counsel.

The court in several instances in its general charge used the words "habitual" and "habitually," as heretofore quoted, to qualify the alleged conduct of plaintiff's husband in dealing with her land, to the frequent use of which words defendant's counsel were allowed exceptions. It was argued that the acts of a person on behalf of another, when assented to by the latter, warrants the implication of an agency, without such acts being so often repeated as to form a habit, and that the court's use of the words complained of was erroneous. In *State ex rel. v. Savage*, 89 Ala. 1, 7 South. 7, 183, 7 L. R. A. 428, which was a proceeding to impeach a probate judge for alleged habitual drunkenness, Mr. Chief Justice Stone, speaking for the court upon the merits of the case, said: "Habit is customary state, or disposition, acquired by frequent repetition; aptitude by doing frequently the same thing; usage; established manner. When a person has repeatedly acted in a particular way, at intervals, whether regular or irregular, for such length of time as that we can predicate with reasonable assurance that he will continue so to act, we may affirm that this is his habit." In *Lynch v. Bates*, 139 Ind. 206, 38 N. E. 806, in construing a statute which forbade the granting of a liquor license to a person in the habit of becoming intoxicated, the court say: "The word habit has a clear and well-understood meaning, being nearly the same as custom, and cannot be applied to a single act." In 1 *American & English Encyclopedia of Law* (2d Ed.) p. 961, the editors of that valuable work, discussing the authority of one person to act for another, say: "While agency may be implied from a single transaction, it is more readily inferable from a course of dealing."

If the definition of the word "habit" as given by the courts in construing statutes relating to the excessive indulgence of intoxicating liquors is to prevail in the case at bar, it would necessarily follow that an agency could not be implied from a single transaction. The words used by the court in its general charge, to which exceptions were taken, were evidently intended as synonyms for the words custom or usage, and were not designed to be expressive of an appetite which by inheritance is or by acquisition had become almost uncontrollable.

Mr. Tiffany in his work on Agency (section 9), in giving illustrations of an agency arising from an estoppel, says: "If a man allows his servant habitually to buy from a tradesman on credit, his conduct is an implied representation of authority to pledge his credit in similar cases. * * * Or, if a merchant is aware that his cashier is in the habit of indorsing and collecting checks without authority in dealing with the bank, and does not notify the bank that the cashier is acting without authority, he will not be allowed to deny the authority." In *St. Louis Nat. Stockyards v. Godfrey*, 198 Ill. 288, 65 N. E. 90, which was an action by a locomotive engineer to recover damages for a personal injury, sustained while switching cars, it was held that the following instruction stated the rule correctly, to wit: "The jury are instructed that if they believe from the testimony, the rule, or notice of the defendant read in evidence, relating to the use of tracks by crews of the plaintiff's company in entering the defendant's yard from the Terminal Railroad Association yard, was habitually violated with the knowledge and acquiescence of the defendant, or was not enforced as to the switching crew with which the plaintiff worked, then the jury should disregard such notice or rule in considering the whole case." In that case, as also in the illustrations given by Tiffany, to which attention has been called, the word "habitually" was evidently designed as a synonym for usage or a course of dealing.

Whether or not an agency can be implied from a single transaction so as to give it the designation of a usage is not necessary to a decision herein, for the bill of exceptions discloses that testimony was introduced by the defendant tending to show that plaintiff's husband had acted for his wife in more than one instance relating to her real property. The habit or usage to which the court refers evidently meant that if the plaintiff ratified all contracts, assumed to have been made with third persons on her behalf by her husband, the agency of the latter might be implied from such course of dealing, without regard to how many times his acts had been affirmed by her. But, if she at any time had repudiated agreements undertaken with third persons by her husband on her behalf, such disavowal would break the continuity of the course of dealing, and repel the implication of an agency arising from her husband holding himself out as her agent. Believing from an examination of the entire charge that the meaning we have ascribed to the words in question was so intended by the court and so understood by the jury, no error was committed in using them in the general charge.

It follows from these considerations that the judgment should be affirmed, and it is so ordered.

WONG SING v. CITY OF INDEPENDENCE et al.

(Supreme Court of Oregon. Nov. 27, 1905.)

1. APPEAL—JURISDICTION—CONSENT OF PARTIES.

Parties to a cause cannot, by waiver or consent, confer appellate jurisdiction, where it does not otherwise exist.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 88-97.]

2. REVIEW—EXISTENCE OF OTHER REMEDY—MUNICIPAL COURTS.

There being no ordinance conferring the remedy, there is no appeal from a judgment of a recorder's court of a city, but the remedy is by writ of review.

3. INTOXICATING LIQUOR—CRIMINAL PROSECUTION—INFORMATION.

Where a city ordinance provided that no person should sell liquor in less quantities than a gallon without a license, and another section declared that any one selling or offering to dispose of any liquor should be punished, etc., the words "in less quantities than a gallon" were by implication imported into the later section, and an information which failed to aver that the quantity sold was less than a gallon was insufficient, under Code Cr. Proc. §§ 1306, 1308, requiring an information to charge but one crime and to be direct and certain.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 235.]

4. SAME—CERTAINTY.

An ordinance forbade the sale of "any spirituous, malt, or vinous liquors." A further provision made each sale a separate and distinct offense. *Held*, that an information charging a sale of "spirituous and malt liquors or spirituous or malt liquors" was not sufficient, under Code Cr. Proc. §§ 1306, 1308.

5. INFORMATION—FORM.

That an information for violation of a city ordinance was in the form prescribed by the ordinance could not bind the defendant or prevent the court from construing the law applicable thereto.

Appeal from Circuit Court, Polk County; William Galloway, Judge.

Wong Sing was convicted in a recorder's court of illegally selling liquor, and from a judgment of the circuit court dismissing a writ of review he appeals. Reversed.

This is a special proceeding to review a judgment of an inferior court. An accusation was filed in the recorder's court of the city of Independence against the plaintiff herein, which charge, omitting the formal parts, is as follows: "The said Wong Sing is accused by this complaint with the crime of selling spirituous or malt liquors in the city of Independence, Oregon, committed as follows, to wit: That said Wong Sing, in the city of Independence, in Polk county, Oregon, did on the 14th day of December, 1904, and the 17th day of December, 1904, then and there being, did then and there sell, or cause to be sold, spirituous and malt liquors, or spirituous or malt liquors, in the city of Independence, without license, and contrary to the laws of the city of Independence, the same being a violation of section 7, of Ordinance 16, which provides for the punishment

of such offenses, and contrary to the statutes in such cases made and provided, and against the peace and dignity of the city of Independence." A demurrer to this pleading was interposed, on the grounds that more than one offense was attempted to be charged and that the facts so stated do not constitute a crime. The demurrer was sustained as to the date, "the 17th day of December, 1904," as set out in the complaint, but overruled in all other respects, and, a trial being had, the plaintiff herein was found guilty as charged and sentenced to pay a fine and the costs and disbursements of the action. He thereupon sued out a writ of review, in pursuance of which the proceedings had against him in the recorder's court in such action, together with a certified copy of Ordinance No. 16, of that city, were certified up to the circuit court for that county, where, upon a hearing based on such return, the writ was dismissed, and from the latter judgment he appeals to this court.

Oscar Hayter, for appellant. G. A. Hurley, for respondents.

MOORE, J. (after stating the facts). It is insisted by defendant's counsel, in support of the judgment of the circuit court, that plaintiff had a remedy by appeal from the judgment rendered against him in the recorder's court; and, this being so, a writ of review was not the proper remedy to correct the errors alleged to have been committed. Assuming, without deciding, that a writ of review does not lie in cases where a remedy by appeal exists, the authority relied upon as conferring the latter right will be examined. The charter reincorporating the city of Independence, filed in the office of the Secretary of State February 21, 1903 (Sp. Laws Or. 1903, p. 703), does not in express terms grant such right. It is argued by defendant's counsel, however, that an ordinance of that city, passed and approved in March, 1894, conferred the right of appeal from judgments rendered in the recorder's court, which municipal enactment was recognized and approved when the new charter was granted. The clause of the charter relied upon is as follows: "All ordinances heretofore passed and in force when this act takes effect, and not in conflict with any of its provisions, shall be and remain in force after this act takes effect until repealed by the city council." The ordinance in question is not certified up as a part of the transcript. There is printed in the brief of the defendant's counsel what purports to be section 13 of Ordinance No. 1, of the city of Independence, passed March 7, 1894, and approved three days thereafter, of which the following is an excerpt, to wit: "Defendant may appeal from a judgment rendered in the recorder's court at any time within 30 days from its rendition." If the proof of the existence of this ordinance was adequate, we do not think the right attempted to be conferred could possibly be granted

in the manner indicated. Jurisdiction of the subject-matter of actions depends for its exercise upon a valid grant of power, evidenced by proper legislative enactment. The parties to actions may waive their own rights and confer jurisdiction of their persons by a voluntary appearance, but they are powerless to confer upon any tribunal jurisdiction of an appeal, because the right to do so is not vested in them. The section of the charter hereinbefore quoted recognized the validity of ordinances "in force" when the act went into effect. An ordinance attempting to confer jurisdiction of the subject-matter of actions was never in force, and hence no appeal lies from a judgment rendered in the recorder's court of the city of Independence.

The conclusion thus reached brings us to a consideration of the question whether or not the complaint, filed in the recorder's court, complied with the requirements of the statute in the manner of charging the plaintiff with the commission of a crime. The charter of the city of Independence, creating the office, analogous to that of a police judge, and prescribing the procedure thereof, contains the following provision: "The recorder is the judicial officer of the said city, and shall hold court therein at such place as the council may provide, which shall be known as the 'recorder's court', and he shall * * * have exclusive jurisdiction of all offenses defined and made punishable by any ordinance of the city, and of all actions brought to enforce or to recover any penalty or forfeiture declared, or given by such ordinance; and he shall be governed by the justice's Code of this state in all civil and criminal proceedings in the recorder's court, including all proceedings for violation of any city ordinance." Sp. Laws Or. 1903, p. 707, § 18. An examination of the justice's Code of this state will show that the following are the provisions regulating the proceedings of such inferior tribunals, to wit: A criminal action in a justice's court is commenced and proceeded in to final determination, and the judgment therein enforced, in the manner provided in the Code of Criminal Procedure, except as in this title otherwise specially provided. B. & C. Comp. § 2263. In a justice's court, a criminal action is commenced by the filing of a complaint therein. Id. § 2264. The complaint is to be deemed an indictment within the meaning of the provisions of chapter 8 of the Code of Criminal Procedure, prescribing what is sufficient to be stated in such pleading, and the form of stating it. Id. § 2265. The provisions of chapter 8 of the Code to which attention is called, so far as applicable to the sufficiency of the complaint in the case at bar, is as follows: "The indictment must charge but one crime and in one form only; except that, where the crime may be committed by the use of different means, the indictment may allege the means in the alternative." Id. § 1308. And it "must be direct and certain,

as it regards the crime charged." Id. § 1306.

The provisions of Ordinance No. 16 of the city of Independence, involved herein, are as follows:

"Section 1. That no person or persons shall be permitted to sell or in any manner dispose of any spirituous, malt or vinous liquors in the city of Independence in less quantities than a gallon without first having obtained a license therefor from the city of Independence as hereinafter provided."

"Sec. 7. Any person who shall sell, give away, or in any manner dispose of, or shall keep for sale, or offer to sell, give away or in any manner dispose of, within the corporate limits of the city of Independence, any spirituous, malt or vinous liquors, without first having obtained a license for that purpose as in this ordinance provided, shall upon conviction thereof before the recorder's court, be punished by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment in the city jail not less than twenty-five days nor more than fifty days, or both such fine and imprisonment, at the option of the court, and each and every sale or disposal of, or offer to sell or in any manner dispose of any spirituous, malt, or vinous liquors, shall constitute a separate and distinct violation of the provisions of this section."

Construing the section last quoted in *pari materia* with the preceding, so as to determine their import, would necessarily incorporate into section 7 the phrase "in less quantities than a gallon," to be found in section 1 of the ordinance. The sales, donations, or disposals of intoxicating liquors thus prohibited, without first having procured a license authorizing them, are of quantities less than a gallon. No license is required, and hence no offense is committed against the state law, when in the same transaction a gallon or more of spirituous, malt, or vinous liquor is sold, given away, or disposed of by any person in the city of Independence. An examination of the complaint in the case at bar, filed in the recorder's court, will show that it fails to state that the quantity of intoxicating liquors, alleged to have been sold by Wong Sing, was less than a gallon. It was not essential to the validity of the complaint that it should specify the exact measure of the intoxicating liquor sold, such as a gill, a pint, a quart, etc., but it was necessary to aver that the quantity disposed of was less than a gallon. *State v. Mondy*, 24 Ind. 268. The complaint, not having averred that the quantity of intoxicating liquor sold was less than the measure specified, failed to state facts sufficient to constitute a crime.

It will be remembered that the complaint accuses Wong Sing of selling "spirituous and malt liquors, or spirituous or malt liquors." It will be kept in mind that section 7 of the

Ordinance No. 16 of the city of Independence prescribed a punishment for any person who without a license therefor sold, etc., "any spirituous, malt or vinous liquors," and provided that each and every sale, etc., of such liquors should constitute a separate and distinct offense. In *State v. Humphreys*, 43 Or. 44, 70 Pac. 824, in announcing the manner of stating the facts constituting the commission of a crime, it is said: "When a statute enumerates several acts in the alternative, the doing of any of which is subjected to the same punishment, all such acts, when not repugnant to each other, may be charged cumulatively as one offense, by using the copulative 'and' where 'or' appears in the statute; but, where the latter word is used in the sense of 'to wit', or as indicating that the terms preceding and following are synonymous, it is unnecessary to observe the distinction in the manner of enumerating the several acts constituting the alleged crime, in which case the disjunctive 'or' may be used in the information or indictment in the same manner as it appears in the statute." Applying this rule to the case at bar, if it were not for the latter clause of section 7 of Ordinance No. 16, to which attention has been called, making each sale, etc., a separate and distinct offense, the complaint, by charging the sale of spirituous "and" malt liquors, might be upheld. It is possible, however, that under a single sale spirituous and malt liquors might have been mixed, so as to constitute but one violation of the provisions of the ordinance.

There is a marked distinction between spirituous and malt liquors. The former is obtained by distillation, the latter by fermenting an infusion of malt. The qualifying words "spirituous" and "malt" are therefore not synonymous terms, and the employment of either cannot be understood as implying the use of the other, so as to permit the disjunctive "or" as used in the phrase "spirituous or malt liquors", set out in the complaint, to be construed as "to wit," such as spirituous liquor or whisky, malt liquor or beer, vinous liquor or wine, etc. The specific charge that Wong Sing sold "spirituous and malt liquors," assuming that these kinds of beverages were blended so as to be embraced in a single transaction, is rendered uncertain by the subsequent statement in the complaint that he sold either "spirituous or malt liquors." As the complaint in a justice's court in a criminal action takes the place and performs the service of an indictment, and is construed in the same manner (*B. & C. Comp. § 2265*), the pleading in the case at bar violates the provisions of the statute which requires that the accusation must be direct and certain as to the crime charged (*Id. § 1306*), and that it must charge but one crime and in one form only (*Id. § 1308*).

The plaintiff's counsel contend that the complaint is insufficient because it does not

state the name of the person to whom the intoxicating liquors were claimed to have been sold, or aver that such liquors were sold to one John Doe, whose true name was to the private prosecutor unknown. In support of the principle thus insisted upon, it is argued that one of the objects of a conviction or of an acquittal is to prevent the person so accused from again being placed in jeopardy for the same offense, and that unless a complaint contains the averments insisted upon the judgment rendered in an action of this kind might not afford a defendant any indemnity from further proceedings or prosecution. The conclusion reached upon this question by the courts of last resort are variant (11 Enc. Pl. & Pr. 547), but, as the complaint in the case at bar is so defective in other respects, we do not deem it necessary to decide the question presented, believing that in case a new complaint is filed all doubt can be resolved by naming the purchaser as a matter of description of the offense.

The defendant's counsel maintain that the complaint in the case at bar complies with the requirements of section 15 of Ordinance No. 1 of the city of Independence, which prescribes the forms thereof. This ordinance is not certified up or made a part of the bill of exceptions, but, if the complaint is copied therefrom, the sufficiency of the pleading might possibly estop the city, but it could not bind the defendant in a criminal action, nor prevent a court from construing the law applicable thereto.

The complaint being defective in the particulars hereinbefore indicated, the judgment last appealed from is reversed, and the cause will be remanded to the circuit court for Polk county, with directions to set aside the judgment of the recorder's court.

MILLS v. MILLS.

(Supreme Court of Oregon. Dec. 4, 1905.)

1. DIVORCE—CRUELTY—EVIDENCE.

Where, in an action for divorce for cruelty, the only personal violence shown was in defendant's attempt to hold plaintiff away to prevent her from taking their child away from him, and indicated no willful purpose or desire on his part to do her personal injury, it was insufficient to sustain a decree in her favor.

2. SAME—CUSTODY OF CHILDREN.

Where, in an action by a wife for divorce, plaintiff was found guilty of adultery on a cross-bill filed by defendant, the custody of their minor child should be awarded to the defendant, subject to such opportunity to visit as the circuit court in its discretion on plaintiff's application should deem just.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 783.]

Appeal from Circuit Court, Baker County; Samuel White, Judge.

Action by Lena D. Mills against William E. Mills. From a judgment for plaintiff, defendant appeals. Reversed.

W. H. Strayer, for appellant.

PER CURIAM. This is a suit for divorce in which each party is asking for a legal separation from the other; the plaintiff by her complaint, and the defendant by his answer by way of cross-complaint. The basis of plaintiff's suit is cruel and inhuman treatment; that of defendant alleged acts of adultery by the plaintiff. Mrs. Mills, by her own testimony and that of some other witnesses, shows that on two occasions the defendant choked her while angry and used towards her some vile and opprobrious language. As to the personal violence, the proofs, on the other hand, indicate that upon each occasion the parties were engaged in an attempt each to retain possession of their minor child, and that, if any violence was exerted by defendant toward plaintiff, it was only to hold her away so as to prevent her from taking the child from him. We are firmly of the view that there was no willful purpose or desire on the part of defendant to do her personal injury, and it is very apparent that he did nothing of the kind. There may have been some language used by the defendant towards plaintiff that was altogether inexcusable, but it is also apparent that the plaintiff was equally as forceful in the same direction in her own expressions directed towards the defendant, so that neither party can claim an advantage on that ground. As it pertains to the alleged threat to kill, the preponderance of the evidence disproves it. This disposed of plaintiff's cause of suit.

As to that preferred by the defendant, we are firmly convinced that it has been proven. The plaintiff has doubtless been guilty of acts of adultery with one Widdowson. This has been shown by a reliable witness who came upon them unawares in a compromising position, and by many other witnesses who have taken note of their acts and demeanor until they have almost become a public scandal. The plaintiff and Widdowson deny that they have been guilty of any such unbecoming acts of indecency, but a careful reading of the whole evidence convicts them in our minds unquestionably of the charges. It is unnecessary in a case of this nature that we make extended reference to the evidence, or discuss the matter largely, but it is sufficient that we are convinced that the charges have been proven. These considerations lead to a reversal of the decree of the trial court. The plaintiff being in the fault, and because of her loose conduct, the custody of the minor child should be given to the father.

The decree of this court will therefore be that the defendant have a divorce from the plaintiff, and that he have the care and custody of the minor child, subject to such opportunity to see and visit it as the circuit court may, upon proper application, determine.

LEAVITT v. SHOOK.

(Supreme Court of Oregon. Dec. 4, 1905.)

1. LIMITATIONS—REPLEVIN.

Where, in replevin brought in 1905 to recover a horse, defendant and his vendor had been in open, undisputed possession of the same since 1896, claiming ownership in good faith, plaintiff's action was barred by limitations.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 89, 239.]

2. SAME—EVIDENCE.

Where, in replevin to recover a horse, defendant claimed to have purchased the same in good faith from R., who testified that he purchased the horse from one J., whom he believed to be the owner, in March, 1896, and had in his possession and delivered to R. what purported to be a bill of sale of the horse to him from another, such bill of sale was admissible without proof of its genuineness to show the manner and circumstances under which R. acquired possession.

3. SAME—BRAND—RECORD.

Where, in replevin to recover a horse, defendant's vendor testified that after he purchased the animal she was branded with his brand, a copy of which was recorded, such copy was properly admitted in evidence as tending to show good faith.

Appeal from Circuit Court, Baker County; Samuel White, Judge.

Action by E. E. Leavitt against J. R. Shook. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Leroy Lomax, for appellant. W. L. Patterson, for respondent.

PER CURIAM. The judgment in this case will be affirmed. It is an action of replevin to recover possession of a certain mare, which the evidence for the plaintiff showed belonged to him, but had strayed from his place in 1893, and its whereabouts had been unknown to him until the spring of 1905, a few days before he commenced this action. The defendant claimed to have purchased the animal in good faith from George and H. J. Rizer in 1903; that the Rizers purchased her from one Frank Jones in good faith in 1896, believing he was the owner and had the right to sell; that they thereafter remained in the open, notorious, and undisputed possession thereof under an honest claim of right until the time of the sale to defendant in 1903. The plaintiff claimed that the possession by the Rizers was without right and fraudulent. The jury returned a general verdict to the effect that the plaintiff was the owner and entitled to the possession of the animal, but at the same time, and by direction of the court, rendered a special verdict as follows: "We, the trial jury, duly impaneled to try the above-entitled cause, make the following special findings: (1) If you find from the evidence that the defendant purchased the animal described in the complaint from George Rizer and H. J. Rizer, then state for how many years the said Rizers had the possession of the said animal. Answer. Seven years (2) Was there any concealment or improper

act on the part of the said Rizers in acquiring said animal or in their possession thereof? Answer. No. [Signed] Geo. W. Wright, Foreman." Upon motion of the defendant the general verdict was disregarded and one rendered in his favor upon the special findings, and plaintiff appeals.

Under the special findings the defendant was entitled to a judgment in his favor, because the action was barred by the statute of limitations. *Wells v. Halpin*, 59 Mo. 92; *Dee v. Hyland*, 3 Utah, 308, 3 Pac. 388. It is unnecessary, therefore, to consider any of the assignments of error except such as affect the special verdict. George Rizer was a witness for the defendant and testified that he and his son, who are partners, purchased the mare in question of one Jones, whom they believed to be the owner, in March, 1896, and that Jones had in his possession at the time, and delivered to them, what purported to be a bill of sale from C. L. Cromwell to him of this particular animal and others. This bill of sale was introduced in evidence to show the manner and circumstances under which the Rizers came into possession of the animal, and not as a muniment of title, and was therefore competent for whatever the jury might consider it worth, without proof of its genuineness. *Spooner v. Holmes*, 102 Mass. 503, 3 Am. Rep. 491; *Stelner v. Trantum*, 98 Ala. 315, 13 South. 365. Rizer also testified that after the animal was purchased she was branded with his brand. A copy of his recorded brand was properly admitted in evidence as tending to show good faith.

The other assignments of error are based on instructions which, if erroneous, were harmless because they affected the general verdict only and not the special findings.

Judgment affirmed.

HUME v. BURNS et al.

(Supreme Court of Oregon. Dec. 4, 1905.)

1. APPEAL—RECORD—TRANSCRIPT—IDENTIFICATION OF EVIDENCE.

B. & C. Comp. § 827, providing that, when an equity cause has proceeded to final decree, the judge shall within 10 days after the entry of the decree identify the evidence by a proper certificate, is not mandatory; and where there is some confusion touching the evidence, exhibits, and documents proper to be brought to the Supreme Court with the transcript, a motion to strike such evidence, etc., because not identified by the judge, will be granted, with permission to appellant to apply to the judge for a proper certificate.

2. SAME—MOTIONS TO STRIKE EVIDENCE—DISPOSITION.

Where it will require an extended survey of all the voluminous evidence brought up on appeal in an equity case to determine what is proper and what is not proper, a motion to strike from the transcript evidence, documents, and exhibits which were not introduced on the trial will be left undetermined until the cause is heard upon its merits.

3. SAME.

The consideration of a motion to strike a stipulation from the transcript will be postponed until final hearing, where the court is unable to determine from the information before it at the time the motion is made the propriety of striking such stipulation.

Appeal from Circuit Court, Curry County; J. W. Hamilton, Judge.

Suit by R. D. Hume against E. B. Burns and others. From a decree for defendants, plaintiff appeals. On motions to strike certain matters from the transcript. Granted in part.

M. G. Munly, for the motion. R. H. Countryman and W. C. Hale, opposed.

PER CURIAM. The respondents seek by motion to have stricken from the transcript and files of this court in the above cause the testimony, exhibits, and documentary evidence accompanying such transcript, assigning as grounds therefor: (1) That such testimony, documentary evidence, and exhibits were not identified by the trial judge rendering the decree, as the law requires; (2) that such testimony, etc., are not certified as required by rule 1 of this court; and (3) that there appears to be incorporated with such testimony the evidence of witnesses, including documents and exhibits, which was never given or admitted at the trial of the cause. The respondents also seek by a further motion, filed at the same time, to have stricken from the transcript a stipulation, entered in to between counsel for the parties, touching certain evidence it was desired to have admitted in the cause.

Referring to the first motion, the statute provides that, "when an equity cause has gone to a final decree, the judge of the court rendering the decree shall, within ten days after the entry of the decree, by a proper certificate, identify all the evidence in the case, whether consisting of the testimony of the witnesses, documentary evidence or exhibits." B. & C. Comp. § 827. We have not regarded this statute as mandatory (*Osgood v. Osgood*, 35 Or. 6, 56 Pac. 1017), and, there appearing to be some confusion touching the evidence, exhibits, and documents proper to be brought to this court with the transcript, the motion will be allowed, with permission to the appellant to apply to the trial judge for the proper certificate respecting such testimony, etc., and for this 60 days' time will be given. The certificate of the clerk can also be obtained within the time, if deemed important.

As it pertains to the third ground, it will require an extended survey of all the evidence brought here, which is very voluminous, to determine what is proper and what is not. Hence it is deemed advisable, the cause being in equity, to leave the matter unsettled until the same is heard upon its merits. Referring to the further motion, we are unable to determine with the information before us touch-

ing the propriety of striking out such stipulation. Hence this matter will also be postponed until the final hearing of the cause, with leave to renew the motion then.

The order will be entered in accordance with this opinion.

PLEDGE v. GRIFFITH.

(Supreme Court of Montana. Nov. 17, 1905.)

1. ELECTIONS — CONTESTS — APPEAL — RECORD — EXHIBITS — AUTHENTICATION.

In an election contest, the trial court recounted the ballots. The parties stipulated that in case of appeal the original ballots objected to, marked as exhibits, should become a part of the record without bill of exceptions. On appeal, the ballots were brought into the Supreme Court in a box, to which was attached a memorandum by the trial judge that he believed it contained the ballots used on the trial. *Held*, that the ballots were not before the Supreme Court, because not authenticated as required by Court Rule 8, subd. 1 (57 Pac. vii), providing for the authentication of exhibits by a certificate of the trial court attached thereto.

2. SAME — HARMLESS ERROR.

Where, in an election contest case, the exclusion of the votes cast in a precinct would not change the result, the error in counting the votes cast at that precinct was not prejudicial.

Appeal from District Court, Valley County; Henry C. Smith, Judge.

Election contest by T. R. Pledge against Walter S. Griffith. From a judgment for contestee, contestant appeals. Affirmed.

Hurd and Dignan, W. G. Downing, and Jesse B. Roote, for contestants. S. C. Heron and Sam Stephenson, for contestee.

HOLLOWAY, J. At the general election held in 1904, Harry Cosner was the Democratic candidate for sheriff of Valley county, Mont., and the respondent, Walter S. Griffith, was the Republican nominee for the same office. Griffith was declared elected, and a certificate of election issued to him. Thereupon, this appellant, as an elector of that county, commenced an election contest under the provisions of title 2, pt. 3, of the Code of Civil Procedure, alleging malconduct on the part of the judges of election in certain particulars enumerated in the statement of contest. Issues having been joined, a trial was had before the court sitting without a jury. The court recounted the ballots and, as result, entered judgment declaring the respondent duly elected to said office. From that judgment the contestant appeals.

In this court only two contentions are made: (1) The court erred in counting for the respondent certain ballots which appellant contends bear distinguishing marks; and (2) the court erred in counting for the respondent the votes cast at Poplar precinct.

1. At the close of the trial the district court made an order as follows: "It was ordered by the court that in the event of an appeal herein, the original ballots except-

ed and objected to by both parties marked as exhibits by the stenographer, become part of the record on appeal, and be certified up to the Supreme Court, according to law, and that the bill of exceptions need not copy or set forth the said exhibits, but that the originals be used." The bill of exceptions does not contain copies of any of the ballots used at the trial. In this court we are asked to consider a large number of ballots which were brought into court as the ballots used upon the hearing in the district court. These ballots are not identified in any manner whatever. There is not any certificate of the judge of the trial court on, or attached to, any of them. The ballots were brought into this court in a box, to which box was attached a memorandum in writing by the judge who presided at the trial of the case, to the effect that he had received the box from the clerk of the district court of Valley county, had never opened it or examined its contents, but believes it contains the original ballots used upon such trial. Subdivision 1 of rule 8 of the rules of this court (57 Pac. vii), provides: "Whenever in the trial of an action or other proceeding appealed to this court, an exhibit of a printed book or pamphlet or other printed or engraved matter, or a model, drawing, map, trade-mark, plans, or illustrations, or other matter formed, drawn, printed, or engraved, is introduced or offered in evidence, and it is desired by either party to use the same original exhibit as part of a statement on motion for new trial, or in a bill of exceptions, such exhibit, authenticated by a certificate of the judge of the trial court thereon or attached thereto, may be brought to this court in its original form as introduced in evidence, either bound in the transcript of the record on appeal, if convenient to do so, or as an exhibit accompanying such record to this court. * * * There was not even a pretense of compliance with the provisions of this rule. An original exhibit used in the trial court may be used on appeal in this court, provided it is identified as such original exhibit in its original form as introduced in evidence in the court below; and further provided that these facts are made to appear positively by the certificate of the judge who presided at the trial in the court below. In the present instance there is nothing before us to indicate either that these are the original ballots used on the trial of this case, or, if they are, that they are in the original form as introduced in evidence. For these reasons these ballots are not before us for consideration; and, there being no other evidence of the particular markings on the ballots of which complaint is made, we cannot consider this ground of alleged error.

2. It is said that the court erred in counting the ballots cast at Poplar precinct. The court found that this respondent received 619 votes, 37 of which were cast at Poplar precinct; and that his opponent, Cosner, re-

ceived 539 votes, 12 of which were cast at Poplar precinct. From this it is apparent that if the votes cast for these respective candidates at Poplar precinct be deducted from the total vote which each received in the county, the result of the election will not be affected; and this being so, the reception of those ballots did not prejudice the rights of the unsuccessful candidate, or of the appellant in this case, and neither can complain.

No error appearing in the record, the judgment is affirmed.

Affirmed.

BRANTLY, C. J., and MILBURN, J., concur.

PLEDGE v. TWEEDIE.

(Supreme Court of Montana. Nov. 17, 1905.)

Appeal from District Court, Valley County; Henry C. Smith, Judge.

Election contest by T. R. Pledge against James Tweedie. From a judgment for contestee, contestant appeals. Affirmed.

Hurd & Dignan, W. G. Downing, and Jesse B. Roote, for contestants. S. C. Herron and Sam Stephenson, for contestee.

HOLLOWAY, J. The facts in this case are similar to those in the case of Pledge v. Griffith (this day decided), 83 Pac. 392. At the general election of 1904, Roswell L. Branson was the Democratic nominee for the office of county assessor of Valley county, and this respondent was the Republican nominee for the same office. The appeal is from the judgment declaring this respondent duly elected.

The contentions are the same as in the case of Pledge v. Griffith above. The district court found that respondent Tweedie received a total of 590 votes, 40 of which were cast at Poplar precinct; and that his opponent, Branson, received 543 votes, 9 of which were cast at Poplar precinct. For the reasons stated in the opinion in Pledge v. Griffith above, the judgment is affirmed.

Affirmed.

BRANTLY, C. J., and MILBURN, J., concur.

COLEMAN v. KERR.

(Supreme Court of Montana. Nov. 17, 1905.)

1. ELECTIONS — CONTESTS — GROUNDS — STATUTES.

The reception of illegal votes at an election for a public office is not misconduct on the part of the election officers, within Code Civ. Proc. § 2010, authorizing an elector to contest an election for misconduct on the part of the judges of election, but constitutes a separate ground for contest under the express provisions of the section.

Milburn, J., dissenting.

Appeal from District Court, Valley County; Henry C. Smith, Judge.

Election contest by Eugene D. Coleman against John J. Kerr. From a judgment for contestee, contestant appeals. Affirmed.

Hurd & Dignan, W. G. Downing, and Jesse B. Roote, for plaintiff. S. C. Herron and Sam Stephenson, for respondent.

HOLLOWAY, J. At the general election held in 1904, Thomas Dignan was the Democratic candidate for the office of county attorney of Valley county, and this respondent, Kerr, was the Republican nominee for the same office. The facts in this case are similar to those in the cases of *Pledge v. Griffith*, 83 Pac. 392, and *Pledge v. Tweedle*, Id. 393, this day decided. The appeal is from a judgment declaring the respondent, Kerr, duly elected to said office.

The contentions made in this court are the same as those advanced in the cases above referred to, and the decisions in those cases determine the first of these contentions adversely to the appellant. The district court found that the respondent, Kerr, received 574 votes, 41 of which were cast at Poplar precinct, and that his opponent, Dignan, received 556 votes, 7 of which were cast at Poplar precinct; so that, if the votes cast in that precinct be eliminated from consideration, the result of the election would be affected and the respondent would have failed of election, so far as the result would be affected by the vote of that precinct alone. Throughout the statement of contest the allegations are that the board of election judges and the election judges were guilty of misconduct, specifying wherein such misconduct was manifested, and in their brief counsel for appellant say: "The statement of contest charges misconduct on the part of the board of judges in not counting legal votes for Thomas Dignan, and in counting illegal votes for the respondent, John J. Kerr." Section 2010 of the Code of Civil Procedure is as follows: "Any elector of a county, town or city, or of any political subdivision of either, may contest the right of any person declared to be elected to an office to be exercised therein, for any of the following causes: (1) For misconduct on the part of the board of judges, or any member thereof. (2) When the person whose right to the office is contested was not, at the time of the election, eligible to such office. (3) When the person whose right is contested has given to any elector or inspector, judge or clerk of the election, any bribe or reward, or has offered any such bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise, defined in title 4, part 1, of the Penal Code. (4) On account of illegal votes."

Under the allegations of this statement

of contest we are asked to consider the question whether the votes cast at Poplar precinct were in fact legal votes. In the absence of sections 2010 to 2025 inclusive, the right of one declared to be elected to public office, if questioned, would have to be determined by quo warranto proceedings (section 1410, Code Civ. Proc.), and in such proceedings any ground might be urged which would render it unlawful for the person declared to be elected, to hold or exercise the office. But the provisions of section 2010 above afford a special statutory remedy, provided the person complaining limits his grounds of contest to the particular causes therein mentioned. Each of the four grounds enumerated constitutes a separate cause of contest. They are independent of each other, and, while a complaining party might join grounds of contest embracing the separate causes mentioned, if he does not do so, but elects to proceed upon one particular cause, he is deemed to have waived the other causes enumerated. For instance; if he elects to proceed upon the theory that the person declared elected was not at the time of the election eligible to such office (subdivision 2, § 2010), he cannot be heard to urge in this court for the first time that he has mingled with his allegations others under which he should be permitted to show that illegal votes, for instance, were counted for the successful candidate, or that the successful candidate had been guilty of any of the criminal practices enumerated in subdivision 3. The evident purpose of the statute is to afford to the person whose election is contested precise information of the particular cause or ground of contest. The ground selected in this instance is misconduct on the part of the election judges, as specified in subdivision 1. In attempting to enumerate the particulars of such misconduct, it is alleged that they received and counted for the contestee, Kerr, illegal votes, votes cast at a precinct within an Indian reservation, and at a polling place established at an Indian agency. But in making the reception of illegal votes a separate ground of contest, the Legislature particularly excepted such cause from the definition of misconduct on the part of the judges of election, and the distinction between these grounds of contest is emphasized by section 2015 of the Code of Civil Procedure, which provides that when the reception of illegal votes is urged as cause of contest, the contesting party cannot give any testimony relative thereto, unless he deliver to the opposite party, at least three days before the trial, a written list of the number of illegal votes and by whom given, which he intends to prove on the trial, and no testimony can be received of any illegal votes except such as are specified in such list.

To say that the reception of illegal votes may be classed as misconduct on the part

of the judges of election would be to nullify subdivision 4 of section 2010 above, while an elementary rule of statutory construction requires that this court shall give meaning to every statutory provision, if possible; and in order to carry that rule into effect it is necessary for us to say that malconduct on the part of the judges of election, mentioned in subdivision 1 above, must of necessity consist of acts entirely separate from the reception of illegal votes, which is made a distinct ground of contest. Therefore, in this instance, the contestant having elected to proceed upon the ground of malconduct on the part of the judges of election, we may not inquire whether or not facts and circumstances of an entirely different character from those selected as the basis for this ground of contest in fact existed. The question as to whether the votes cast at Poplar precinct were illegal, under section 1245 of the Political Code, is not, therefore, before us. The judgment is affirmed.

Affirmed.

BRANTLY, C. J., concurs.

MILBURN, J. I dissent. I am much inclined to the opinion that the votes cast at Poplar should have been thrown out at the trial of the contest. The statement of the contestant is not such as a careful lawyer should have drawn, but I think it is fairly implied therein that one of the grounds of the contest was "on account of illegal votes." Subdivision 4, § 2010, Code Civ. Proc. It is true that section 2015 requires that the contestant, at least three days before the trial, shall deliver to the opposite party a written list of the number of illegal votes and by whom given, which he intends to prove on the trial. But I think the statement made the point, lamely perhaps, that all the votes cast at Poplar on the Indian Reserve were illegal, although it is stated in a mass of matter coming after the designation of malconduct of the judges as ground of contest. Does not this make it certain as to what votes and voters were attacked? Was not the object of the requirement of notice fully attained? The pollbooks and ballots made it all clear, and they were to be had at least three days before the trial. The object is to prevent surprise to the contestee as to which of the votes and voters the contestant refers.

In my opinion, all of the proceedings in and about the election at Poplar—all being within the Indian Reserve—were illegal and void. If the votes there cast had been thrown out, Mr. Kerr would not have had a majority, and his opponent would have been declared elected. It is difficult, on the papers in this case, to decide; but, for the reasons given by me above, I am inclined to the belief that the opinion of the majority of the court is erroneous, and that the correct conclusion has not been reached.

MOORE v. GRIFFIN et al.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. DEED — CONSTRUCTION — EXCEPTIONS — RESERVATIONS.

A deed to real estate contained the following provision: "Reserving to said parties of the first part all the rights, privileges, and benefits secured * * * under an oil and gas lease executed by said parties of the first part, * * * with full power and right to renew or extend, change, or modify said lease * * * as fully and to the same extent as though this conveyance had not been executed. It is intended hereby to reserve all oil and gas privileges in and to said premises." This constitutes an exception, and not a reservation. The title to the oil and gas in said lands remained in the grantors.

2. VENDOR AND PURCHASER — BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE.

The owners of lands make a lease of the oil and gas privileges in the lands. Thereafter they convey the lands by warranty deed excepting and reserving all rights and privileges secured to them by the lease and "all oil and gas privileges in and to said premises." Their grantee conveys by general warranty to another without any reservation or exception. Thereafter the oil and gas lease is canceled by consent of the parties to the lease. All of the conveyances being of record, a subsequent purchaser of the lands purchases with constructive notice and takes no interest in the oil and gas; and the cancellation of the lease does not extinguish the rights of the original owners, nor vest the right to the oil and gas in the owner of the lands at the time of such cancellation.

(Syllabus by the Court.)

Error from District Court, Wilson County; L. Stillwell, Judge.

Action by M. A. Moore against Joel Griffin and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Plaintiff brought this action to quiet the title to 160 acres of land in Wilson county against Joel Griffin and wife. The case was tried by the court, and defendants had judgment, from which plaintiff appeals. On September 24, 1894, defendants owned the land in fee. On that date they conveyed by general warranty deed to Susan J. Gore, who afterward conveyed to another, and by regular conveyances the title passed to plaintiff, March 5, 1901. The deed made by defendants to Susan J. Gore contained an exception or reservation out of which arises the sole contention in this case. The deed recites a consideration of \$6,000 and in the granting clause, following the description of the land, is this provision: "Reserving to said parties of the first part, their heirs and assigns, all the rights, privileges, and benefits secured to the party of the first part under an oil and gas lease executed by said parties of the first part to Guffey and Galey, dated April 9, 1894, with full power and right to renew or extend, change or modify, said lease with the said Guffey and Galey, or their heirs and assigns as fully, and to the same extent, as though this conveyance had not been executed. It is intended hereby to reserve all oil and gas privileges in and to

said premises, and to lease and transfer the same." The warranty clause of the deed closes as follows: "Except as above set forth, and the right at all times to enter upon said premises to operate for oil and gas." The oil and gas lease referred to in the deed had been executed to Guffey and Galey by defendants several months prior to their conveyance to Susan Gore, and contained the usual provisions. It was duly recorded in April, 1896, but prior to the purchase of the lands by plaintiff. In March, 1896, defendant Joel Griffin made an extension and what purports to be an assignment of his lease to the Forest Oil Company and in August, 1897, with the consent of Guffey, and Galey, and the Forest Oil Company, the lease was canceled. These transfers and the release were attached to the original lease and duly recorded. In none of the conveyances subsequent to the first, from the Griffins to Mrs. Gore, was any reference made to this lease or to any exception or reservation of the oil and gas, and plaintiff claims that he purchased without actual or constructive notice to either.

T. J. Hudson, for plaintiff in error. Cates & Cates and B. F. Shinn, for defendants in error.

PORTER, J. (after stating the facts). Plaintiff in error fails to specify in his brief any errors complained of as required by rule 10 of this court (79 Pac. ix), and the judgment might be affirmed for this reason. It is a case, however, in which particular specifications are not so material. The main contention is that the judgment is not sustained by sufficient evidence, and is contrary to law. Most of the testimony is in reference to the actual knowledge plaintiff had of the lease and exception referred to in the first deed. The court very properly ruled all of it out of the case. Whether he had actual notice was immaterial. He was bound by the recitals in the former deed. *Knowles v. Williams*, 58 Kan. 221, 228, 48 Pac. 856. The case turns upon the force and effect of the provision in the deed. Plaintiff argues that it is an exception instead of a reservation. Considerable learning has been expended in refining the distinctions between an exception in a deed and a reservation. Strictly speaking, a reservation is something created or reserved out of the thing granted that was not in existence before, while an exception must be a part of the thing granted. *Winston v. Johnson*, 42 Minn. 398, 45 N. W. 958. A similar provision in a deed was held to be an exception, and not a reservation, in *Barrett et al. v. Kansas & T. Coal Co.* (Kan.) 79 Pac. 150. There the provision was as follows: "This deed is made subject to the following exceptions, reservations and conditions, to wit, * * * the said party of the first part hereby reserves the coal and other minerals underlying said land."

The deed in that case contained both words, "exceptions" and "reservations"; but otherwise the provision is similar to the one here. The modern tendency of the courts has been to brush aside these fine distinctions, and look to the character and effect of the provision itself. *Gould v. Howe*, 131 Ill. 490, 23 N. E. 602. While the distinction between an exception and a reservation in a deed is well established, the words are frequently used interchangeably and synonymously. 11 A. & E. Enc. of Law (2d Ed.) p. 555. In *Bainbridge on Mines and Minerals*, 34, it is said: "The severance of mines is usually effected by exceptions in deeds of assurance, which transfer the freehold in the surface and reserve the mines. An exception is distinguished from a reservation by its being part of the thing granted and in existence at the time of the grant, while the latter is a right of new creation arising out of the subject of the grant. They are different in legal effect, but in their creation 'there is no magic in words,' and if the meaning is clear, either of the above expressions will operate for the purpose designated. They are also construed exactly in the same way as actual grants. In either case the law favors their construction by giving them all proper and necessary incidents." "The owner of land may convey a surface estate in fee in it, and reserve to himself an estate in fee in the minerals, or any particular species of them; in which case the vendor holds a distinct and separate estate in the minerals. By this severance each estate is subject to the law of descent, devise, and conveyance." *Kincaid, etc., v. McGowan, etc.*, 88 Ky. 91, 4 S. W. 802, 13 L. R. A. 289. Another case very much in point is *Murray v. Allred*, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740. There the owner conveyed the lands, reserving "all mines, minerals, and metals in and under the land." His grantee conveyed by general warranty without any reservation. Allred who took by regular chain of conveyances brought an action to determine the ownership of the petroleum oil beneath the lands, claiming that oil is not a mineral, but that, if it should be held to be a mineral, his possession of the surface was adverse to the claim of defendant to the oil. The court in an exhaustive opinion held that oil is a mineral, and recognized the doctrine that the exception in the deed separated the estate in the minerals from the estate in the lands, and that the possession of the surface of the land, without any denial of the mineral rights, was not adverse to the claim of the owner of the minerals. Different estates may be created in the surface and soil of lands and the underlying strata in which minerals, oils, and gas, may be found; and this separation of estates may be accomplished by an exception in the deed conveying the lands by which the grantor carves out

and retains the right to the minerals in the land. The right retained by the exception is the ownership of the minerals. *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 25 Atl. 597, 18 L. R. A. 702, 84 Am. St. Rep. 645; *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 604, 31 L. R. A. 128, 56 Am. St. Rep. 884.

Plaintiff contends, however, that the cancellation of the Guffey and Galey lease, mentioned in the exception, operated to extinguish the rights of defendants therein, and to cast or vest upon the then owner of the lands all the rights in the oil and gas. *Farnum v. Platt*, 8 Pick. 339, 19 Am. Dec. 330, is in point. The owner of land, having leased a stone quarry thereon for a term of years, conveyed the land, reserving the use of the quarry until the expiration of the lease. During the continuance of the term, the lease was canceled by consent. It was held that this did not extinguish the reservation, but that would continue until the end of the term. Besides, the rights of defendants in the oil and gas do not depend upon the existence of the lease. The deed excepted and saved to them, not only their rights under the lease, but "all oil and gas privileges in and to said premises." The provision in the deed to Mrs. Gore is an exception as distinguished from a reservation. Its force and effect was to carve out a separate estate in the oil and gas from the estate in the surface soil. The title to the surface and soil of the lands passed to the grantee. The title to and ownership of the oil and gas in the lands remained with the grantors.

The judgment will be affirmed. All the Justices concurring.

(72 Kan. 180)

LEVITT v. CITY OF WILSON.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. MUNICIPAL CORPORATIONS — CORPORATE EXISTENCE—COLLATERAL ATTACK.

The regularity of the organization and corporate existence of a city is not open to attack by a private individual in a collateral proceeding.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Municipal Corporations, § 42.]

2. SAME—CITY LIMITS—AGRICULTURAL LANDS.

Unplatted land used for agricultural purposes may be included within the corporate limits of a city, and subjected to the payment of city taxes.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Municipal Corporations, § 12.]

3. STATUTES—SPECIAL ACTS—ALTERATION OF CITY LIMITS.

Section 109, c. 529, p. 804, Laws 1903, a special act which, among other things, purports to withdraw a tract of land from the city of Wilson, is unconstitutional and void.

(Syllabus by the Court.)

Error from District Court, Ellsworth County; R. R. Rees, Judge.

Action by George L. Levitt against the city of Wilson. Judgment for defendant, and plaintiff brings error. Affirmed.

Ira E. Lloyd, for plaintiff in error. N. Coover and David Ritchie, for defendant in error.

JOHNSTON, C. J. George L. Levitt contended in this action that the city of Wilson was exercising municipal control over real property of his which was not within the corporate limits of the city. In 1883 the judge of the district court, upon a petition, undertook to organize the city of Wilson by making an order of incorporation which fixed the boundaries, prescribed the time for the first election, and made provision for conducting the election. The land in question was unplatted, and has remained so ever since, and while it was within the exterior limits the city did not levy or collect any taxes upon it until 1902. Streets were extended through a portion of the land in 1891, when it was owned by the Union Pacific Railroad Company, and the damages then awarded for the land appropriated were accepted by the company.

The plaintiff contended that the proceedings to incorporate were not regular and valid, and that, even if the corporation is valid, the lands in question were not legally included, and, if the lands were ever legally brought within the corporate limits, they were taken out by virtue of a provision of chapter 529, p. 779, of the Laws of 1903. None of these contentions were sustained by the trial court. The validity of the incorporation is assailed because of the supposed insufficiency of the petition upon which the district judge acted, and of irregularities in the making of the order. The order of incorporation purports to have been made by the district judge, and it was entered upon the journal of the district court as the statute required. The name of the judge is not signed at the end of the order, but the statute does not in terms require it to be so signed. It is said that the petition did not contain the requisite number of signers. But such as it was the judge acted upon it, and made an order of incorporation in the usual form. Proceeding upon the theory that the organization was legal and effective, it has exercised the functions of a city and maintained a corporate existence for about 20 years. There was statutory authority for the incorporation of such a city, and, if it be assumed that it was informally and irregularly organized, it became at least a de facto municipality. The regularity of the organization and its right of existence might be challenged by the state at the instance of the county attorney or Attorney General, but it is not open to attack by a private individual in a collateral proceeding. *Mendenhall v. Burton*, 42 Kan. 570, 22 Pac. 558; *In re Short*, 47 Kan. 250, 27 Pac. 1005; *Kansas Town & Land Company v. Allen* (Kan. App.) 51 Pac. 804. The fact that the land was unplatted did not prevent its inclusion as a part of the city, and it has been held that land within the limits of

the city, although used for agricultural purposes, may be subjected to the payment of city taxes. *Mendenhall v. Burton*, supra.

The remaining contention is that the land was excluded from the corporate limits of the city by force of chapter 529, p. 779, Laws 1903. That is a special act applying to a great many municipalities, and section 109 provides that "so much of the city of Willson, Ellsworth county, Kansas, described as follows [giving description] an area of eleven and twenty one-hundredths acres, be and the same is hereby vacated as the city of Willson in said county, and that the same be restored to its original condition." It will be observed that the act does not purport to vacate any lots or blocks, and, in fact, there were none to vacate, as it was an unplatted tract. It does assume, however, to vacate a part of the city itself, thus taking the land of plaintiff out of the corporate limits and restoring it to its original condition. Under our Constitution special legislation with respect to municipal corporations, or affecting corporate powers, is not permissible. Const. art. 12, §§ 1, 5. It is well settled that special legislation purporting to enlarge or diminish the corporate limits of a city is invalid. *Gray v. Crockett*, 30 Kan. 138, 1 Pac. 50; *Commissioners of Shawnee County v. State*, 49 Kan. 486, 31 Pac. 149; *Conklin v. Hutchinson*, 65 Kan. 582, 70 Pac. 587.

It is argued that vacation may be accomplished by a special act, and under the general law (chapter 66, p. 92, Laws 1893) such vacation ipso facto excludes such part from the corporate limits. In this case the general law can have no application, as the special act itself purports to withdraw the territory in question from the city. The only kind of vacation intended was the taking of the tract from the city limits and the restoring of it to the status it had before incorporation. Even if no more than the vacation of a platted portion of the city had been intended, the corporate limits could not have been changed by the passing of a special and invalid act operating in connection with a general law. It has just been held that it must have been wholly accomplished by a general law. *Davenport v. Ham* (just decided) *infra*.

The judgment of the district court will be affirmed. All the Justices concurring.

DAVENPORT v. HAM.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. STATUTES—SPECIAL ACT—BOUNDARIES OF CITY.

The boundaries of a city cannot be changed by a special act of the Legislature.

2. SAME—CORPORATE POWERS.

A general statute which attempts to confer upon special laws subsequently passed the effect of changing the boundaries of cities violates section 1, art. 12, of the Constitution, and is void.

(Syllabus by the Court.)

Error from District Court, Rooks County; Chas. W. Smith, Judge.

Action by W. B. Ham against W. L. Davenport. Judgment for plaintiff, defendant brings error. Reversed.

S. N. Hawkes, for plaintiff in error. W. B. Ham, for defendant in error.

GREENE, J. W. B. Ham obtained a perpetual injunction against W. L. Davenport, treasurer of Rooks county, restraining him, as treasurer, from selling certain lands in Wood's addition to the city of Stockton for the unpaid city taxes for 1902.

The only question which we are called upon to determine is the constitutionality of section 636, Gen. St. 1901 (section 2, c. 66, p. 92, Laws 1893), which reads: "If any town-site or portion of a town-site containing more than five acres shall hereafter be vacated by the board of county commissioners or by act of the Legislature, and such town-site or portion of a town-site is at the time a part of a city of the first, second or third class, the act of vacation thereof shall of itself detach the same from such municipal corporation, and it shall no longer be a part of such city, nor included within the corporate limits thereof." The lots, blocks, streets, and alleys in Wood's addition to the city of Stockton, containing more than five acres, were vacated by chapter 326, p. 476, Laws 1893. It is contended by the defendant in error that by the provisions of section 636 the land in which the streets and alleys were vacated by chapter 326 were thereby detached from the city, and thereafter were not subject to the payment of city taxes. Section 1 of article 12 of our Constitution reads: "The Legislature shall pass no special act conferring corporate powers." It has been determined in this state that this provision includes municipal corporations. *City of Wyandotte v. Wood*, 5 Kan. 603; *Atchison v. Bartholow*, 4 Kan. 124; *Gray v. Crockett*, 30 Kan. 138, 1 Pac. 50. It has also been held that an act changing the boundaries of a city is an act conferring corporate powers. *Gray v. Crockett*, supra; *Commissioners of Shawnee County v. State ex rel.*, 49 Kan. 486, 31 Pac. 149.

Chapter 326, p. 476, Laws 1893, is a special act, and could not change the limits of the city of Stockton. It could only have such effect in conjunction with section 636. There can be no doubt that it was the intention of the Legislature that it should operate to detach from the corporate limits of any city in Kansas all territory in which the lots, blocks, streets, and alleys should thereafter be vacated. It is a rule of construction of statutes that, where several statutes have been enacted relating to the same subject, they should be construed together and harmonized, and each given the meaning intended by the Legislature, and the two statutes under consideration should be so construed. If section 636 should be given the force in-

tended, the Legislature could change the boundaries of a city by special act. It would thus accomplish by indirection that which the Constitution has imperatively forbidden. The Legislature cannot enact a law which will give to it the power to subsequently violate the Constitution. It cannot without violating this provision of the Constitution enact a law the purpose and effect of which is to give to special acts subsequently passed the force and effect of changing the corporate limits of cities. Chapter 328, being special, cannot be broadened, nor converted into a general law conferring corporate powers, by the provisions of any previously existing law. It has just been held in *Levitt v. City of Wilson*, 83 Pac. 397, that section 109, c. 529, p. 804, Laws 1903, which undertook to withdraw certain lands from the corporate limits of the city of Wilson, violated sections 1 and 5 of article 12 of the Constitution, because it was a special act and contemplated the change of the corporate limits of a city. Section 636 is a plain attempt to evade this constitutional provision by providing that its provisions shall be read into all special acts subsequently passed vacating streets and alleys. It is therefore unconstitutional so far as it attempts to confer upon special acts of the Legislature subsequently passed the effect of a general law granting corporate powers.

We might rest this case here, but it is urged that section 636 was held to be constitutional in *Town Company v. Smith Center*, 6 Kan. App. 252, 51 Pac. 801, which was affirmed by this court, and also in *Town Company v. McLean*, 7 Kan. App. 101, 53 Pac. 76. An examination of these cases will disclose that section 636 was not involved in either. The streets and alleys in the lands involved in those controversies had been vacated prior to the passage of the act of 1903. The question presented in those cases was the constitutionality of section 635. Whatever might be the judgment of the court upon the constitutionality of that section, it is not involved in this case, and we have no occasion to pass upon it.

The judgment is reversed, and the cause remanded, with instructions to set aside the permanent injunction. All the Justices concurring.

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**RUGGLES et al. v. SPINDLE BOTTOM
OIL & GAS CO. OF CHANUTE,
KAN., et al.**

(Supreme Court of Kansas. Nov. 11, 1905.)
**MINES AND MINERALS — LEASES — SETTING
ASIDE—FRAUD.**

Where a lessee of lands for oil and gas purposes falsely represented that he had a drill which he was bringing to the field and that it would be put in operation inside of 30 days, and in reliance thereon a lease was executed providing that on failure to drill an oil or gas

well within six months the contract should cease, an action to set aside the lease on account of fraud in the statement as to the drill could not be maintained.

Error from District Court, Wilson County; L. Stillwell, Judge.

Action by S. H. Ruggles and others against the Spindle Bottom Oil & Gas Company of Chanute, Kan., and others. From a judgment sustaining a demurrer to the petition, plaintiffs bring error. Affirmed.

T. J. Hudson, for plaintiffs in error.
Lapham & Brewster, for defendants in error.

PER CURIAM. The petition alleges that, in the preliminary conversation which led up to the making of a written contract of lease of lands for oil and gas purposes, the agent of the lessee, for the purpose of inducing lessors to make the contract, represented that said company (lessee) had a drill loaded on the cars at Chanute for the purpose of bringing the drill to the field of leases then being taken by said company, and that said drill would be put in operation in said field inside of 30 days from said 31st day of October, 1902. And further the petition alleges that said statements and promises were false but were believed and relied upon by the lessors as true, and that relying thereon they did on the same day enter into a contract in writing, which, among other things, provided as follows: "In case no oil or gas well be drilled on said premises within six months of date hereof, all rights and obligations secured under this contract shall cease upon notice in writing by the party of the first part, unless the second party shall elect thereafter from year to year to continue this lease in force as to all or any portion of said premises by paying at the expiration of each year an annual rental of fifty cents per acre for all said premises, or such portion as it may designate until well is drilled upon said premises."

This action was brought to set aside the lease on account of fraud and this was the only fraud alleged or proven. There is no claim of mistake or misunderstanding as to the terms of the written contract or that the same does not fairly express the final agreement of the parties. Failure to do a thing at the time it is promised to be done, which time is subsequent to the promise, does not relate back and make the promise fraudulent, especially when the parties, after the verbal promise, enter into a written contract which provides another and later time for the performance of the thing promised. Neither is it a material misrepresentation, even if false, that the company had a drill loaded on the cars at Chanute for the purpose of bringing the drill to the field when the written contract, into which the oral negotiations merged, allowed the company six months at least to do such drilling.

The demurrer was properly sustained.

MOORE v. WA-ME-GO et al.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. APPEAL—REVIEW—PRESUMPTIONS.

In the absence of any showing to the contrary, an order of revivor made by the district court will be presumed by this court to have been properly and legally made.

2. INDIANS—ALLOTMENT OF LANDS—CITIZENSHIP.

When lands composing an Indian reservation have been allotted and patented in severalty among the members of the band or tribe of Indians occupying such lands, each and every allottee becomes a citizen of the state wherein such reservation is located, and subject to the laws thereof.

3. SAME—MARRIAGE—DIVORCE—VALIDITY.

A marriage or divorce between members of an Indian tribe, valid under the rules and customs of such tribe, will be recognized and enforced by the courts of this state: but a marriage or divorce between Indians after they become citizens of this state must be in compliance with the laws of this state.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Marriage, § 6.]

(Syllabus by the Court.)

Error from District Court, Jackson County; Marshall Gephart, Judge.

Action by J. P. Moore, administrator of Wa-me-go, against Henry Wa-me-go and Nah-con-be, alias Henry Clay Bear. Judgment for defendants, and plaintiff brings error. Reversed.

Crane and Woodburn Bros., for plaintiff in error. J. A. Rokes, for defendants in error.

GRAVES, J. This action was commenced in the district court of Jackson county, May 2, 1903, to partition property belonging to the estate of Shough-ne-gish-go-quah, deceased. The plaintiff, Wa-me-go, and the defendant Nah-con-be, alias Henry Clay Bear, each claimed to have been the legal husband of the deceased at the time of her death, and therefore entitled to one-half of her estate. This claim constitutes the principal question in this case. To determine this dispute it is necessary to consider the following facts: Prior to February 8, 1887, Wa-me-go, who commenced this action, and all the other parties named herein, were members of the Prairie Band of the Pottawatomie Tribe of Indians, and resided on the diminished Pottawatomie reservation in Jackson county, Kan. By an established custom among these Indians marriage is regarded as a relation which may be assumed or dissolved at the pleasure of the parties thereto. No formal contract or ceremony is essential, a mere mating and cohabitation as husband and wife constitutes marriage. This important relation may by the same custom be terminated whenever it becomes tiresome or when for any reason a change is desired. Separation by mutual consent is equivalent to an absolute divorce, and the parties are thereafter free to form other marital alliances, as may best suit their pleasure or convenience. In accordance with this custom,

the plaintiff, Wa-me-go, and Shough-ne-gish-go-quah were married, and became the parents of two sons, George and Henry Wa-me-go. While they were living together as husband and wife the lands of said reservation were allotted among the Indian occupants thereof, and patents were duly issued and delivered in accordance with such allotment, whereby allottees became the owners in severalty of the lands allotted to them respectively. By such allotment each of the parties named herein became the owner in severalty of a part of the land so allotted, and Shough-ne-gish-go-quah became the owner of the land in controversy. After this allotment was completed, and patents had been duly issued and delivered to each of the above-mentioned allottees, in compliance with the provisions of chapter 119, Act Cong. Feb. 8, 1887, 24 Stat. 388, the plaintiff, Wa-me-go, and Shough-ne-gish-go-quah, upon the supposition that they were still living under the tribal customs, as formerly, separated and ceased to live together as husband and wife, and each again married, in accordance with such tribal custom. Thereafter Shough-ne-gish-go-quah, and the defendant, Nah-con-be, alias Henry Clay Bear, lived together as husband and wife and continued to so cohabit until her death, which occurred August 2, 1900. The separation of the plaintiff and Shough-ne-gish-go-quah, and their subsequent marital relations as hereinbefore stated, took place by virtue of the aforesaid Indian custom, and had no other sanction or authority. Afterwards George Wa-me-go died, leaving his parents, both of whom were then living, as his sole heirs at law. After the trial in the district court, and after the case-made had been settled and signed, the plaintiff, Wa-me-go, died, and the action was revived in the name of J. P. Moore, administrator of the estate of Wa-me-go, deceased, who brings the case here as plaintiff in error.

The defendant in error Nah-con-be, alias Henry Clay Bear, has filed a motion to dismiss the petition in error, for the reason that the subject of the action appears to be real estate in which an administrator has no interest. Upon this motion the plaintiff in error claims that after the final decree in the district court, and before the order of revivor was made, all the parties agreed that the lands in controversy should be sold and the proceeds placed in the hands of the United States Indian Agent until the final decree was entered in the case, and that then such proceeds should be disposed of in accordance with such final decree, and some evidence including a conveyance of said lands executed by all the parties including said defendant in error, and his new wife, and duly approved by the Secretary of the Interior, has been presented, but no proper showing has been made upon either side of this question, and this court has nothing tangible to act upon; it therefore, in compliance with the general presumption, which

exists in favor of all judgments and orders of courts of general jurisdiction, will assume that the district court, when it made this order of revivor, had adequate reasons therefor, and the motion to dismiss will be denied.

The district court decided that the separation of the plaintiff and his wife Shough-ne-gish-go-quah, under the custom of their tribe, was equivalent to a divorce, and that her subsequent affiliation with the defendant Nah-con-be, alias Henry Clay Bear, in accordance with such custom, constituted a valid marriage, and that said defendant was therefore entitled to the undivided one-half of her estate. The plaintiff in error claims that after the allotment the tribal relations of these parties were severed, and they immediately became citizens of the state of Kansas, and subject to its laws, and, as this separation and marriage occurred after the allotment, their rights and duties as married people are to be measured by the same rule that applies to other citizens. In this contention, we agree with the plaintiff in error. It is a general rule, having few, if any, exceptions, that a marriage, valid where consummated, is valid everywhere, and this rule has been quite generally applied to Indian marriages, where the marriage was contracted while the tribal relations of the parties continued. 19 Am. & Eng. Enc. of Law (2d Ed.) p. 1216; *Earl v. Godley* (Minn.) 44 N. W. 254, 7 L. R. A. 125, 18 Am. St. Rep. 517. This rule, however, does not benefit the defendant in error, for it is conceded that the marriage of the plaintiff, Wa-me-go, to Shough-ne-gish-go-quah, although an Indian marriage, was valid and continued to be so until her death. Therefore their subsequent separation by mutual consent merely, and her subsequent cohabitation with the defendant Nah-con-be, alias Henry Clay Bear, were illegal and void, and conferred no right upon said defendant to share in her estate.

February 8, 1887, Congress enacted a statute (chapter 119, 24 Stat. 388) providing for the allotment of lands among Indian bands and tribes and to confer upon the allottees, the rights of citizenship in the state where the lands were located. Section 6 of this act has special application here and reads: "That upon the completion of said allotments and the patenting of the lands of said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law." By this statute, Congress evidently intended to elevate these allottees from the irresponsible condition of "wards of the nation," to the position of free and independent citizens of the United States, and of the state of Kansas. *United States v.*

Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532; *In re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848; *In re Nowgezhuck*, 69 Kan. 410, 67 Pac. 877. As soon as the allotment was completed these parties became subject to all the laws of the state of Kansas, like other citizens, and were absolved from all their tribal relations. Thereafter they were bound to take notice of, and conform to, the laws of this state. If they desired a divorce, application could have been made to the courts therefor in the usual way, and they would have found that the law interposes no unreasonable obstacle to such a proceeding. In this manner the subsequent happiness of the defendant in error might have been fully realized without violating the law.

The defendant in error and his supposed wife, no doubt, acted in good faith, upon the mistaken belief that they were legally married to each other, and their long continuous cohabitation might be construed into a common-law marriage, which has been held to be valid in this state, were it not that her former marriage with the plaintiff must be held valid, and it has never been legally dissolved. We therefore decide: (1) That the marriage of Wa-me-go to Shough-ne-gish-go-quah was valid. (2) That upon the completion of the allotment proceedings, all the parties hereto, at once, became citizens of the state of Kansas, and subject to all the laws thereof. (3) That thereafter the aforesaid marriage could not be annulled, except by proceedings under the law of this state for that purpose, which were not had. (4) Said marriage existed and was in full force and effect at the time of the death of Shough-ne-gish-go-quah, and at that time Wa-me-go was her legal husband and entitled to one-half of her estate.

The facts having been agreed to, it will be proper for us to direct judgment thereon. The district court is instructed to vacate its judgment so far as the defendant Nah-con-be, alias Henry Clay Bear, is concerned, and to decree that the plaintiff, Wa-me-go, was the surviving legal husband of Shough-ne-gish-go-quah, and entitled to one-half of her estate, and make such orders as will fully carry out the views herein expressed. All the Justices concurring.

HARDY et ux. v. LADOW et al.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. JUDGMENT—PRAYER FOR RELIEF.

The demand of the plaintiff in his petition does not necessarily limit the court in the judgment which it may render. It is the case made by the pleadings and the facts proven, and not the prayer of the pleader, which measure the relief that the court may award.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 441, 442.]

2. REFORMATION OF INSTRUMENTS—INNOCENT MISTAKE.

A plaintiff alleged that the terms of a lease were agreed upon, but that advantage was taken

of his infirmities, and he was procured to sign a lease which did not conform to the agreement of the parties. He prayed for a cancellation of the lease, and there was also a prayer for general relief. Upon the testimony the court found that no fraud was intended, and that the nonconformity of the lease with the agreement was the result of an innocent mistake. *Held*, that it was within the power of the court to reform the lease, and make it conform to the understanding and agreement of the parties.

(Syllabus by the Court.)

Error from District Court, Wilson County; L. Stillwell, Judge.

Action by James F. Hardy and wife against B. E. Ladow and another. Judgment for defendants, and plaintiffs bring error. Affirmed.

Mikesell & Wilson and P. C. Young, for plaintiffs in error. S. S. Kirkpatrick, for defendants in error.

JOHNSTON, C. J. The controversy in this case is whether a written lease conforms to the agreement of the parties. After considerable negotiation James F. Hardy and his wife signed an oil and gas lease to the Kansas Pipe Line & Refining Company. It was written by an agent of the company, examined by an agent of the Hardys, and read aloud in their presence before it was signed, but it is claimed that it was not correctly read, and that provisions which it was supposed to contain were fraudulently omitted. It was alleged that Mrs. Hardy was blind, and that Mr. Hardy's vision was greatly impaired; that the lease was executed in the nighttime; that because of their infirmities they had to depend upon others to ascertain the contents of the prepared lease; and that the agent of the company conspired with their agent to procure the signing of a lease which differed materially from the agreement arrived at and from that which the lease was supposed to incorporate. They therefore brought this action against B. E. Ladow, to whom the lease had been assigned, and who had purchased it for the Fredonia Gas Company, which was also made a party defendant, and in their petition they ask for a cancellation of the lease, "and for such other and further relief as to the court might seem just and proper." The answer of the defendants denied that the lease was incorrectly written or wrongfully obtained; alleged that it had been read aloud before it was signed, and a copy which was compared with the original was left with the Hardys, and had been in their possession ever since its execution; that the defendants had purchased the lease and expended large sums of money in laying pipes and mains across the lands of plaintiffs for the purpose of conveying the gas from the wells to be drilled on and near the premises of the plaintiffs; that this was done with full knowledge on the part of the Hardys of the

assignment of the lease, who made no objection thereto and gave no intimation that the lease was wrongfully obtained until about the time the action was brought. It is alleged that the assignment of the lease was taken and \$600 paid therefor by the defendants upon the belief that it was a valid instrument, and without knowledge that there had been any wrongs or defects in its execution, and they averred that it would be inequitable and unjust to permit the plaintiff to now assert that the lease was void and of no value. The circumstances of the transaction were fully presented to the court upon the trial, and its opinion as expressed in the record was that "no willful fraud or wrong had been perpetrated upon the plaintiffs in the matter of the execution of the lease in controversy, but that any deviation in the terms of the written lease from the actual contract between the parties thereto occurred simply by reason of an innocent mistake or misapprehension." The court further found that, when the defendants acquired the lease, they had no notice of any defects in its execution, or of any equities in favor of the plaintiffs, and that, while plaintiffs were entitled to relief, it would be unjust to decree a cancellation of the instrument, and that in equity and in justice to all the parties the lease should be reformed so as to conform to the agreement and understanding of the parties at the time of its execution, and judgment was accordingly given.

The first and principal complaint is that the court exceeded its authority in reforming the lease, when the only relief sought was its cancellation. It is insisted that the prayer of the petition measured the power of the court in rendering judgment. While the Code requires that the plaintiff shall demand the relief to which he supposes himself to be entitled, the relief which the court may grant him depends upon the facts alleged in the petition, rather than upon the arbitrary demand which he may make in the prayer. In *Bliss on Code Pleading*, § 161, it is said that "if the facts put in issue and established by the evidence entitle the party to any relief in the power of the court to give, although not that demanded, it is the duty of the court to give it, and its power to do so is not conditioned upon the form of the prayer." *Walker v. Fleming*, 37 Kan. 171, 14 Pac. 470; *Henry v. McKittrick*, 42 Kan. 485, 22 Pac. 576; *Bunk v. Wattles*, 8 Kan. App. 136, 54 Pac. 1103. The prayer of a pleading is sometimes used to explain the averments which precede it, and a party may not be in a position to complain who is given no more than he demands; but, so far as the court is concerned, it is the case made by the pleadings and the facts proved, and not the prayer of the party, which determines the measure of relief which the court may award. In *Smith v. Kimball*,

36 Kan. 492, 13 Pac. 812, it was said: "However strongly a pleader may be bound, and however much he may be estopped by the averments of facts in the body of his pleadings, it is doubtful if he is bound or estopped by his prayer for relief. He is supposed to know the facts upon which he predicates his action, and to state them as he understands them, but the relief to which he is entitled on the facts related is a question for the court, and over which he has no control." Here, in addition to the demand for the cancellation of the lease, was a prayer for general relief. Under the equity practice, a mistake in the demand for special relief does not preclude the court from granting the proper relief under the general prayer. *Taylor v. Insurance Company*, 9 How. (U. S.) 406, 13 L. Ed. 187; *Stevens v. Gladding*, 17 How. (U. S.) 454, 15 L. Ed. 155; *Patrick v. Izenhart* (C. C.) 20 Fed. 339; 5 Encyl. of Pl. & Pr. 956. Under the Code the power of the court to grant relief under a general prayer is no more restricted than under the equity practice, and, indeed, the theory in some courts is that the general prayer, although not expressed, is always implied in actions of this character. *Knight v. Houghtalling*, 85 N. C. 17. In this case the plaintiffs set up the contract of the parties, and asked for the cancellation of the same by reason of the fraud. The court in effect found in favor of the plaintiffs as to the character of the contract, that a mistake had been made in the execution of the lease, but that no actual fraud had been committed in its execution. The decree of the court gave effect to the actual agreement of the parties, and the reformation of the lease for this purpose was consistent with the pleadings and the proof of the case, and certainly within the power of the court to grant.

The contention that the contract found and declared by the court was not the one made by the parties cannot be sustained. Although the parties did not agree fully as to the interpretation of some of the provisions of the lease, there appears to be little dispute in the testimony as to the substantial features of the agreement actually made and intended to be included in the written lease. In the provision that, if either oil or gas should be found in paying quantity, another well should be drilled within six months thereafter, and one in each succeeding six months' period until eight wells were drilled, the words "or gas" were left out of the lease, which was a substantial departure from the agreement, but their omission, as the court found, was an innocent mistake. The use of the words "or gas" in one part of the lease to some extent indicates that their omission in another part was inadvertent. The testimony appears to sufficiently support the finding of the court as to the terms of the agreement, and these are fairly included in the lease as reformed by the court.

The judgment of the court appears to have been not only within its powers, but in accord with equity and justice, and therefore it will be affirmed. All the Justices concurring.

FINCKE et al. v. BUNDRICK.

(Supreme Court of Kansas. Nov. 11, 1905.)

EXECUTORS — SALE OF DECEDENT'S LAND — FRAUD—SETTING ASIDE.

A sale of real estate belonging to the estate of a deceased testator, made by an executor to the surety on his bond under an order of the probate court procured through the fraud of the executor, may be set aside at the suit of a devisee, even although the surety was ignorant of the dishonest conduct of his principal.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1546.]

(Syllabus by the Court.)

Error from District Court, Wyandotte County; E. L. Fischer, Judge.

Action by Julia K. Bundrick against Christian W. Fincke and Christian W. Schoeller. Judgment for plaintiff, and defendants bring error. Affirmed.

Philip Erhardt and L. W. Keplinger, for plaintiffs in error. C. W. Trickett and Samuel Maher, for defendant in error.

BURCH, J. Julia Fincke died, leaving a will in which she bequeathed her personal property in equal shares to her son, C. W. Fincke, and her daughter, Mary Bundrick, and devised her real estate, one-half to Julia, the daughter of Mary Bundrick, and one-half to her son, C. W. Fincke. The will also contained the following provisions:

"My said son is to have full power to handle, take charge of, and collect the rentals of said real estate until such time as it shall be ordered sold by the court of proper authority, as it shall hereafter appear in said instrument that he is appointed as executor of this, my last, will and testament.

"All costs and expenses of administration upon my estate shall be paid from the proceeds of the sale of the said above-described real estate and the balance shall be divided as above stated."

This will was duly probated, and C. W. Fincke qualified as executor under it. His bond as such executor assured a faithful administration of the estate, and was signed by Christian Schoeller. Something more than a year after his qualification the executor presented to the probate court a petition for the sale of the real estate described in the will. The terms of the will were set forth, and the statement was made that the costs and expenses of administering the estate would amount in the aggregate to the sum of \$410.17. No reference was made to any debts of the testator. An order of sale was granted and further proceedings were

had, resulting in a sale of the land to the executor's bondsman for the sum of \$775. The sale was approved, and an executor's deed was issued and recorded. Subsequent to these proceedings the executor made a final settlement of the estate. In his final account he brought forward against the proceeds of the sale of the land items of various kinds, aggregating \$799.91, but he acknowledged receiving rents from the real estate in the sum of \$111.50, and therefore admitted having in his hands a balance of \$86.59, one-half of which, or \$43.295, he said belonged to Julia Bundrick as a devisee of her grandmother's land. This accounting was approved by the probate court, but the executor did not pay to Julia her share of the money. The account states that it was deposited in court, but she has never received it. During the time covered by the administration of the estate Julia Bundrick was a minor and, so far as the record shows, without a guardian. She was unrepresented in the proceedings in the probate court, and she was ignorant of the sale of her property until after she became of age. After reaching her majority she discovered and investigated the facts and, brought the action in the district court, from which this proceeding in error arises.

In her petition as it was finally amended she related the foregoing facts, and charged that at the time the petition for the sale of the real estate was filed the costs and expenses of administration amounted to only \$64, that all other items of the \$410.17 were falsely and fraudulently asserted against the land, that the order of sale was procured through the fraud and imposition of the executor upon the probate court, that the sale to the bondsman was a device by which the executor might himself acquire the entire title to the property, that the final account, by means of which the proceeds of the sale were more than consumed, was fraudulently concocted, and that the final settlement was fraudulent and void. The petition contained other attacks upon the validity of the probate proceedings, and the conduct of the executor and his bondsman, and other allegations essential to the relief demanded, were made. Such relief consisted in setting aside the probate proceedings relating to the sale of the land, cancelling the executor's deed, placing the plaintiff in possession, decreeing partition, and awarding damages for rents and profits. After a trial the court granted substantially the prayer of the petition.

In this court the executor and his bondsman make the following assignments of error: "Said judgment was in favor of defendant in error, when it should have been in favor of each of plaintiffs in error. The court erred in overruling the motion of each of plaintiffs in error for a new trial." The first assignment of error amounts to nothing. It merely asserts that the judgment is wrong.

The only proposition contained in the motion for a new trial which the defendants argue in their brief is that the decision of the trial court is not sustained by sufficient evidence, and is contrary to law. That, therefore, is the limit of the present inquiry.

There is evidence in the record to show that the executor began his administration by filing a false inventory, in that he failed to list a note of \$800 due from himself. After citation and a trial he was ordered by the probate court to include this note among the assets of the estate, whereupon he compromised with his co-legatee for her interest in the personal property on a basis confessedly below its value. He then undertook to relieve the personal property of every kind of liability, and to make the land, which has been charged with costs and expenses of administration only, bear all the obligations which the personal property alone should have paid. But apparently he was not satisfied with this. Conceiving that the surviving husband of the deviser had a one-half interest in the land, he obtained from such survivor a quitclaim deed of the real estate to himself. The deed, however, conveyed nothing, because the terms of the will had been assented to, and so he attempted to charge the sum paid therefor against the real estate. He included \$100 of the amount in the "costs and expenses of administration" referred to in the petition to sell the land, and actually reimbursed himself to that extent from the proceeds of the sale. The decedent left no debts. It cost nothing to collect the assets of the estate, except those due from himself, and yet, upon his showing, the real estate—two lots appraised at \$700 and \$300, respectively—proved insufficient to meet the costs and expenses of administration. When the estate was finally settled, he had title to all the personal property, and his only bondsman had title to all the real estate.

The orders of the probate court by which this astonishing result was accomplished appear to have been made in reliance upon the executor's sole oath to the truth and correctness of his accounts and proceedings. In the district court he was examined as a witness in reference to his conduct. The trial judge heard all he had to offer in his own behalf, and saw his demeanor while testifying. It is not necessary to discuss the testimony in detail. So far as he is concerned, the court had the right to conclude that the sale of the land and the final settlement of his accounts were insufferably fraudulent and utterly unsustainable.

On behalf of the bondsman, however, it is contended that he was not a party to his principal's fraud, or cognizant of it, and that the law enjoined upon him no duty to make inquiries, except to ascertain that the court had jurisdiction to grant the order of sale. The district court probably believed that the bondsman was implicated in his principal's

fraud. He resided in Oklahoma at the time of the trial, and consequently his evidence appears by deposition. He was asked where he obtained the money with which to pay for the real estate, and he replied that it made no difference. He said he always had plenty of money; that he was not doing a banking business at the time of the sale; that he paid cash for his stuff, and used to carry a lot of money. He admitted that Fincke was in possession of his papers, looked after the insurance and repair of the property, and collected the rents accruing from it; but he was unable to give any accurate information as to when he had received remittances on account of rent or the amount of such remittances. When pressed for information upon those subjects, he said, "That is my business," and "I don't remember." When an effort was made to trace the money supposed to have been derived from the sale, the executor declared that he kept it in a separate bunch, part currency and part gold, in his pocket and in his house for some years, and gave an excited account of how completely his house was equipped with burglar alarms. Under these circumstances it is difficult to say that the charge of a proceeding taking the form of a sale, but in fact manipulated by both parties for the benefit of the executor, is wholly unsupported by evidence. But, because of the view which the court takes of the nature of the relation existing between an executor and his bondsman when dealing with each other in reference to property of the estate, it is not necessary to rest a decision upon this ground alone.

By his bond the defendant Schoeller became surety to the beneficiaries of the administration proceedings for the executor's good conduct. In the language of the books he undertook that his principal should "do a particular act," viz., administer his trust faithfully and without fraud. Woerner on Administration (2d Ed.) p. 548, § 255. This promise was original and primary on the surety's part, and bound him from the beginning. 1 Brandt on Suretyship, (3d [Ackley's] Ed.) § 2. The moment the executor by machination and deceit obtained a fraudulent order of sale, a duty was disregarded and a breach of the bond occurred. Green's Administratrix v. Creighton, 23 How. (U. S.) 90, 108, 16 L. Ed. 419. Knowledge of the fraud was not necessary to make the surety responsible at law on his bond for the result. He is held to know every default of his principal (1 Brandt on Suretyship, supra), and, whenever a judgment establishing a devastavit against an executor is rendered, his surety is estopped to dispute it (11 A. & E. Encycl. of L. [2d Ed.] 901). That the liability of both the principal and surety may be determined in the same proceeding and in a court of equity, if special circumstances similar to those involved in this case exist, is now the generally accepted law of the United States. 11 A. & E. Encycl. of L. (2d Ed.) 902. If, therefore,

the relief sought in this suit were upon the executor's bond, liability would immediately attach upon the court finding that the order to sell the land had been procured by the executor's fraud. This being true it is difficult to perceive why a court of equity and good conscience should allow the surety to enter the breach made by his principal in the citadel of the plaintiff's rights, carry away the spoils of the fraud, and then, with the booty in his possession, urge the strictissimi character of his contract against a demand for reparation. So long as a surety keeps aloof from the conduct of the trust whose faithful administration he has guaranteed, and seeks no personal profit from it to himself, he may well stand upon the letter of his bond, and refuse to be responsible, except in damages. But the moment he abandons such an attitude and begins to deal with his own privy in the property of the estate, he ought to be held to a knowledge of all facts vitiating the transaction of which his principal is aware, and ought to be stripped of all the fruits of any fraud perpetrated by his principal, precisely the same as the principal himself.

But little light is thrown upon this precise question by decided cases. In the case of Hilsted v. Hyman, 3 Bradf. Sur. 426, decided by the Surrogate's Court of the county of New York in 1855, it is said that the surety on an administrator's bond may speculate in claims against the estate, provided no connivance with the administrator appear. This seems to be a dangerous rule, but, granting it to be correct, it does not reach the facts of this controversy. Other cases brought to the attention of the court relate to liability on the bond. The problem involves the ancient antagonism between self-interest and integrity. Michoud et al. v. Girod et al., 4 How. (U. S.) 503, 555, 11 L. Ed. 1076. One of the purposes of the law in requiring a bond to be given is that there shall be no fraudulent conduct to repair, and every possible safeguard to this end must be erected and maintained. So long as the surety is not allowed to speculate in the assets of the estate, or is obliged to inform himself of all the facts if he does speculate, his sole interest is in the rectitude and fidelity of his principal. Open to him a prospect of gain by freely bargaining with his principal, and he at once becomes concerned in the disregard of all those austere principles which must govern the conduct of those who undertake the management of trust estates. He becomes exposed to every temptation which would beset the executor himself if he were allowed to profit from official acts, and, if he should yield, he becomes actively enlisted in the support of fraudulent conduct, against which he has engaged to save the estate harmless. No such portent should be suffered to overhang the delicate relation of trustee, surety, and beneficiary. It is not the purpose to declare in this case that a sale of land by an executor or ad-

ministrator to his bondsman can be impeached merely because of the relations of the parties, if made in good faith under an order untainted by fraud. But the court is fully persuaded that a sale by an executor to his bondsman ought not to stand if made by virtue of an order procured through the fraudulent conduct of the executor, even although the surety should be ignorant of the dishonest character of the proceeding.

Since it was not possible for the plaintiff to obtain relief in the probate court, administration having been closed and the executor finally discharged, the district court had jurisdiction to entertain her suit. *Gafford v. Dickinson*, 37 Kan. 287, 15 Pac. 175; *McAdow v. Boten*, 67 Kan. 136, 72 Pac. 529. In view of the foregoing it is not necessary to decide the questions raised by the plaintiff respecting the jurisdiction of the probate court to order a sale.

The judgment of the district court is affirmed. All the Justices concurring.

SCHWARZSCHILD & SULZBERGER CO. v. WEEKS.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE OF MASTER.

In an action by a servant against the master for negligence, where the negligent act is in violation of a positive duty, which the master owes to the servant, that becomes the controlling fact in determining the master's liability, and where the negligence of the master is the proximate cause of the injury the master will be held liable, notwithstanding the negligence of the master may have been set in operation by the act of one who otherwise might be held to be a fellow servant.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 515, 534.]

2. SAME—DUTY OF MASTER.

The master owes to the servant the duty to take reasonable precautions to protect the servant from injury.

3. NEGLIGENCE—PROXIMATE CAUSE.

Negligence is the proximate cause of an injury when it appears that "the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

(Syllabus by the Court.)

Error from District Court, Wyandotte County; E. L. Fischer, Judge.

Action by Cyrus V. Weeks against the Schwarzschild & Sulzberger Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Defendant in error sued to recover for personal injuries occasioned by the operation of a friction hoist used in raising and lowering beeves in a packing house. This case was here once before and was reversed for error in the instructions. *Schwarzschild & Sulzberger Company v. Weeks*, 66 Kan. 800, 72 Pac. 274. At the close of plaintiff's testimony upon the second trial, he asked leave to

amend his petition to conform to the facts proven. Defendant company objected, and the court overruled the objections. The amendment was dictated to the court reporter, but was not written out or attached to the petition until the time of the settlement of the case made when, by order of the judge, it was written out and attached to the original petition before the case made was settled. The original petition alleged that in the process of slaughtering beeves, after the cattle were killed, they were shackled by the hind feet, and hoisted to an overhead track, and thus conveyed to the skinning beds. A beef was dropped on each bed, where men skinned the legs, and washed the shanks; then a heavy iron spreader was attached to the hind legs and it was again hoisted, and, as work progressed upon it, conveyed along the overhead track. After the carcass of a beef had been hoisted the second time "fell beaters" removed the hide, "gutters" opened the paunch and "paunch pullers" removed the paunches. It was the duty of the man following the shank washer to hoist the carcass to the proper elevation for completing the work. The hoisting was done by means of an appliance called a friction hoist, operated by a rope. The operator was called the hoister. Next following him were the fell beaters, who with cleavers beat away the skin from the shanks. To operate the friction hoist required skill and experience. If the rope was unskillfully handled the beef would fall to the floor and endanger the lives of the workmen. Plaintiff was employed as hoister in charge of the hoisting apparatus. It became his duty, in case a workman in front of him left the line for any purpose, to step forward and take the place of that workman, and it then became the duty of one of the fell beaters immediately behind him to take his place and operate the hoist, the fell beaters being experienced and skilled in the operation thereof. At the time of the injury to plaintiff one of the workmen ahead of him was called away. Plaintiff took his place and was engaged in washing shanks when one of the paunch pullers without the knowledge of plaintiff or of the fell beaters seized the rope and attempted to raise a beef immediately behind plaintiff, and by reason of his unskillfulness and inexperience in the operation of the hoist, the beef dropped upon plaintiff, and injured him. It was further alleged that defendant company without the knowledge of plaintiff had allowed and permitted other employes who were inexperienced and unskilled in its operation, including this particular one, to operate the hoist, and that defendant was negligent in so doing. The amendment alleged that it was an established rule that no one but the hoister and the two fell beaters behind him should operate the hoist, and that without plaintiff's knowledge the rule became relaxed: that the man Shortridge who attempted to operate it was not

informed of the rule or instructed in the use of the hoist. The answer, in addition to a general denial, set up that plaintiff had assumed the risk of the injury, also that the injury was the result of negligence of fellow servants. Defendant below offered no evidence, but elected to stand upon its demurrer to the evidence of plaintiff. The jury found for plaintiff. The court overruled the motion for a new trial and defendant brings the case here for review alleging numerous errors.

Frank P. Seabee, J. F. Wendorff, and Angevine & Cubbison, for plaintiff in error. Wm. B. Sutton and H. E. Dean, for defendant in error.

PORTER, J. (after stating the facts). Counsel for plaintiff in error devote a considerable part of their brief to the contention that it was error to allow the amendment because there was no evidence in support of it and, what there was, if any, was admitted over their objections; that the amendment was not made, in fact, until months after the trial, at the time fixed for the settling and signing of the case made, and introduced a new cause of action which was barred by the statute of limitations. The case made shows that permission to make the amendment was asked and granted at the close of plaintiff's testimony; that prior to the settling and signing of the case made, it was written out from the notes of the court reporter by order of the judge, attached to the original petition and incorporated in the case made, so that the question whether it was made at the time it purports is immaterial. We are bound by the recitals of the case made.

It is urged that there being no allegations in the original petition in reference to an established rule, it was error to permit evidence of such a rule. At the same time it is contended that the evidence introduced failed to prove the existence of any established rule. In the latter contention we agree with counsel. The most that can be said for the evidence is that it tended to prove that a sort of method prevailed in the operation of the killing beds, and that certain workmen had certain duties in connection with the operation of the friction hoist. So far as the evidence of which complaint is made tended to prove these things, it was not a departure from the general scope of the original petition. Plaintiff in error was not prejudiced by the attempt to prove the establishment of a fixed rule since the attempt failed. The allegation in the amendment of the existence of a rule stands as though made in the original petition and not proved. The whole contention about the amendment to the petition, however, becomes immaterial. It appears from an examination of the instructions that the trial court ignored the amendment entirely and instructed as if it had not been made. This

practically takes the amendment out of the case, and with it goes one of the main contentions.

Plaintiff in error argues that the court should have sustained the demurrer to the evidence and raises several points, the chief of which are: (1) That defendant was not guilty of any negligence; and (2) that the injury was caused by the act of a fellow servant. We shall consider these points together. The doctrine of fellow servant is not involved in the case as we view it. The master owes certain duties to the servant, among them the duty to take reasonable precautions to prevent an injury to the servant while at work. In *Brick Co. v. Shanks*, 69 Kan. 306, 76 Pac. 856, it was held that whenever the negligent act violates a duty which the master himself owes to the servant that becomes the controlling fact in determining the master's liability notwithstanding the negligence of the master was set in operation by one who otherwise might have been designated a fellow servant. In some of the controlling principles that case is similar to this, though the facts there were different and there was involved the question of the duty of a pit boss to warn the employees of certain dangers; but the duty of the master to conduct his business "in a manner affording reasonable protection to his employees" is recognized. In *Daniel v. Ches. & O. R. Co.* (W. Va.) 15 S. E. 162, 16 L. R. A. 383, 32 Am. St. Rep. 870, the court, in enumerating the personal nonassignable duties "which the master owes his servant, no matter by whom performed," and quoting from *Madden's Adm'r v. C. & O. Ry. Co.*, 28 W. Va. 617, 57 Am. Rep. 695, says: "The duties of the master or employer may be summed up as follows: (1) To provide safe and suitable machinery and appliances for the business, including a safe place to work. This includes the exercise of reasonable care in furnishing such appliance, and the exercise of like care in keeping the same in repair and in making proper inspections and tests; (2) to exercise like care in providing and retaining sufficient and suitable servants for the business and instructing those who, from newness or age, evidently need it; (3) to establish proper rules and regulations for the service, and having adopted such, to conform to them." In *Bishop on Noncontract Law*, 691, the author says: "The leading principle, around which the others cluster, is, that the master shall exercise in the carrying on of his business all the watchfulness over his servants and employ all the safeguards, which reasonable and considerate prudence may dictate. For any violation of this duty resulting in an injury to a servant he [the master] is answerable to him."

Upon the general proposition that the duty rests upon the master not to expose the servant, in the discharge of his duty, to perils

and dangers against which the master may guard by the exercise of reasonable care. See *Pullman Pal. Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; *Cayzer v. Taylor*, 10 Gray, 274, 69 Am. Dec. 317; *Gilman v. Eastern R. R. Co.*, 10 Allen, 238, 87 Am. Dec. 635. Wood on Master & Servant, § 326; Beach on Cont. Neg. 353; *Hough v. Railroad Co.*, 100 U. S. 213, 25 L. Ed. 612. In order that the master may claim exemption from liability for injuries to a servant on the ground that the negligent act was that of a fellow servant, the master must have exercised reasonable care to prevent the injury. The risk that the master may neglect to do this is not one which the servant assumes. *Pullman Car Co. supra*; *Coppins v. N. Y. C. & H. R. R. Co.*, 122 N. Y. 557, 25 N. E. 915, 19 Am. St. Rep. 523; *Keast v. Santa Ysabel Gold Mining Co.*, 136 Cal. 256, 68 Pac. 771. The case here is analogous to that of the sudden and unexpected starting of dangerous machinery where the starting is due to the negligence of the master or some one for whose negligence the master is responsible. In such cases the master is held liable. *Thompson's Com. on Neg. § 5422*; *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149; *Donahue v. Drown*, 154 Mass. 21, 27 N. E. 675. A duty like that requiring the master to establish rules for the conduct of his business for the safety of his servants is the one which requires him, "in carrying on a dangerous or complicated business, to reduce it to such a system and to conduct it in such a manner as will best promote the safety of his servants; and he is consequently liable to a servant for an injury occasioned by a defective system of using his machinery or conducting his business, as well as for injuries occasioned by defects in such machinery." *Thompson's Com. on Neg. § 4175*. See, also, *Hunn v. Railroad Co.*, 78 Mich. 513, 44 N. W. 502, 7 L. R. A. 500.

Here was a dangerous appliance not in the sense that the persons using it might be injured but dangerous to others. Operated by a skillful and experienced person there was danger to no one. Operated by an inexperienced and unskilled person, a heavy beef with the added weight of iron spreader, itself weighing hundreds of pounds, would fall upon and among other workmen while their attention must be given to their own work, and their lives become endangered. There is some evidence in the record, which fairly tends to prove that there had been a method of procedure in the operation of the work on the killing beds as set out in plaintiff's petition; that there were among the workmen usually about 10 common laborers, including the paunch pullers, without any experience in the operation of the hoist; and witnesses testified that frequently these common laborers pulled the rope which operated the hoist, and did this in the presence of the foreman.

Plaintiff testified that he had no knowledge of this, and the master offered no testimony to dispute it. All the witnesses familiar with the operation of the hoist agree that it required experience and skill to operate it safely and properly. The rope had to be pulled just right, just far enough, or the beef would be dropped suddenly upon the workmen. The workman, Shortridge, did what was natural and might have been expected of any of the common laborers on the beds unless instructed to the contrary. There was a rope to be pulled; some one said, "pull the rope" and, wishing to be useful, he pulled it. He knew nothing about how to do it properly, and the result was the injury to the plaintiff. The duty of the master to use ordinary care to prevent injury to plaintiff by establishing and enforcing a rule, or by some other reasonable method, so far as the evidence shows, was ignored. The master did nothing to protect the servant. It is not claimed that Shortridge was negligent in the ordinary sense of a servant, who knows how to do a thing properly, and carelessly does it wrong. He acted ignorantly. He had no duty to perform, except not to act, and he never had been instructed not to act. As previously stated, it was natural for him or any of the other common laborers, in the absence of any rule or instruction, to attempt to do what he did. His act became possible from the negligence of the master. The proximate cause of the injury was not the act of Shortridge, but the neglect of the master to take reasonable precautions to see that such a thing did not occur. It is held generally that negligence is the proximate cause of an injury when it appears that "the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstance." *Milwaukee, etc., Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. See, also, *Railway Co. v. Parry*, 67 Kan. 515, 73 Pac. 105. The petition it is true, does not allege that it was the duty of defendant to adopt rules or methods in the operation of the killing beds to provide for the safety of plaintiff. It recites the facts, the usual method employed, and the departure from the usual method. It is shown in evidence that no care was taken in fact to prevent these common laborers from doing what it was clearly natural and probable that they might do, and which it appears one of them did do. The law defines the duty of the master, however, and while it is not necessary here to decide what would have been reasonable precautions for the master to have taken to prevent injury to the servant, it is sufficient that as the case stood at the close of plaintiff's testimony, there was some evidence that no precautions of any kind had been taken and that the failure to take reasonable precautions was the proximate

cause of the injury to plaintiff. There was no error in overruling the demurrer.

Error is also claimed in the instructions. The twelfth instruction of which complaint is made relates to the law of fellow servant and, while it might be open to some criticism, plaintiff in error was not prejudiced because the negligence of a fellow servant is not available as a defense in this action. Instruction number 13 fairly states the law governing the facts in evidence. The words, "were liable," are qualified by the phrase "under the method of operating defendant's killing beds." The complaint is that there was no evidence to warrant the instruction, but as we have said, there is some evidence that common laborers, without experience, and in the presence of the foreman, frequently attempted to operate the hoist. "The employer is chargeable with knowledge of whatever it is his duty to find out and know." Thompson's Com. on Neg. § 5404.

Error is specified in overruling defendant's challenge for cause to a juror, and also on account of some remarks of counsel for plaintiff below in his opening statement. These matters cannot be considered for the reason that they do not appear in the record except in the form of an affidavit, and the record shows this affidavit was filed the day after the motion for a new trial was overruled. The record does not disclose that the court's attention to these alleged irregularities was challenged by the motion for a new trial. We find no error in the instructions, and in our view of the law of the case, there was sufficient evidence to submit to the jury upon the allegations in the petition and to support the verdict.

The judgment will be affirmed. All the Justices concurring.

ELSE et al. v. FREEMAN et al.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. TRIAL—SPECIAL FINDINGS BY COURT—REQUESTS—NECESSITY.

The failure of the court making special findings, in addition to a general finding, to cover all the issues by its special findings, is not reviewable in the absence of a request for further findings.

2. FRAUD—FRAUDULENT REPRESENTATIONS—MATTERS OF OPINION.

A false statement as to the value of land made to induce an exchange for other land is an opinion, and is not actionable as a false representation.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exchange of Property, § 5; vol. 23, Cent. Dig. Fraud, § 13.]

3. SAME.

A false statement to the effect that the fences on a tract of land are good, made to induce an exchange for other land, is a mere opinion, and is not actionable as a false representation.

4. EXCHANGE OF PROPERTY—VALIDITY OF AGREEMENT.

Where, in an action for the cancellation of a conveyance of land to defendant in exchange

of other land because of fraud, it was shown that defendant falsely represented that the fences on the latter land were good, but there was nothing to show that this representation had any influence on plaintiff, a judgment for defendant was proper.

Error from District Court, Hamilton County; Wm. Easton Hutchison, Judge.

Action by Sarah Else and others against M. M. Freeman and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Geo. Getty and Geo. J. Downer, for plaintiffs in error. U. T. Tapscott and W. R. Hopkins, for defendants in error.

PER CURIAM. Stephen Else owned and occupied a farm in Hamilton county, Kan., which he exchanged with M. M. Freeman for land in Howell county, Mo. The trade was made by correspondence between the parties. Neither of them had seen the land traded for until after the exchange of deeds. Else executed the deed to his farm May 11, 1901. In June following he removed to his land in Missouri; but, being dissatisfied therewith, left immediately, and on November 12, 1901, began this suit to cancel the conveyance to his Kansas farm and to recover possession. He claimed in his petition that the conveyance was obtained by false and fraudulent representations concerning the Missouri land.

The court made findings of fact and conclusions of law in which it found generally for the defendant, and specifically found that of the numerous false representations alleged in the petition only three were sustained, and they were not actionable. These three were the following: (1) "Fences are good." (2) "Place is watered by a spring, cistern, and stock pond." (3) "The place is worth \$2,500." Each of these statements were made to induce the trade, and were false and known to be so when made. The court also found that the second representation was not relied upon by the plaintiff, leaving plaintiff's case resting entirely upon findings of fact 1 and 3, which were decided to be in the nature of opinions, rather than representations, and not actionable. The court in its conclusions did not find either way as to the truth or falsity of the other representations. But by its general finding they must be held to have been against the plaintiff.

Complaint is made of this failure of the court to cover all the representations by its special findings, but the failure of the plaintiff to call the attention of the court to this omission and to request further findings relieves the court of criticism therefor. This narrows the questions for this court to consider to whether the court erred or not in holding that the two false representations established were not actionable. As to the representation concerning the value of the land as used here, the district court is sustained by a practically unanimous line of authorities.

As to the statement "fences are good," we have not been favored by either party with a single case directly in point, and none that are closely analogous, and we have been unable after a limited search to find any. We find, however, that the meaning of the word "good" depends almost entirely upon its associations with other words, and relation to the subject-matter about which it is used. Fences vary so much in kind and condition, and what constitutes a good fence in the estimation of people depends so much upon the neighborhood where located and the material of which constructed, that to us the expression "good fence" conveys an idea so vague and uncertain that it seems more appropriate to classify it with opinions than representations. No intimation is given as to the kind of fence, nor quantity. Some of the fences were concededly good, and it was not pretended that all of the fences were of that quality. Therefore, in the absence of authority, we are inclined to agree with the district court. Besides this representation was a minor one, among many others, contained in the same statement, and it does not appear that any or all of them were relied upon by Stephen Else, or that the trade would not have been made anyhow, and without some evidence that this particular representation standing alone had some influence upon his mind the case cannot be sustained; and, this being the only representation left to be considered, no reason for reversal appears.

The judgment is affirmed.

MASON, J., not sitting.

METROPOLITAN LIFE INS. CO. v. ELISON.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. INSURANCE—INSURABLE INTEREST—KINSHIP.

An uncle of one whose life is insured has no insurable interest in the life of the insured by reason of kinship.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 158.]

2. SAME—LIFE INSURANCE—PUBLIC POLICY.

It is against public policy and contrary to law to permit any one to obtain insurance upon the life of a human being by assignment or otherwise, where such person has no insurable interest in the life of the insured.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 138.]

3. SAME—ASSIGNMENT OF INTEREST.

An agreement, by which one-half of the insurance provided for in a life insurance policy was assigned and transferred by the insured and the beneficiary to one having no insurable interest in the life of the insured, upon consideration that the assignee was to pay the premiums as they accrued, contravenes public policy, and neither the assignee nor the beneficiary who participated in the tainted transaction can recover upon the policy.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 166.]

4. SAME.

Life Insurance Company v. McCrum, 12 Pac. 517, 36 Kan. 146, 59 Am. Rep. 537, approved and followed.

(Syllabus by the Court.)

Error from District Court, Lyon County; Dennis Madden, Judge.

Action by Lizzie Ellison against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Action on an insurance policy issued on the life of Adolph Ellison for \$2,000, running 20 years, with premiums of \$13.96, payable quarterly, and his wife, Lizzie Ellison, was named as beneficiary. She brought this action, alleging the issuance of the policy on July 18, 1900, the death of her husband on December 1, 1900, and she set up a contract between herself and husband on the one part, and his uncle, Casper Ellison, on the other, by which an interest in the policy to the extent of \$1,000 was assigned to Casper Ellison in consideration that he should pay the premiums upon the policy. The following is a copy of the contract:

"This contract, made and entered into this 30th day of July, 1900, by and between Adolph Ellison and Lizzie Ellison, his wife, of Emporia, Kansas, party of the first part, and Casper Ellison, of Emporia, Kansas, party of the second part:

"Witnesseth, that whereas, the said Adolph Ellison has taken out a policy of insurance in the Metropolitan Life Insurance Company of the city and the state of New York, which is numbered 186,718, for \$2,000.00 on the life of the undersigned Adolph Ellison, dated July 18, A. D. 1900, through J. J. Butler, its authorized and duly acting agent, at Topeka, Kansas, at the yearly premium of \$55.84, and quarterly \$13.96:

"Now it is mutually understood by and between the parties hereto, to wit, said Adolph Ellison, assured, and Lizzie Ellison, his wife and beneficiary, and the said Casper Ellison, that if the said Casper Ellison shall promptly pay at the proper time said quarterly installment premiums, to wit: \$13.96 each, or \$55.84 per year, when the same are due, as required by the terms of said policy, for the term of 20 years, or during the life of the said Adolph Ellison, the assured, then at the end of 20 years, or at the death of the assured, the said Lizzie Ellison shall pay to said Casper Ellison the sum of \$1,000.00, and the said Adolph Ellison hereby agrees to this proposition and so instructs his said wife and authorizes her to pay to said Casper Ellison the sum of \$1,000 as aforesaid, and the said Adolph Ellison and his wife, Lizzie Ellison, constitutes said Casper Ellison their agent to pay said premiums out of his money for that purpose and to transact all business for them in their behalf in this matter, for the reason that they are Germans and cannot speak and write the English language fluently, hereby authorizing said Ellison to keep the policy

above referred to in his own possession for reference and to acquaint himself with its terms of payment of premiums, and that upon the death of said Adolph Ellison, the said Adolph Ellison now in his lifetime constitutes and appoints said Casper Ellison his attorney and in his name and stead, and said Lizzie Ellison, his wife also joins in this appointment for said Casper Ellison to transact all the matters of business for them, as they are not acquainted with the forms and methods of business in this country, agreeing and understanding that in the consideration of the payment of said premiums regularly as before mentioned that said Casper Ellison shall receive at the end of 20 years from the date thereof, or upon the death of assured, Adolph Ellison, the said sum of \$1,000.

"And upon the part of the said Casper Ellison hereby agrees to promptly pay at the proper time and times all these premiums as they fall due as aforesaid, and to further secure the said Casper Ellison for the sum of money so paid out and invested for them, the said Adolph Ellison and Lizzie Ellison; the said Lizzie Ellison agrees to turn over to said Casper Ellison at the death of said Adolph Ellison, or at the end of 20 years, or when the said policy shall be paid, the draft indorsed by her, that the said Ellison may reimburse himself for the moneys so invested to the amount of \$1,000, as aforesaid.

"In witness whereof, the said parties to this contract have hereunto signed their names and executed this contract for all the purposes therein named, the day and year first above written.

"Casper Ellison.

"Adolph Ellison.

"Lizzie Ellison.

"State of Kansas, Lyon County—ss:

"Be it remembered, that on this the 30th day of July, 1900, before me, the undersigned, a notary public, personally appeared Adolph Ellison, Lizzie Ellison, his wife, said first parties, and Casper Ellison, said second party, who each signed the above contract as their own voluntary act, and acknowledged the execution of the same.

"In witness whereof, I have hereunto subscribed my name and affixed my notarial seal the day and date last above written.

"[Seal.]

Chas. Fletcher,

"Notary Public.

"Comm. expires Nov. 18, 1902."

Casper Ellison having died, his legal representative, Lena Ellison, was made a defendant, and in a cross-petition she alleged that Casper Ellison had paid two premiums, \$27.92, on the policy, and claimed a recovery of \$1,000 of the insurance by virtue of the contract of assignment. The insurance company separately demurred to the petition of Lizzie Ellison and to the cross-petition of Lena Ellison on the ground that neither stated a cause of action against the insurance company. The trial court overruled the demurrer to the

petition, but sustained it as to the cross-petition. Afterwards the insurance company filed an answer, alleging that, notwithstanding the answers of Adolph Ellison that he was in good health and had never been sick and had no usual medical attendant, he was then in fact ill with tuberculosis, and had been treated for that disease by physicians. The reply denied the averments of the answer, and alleged that the insurance company accepted the risk with knowledge of Adolph Ellison's physical condition. The trial resulted in favor of Lizzie Ellison, and the insurance company complains.

James H. Austin, for plaintiff in error.
S. F. Wicker and Fuller & Jackson, for defendant in error.

JOHNSTON, C. J. (after stating the facts). The controlling question in the case is, can the beneficiary, Lizzie Ellison, who joined in the contract by which the insurance on her husband's life was assigned to Casper Ellison, recover on the policy? In her petition, and in part as a basis of recovery, she set up the contract which appears to have been entered into with Casper Ellison 12 days after the policy was issued. The demurrer to the petition raised the question whether, under the facts stated, as well as those admitted by the recitals of the contract, she had stated a cause of action. The contract is plain in its provisions, and leaves no doubt about the purposes of the parties. Casper Ellison agreed to pay the premiums on the policy for 20 years, or until the death of Adolph Ellison, and in consideration therefor was to receive \$1,000 of the insurance money to be paid by the company. There was some claim that he was only to be reimbursed to the extent of the payments made, but it is expressly stated, and again repeated, that he was to receive \$1,000 at the death of the insured or at the maturity of the policy. He was to have the possession of the policy, and the precaution was taken to provide that the draft drawn by the insurance company in favor of Lizzie Ellison should be indorsed and turned over to the assignee. Casper Ellison was an uncle of the insured, and therefore had no insurable interest in his life by reason of kinship. *Singleton v. Insurance Company*, 66 Mo. 63, 27 Am. Rep. 321; *Prudential Insurance Company v. Jenkins*, 15 Ind. App. 297, 43 N. E. 1036, 57 Am. St. Rep. 228; *Corson's Appeal*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479; 2 *Joyce on Insurance*, § 1069. The consideration of the transfer was not for advances made by the uncle, nor as security for any subsisting indebtedness. It, therefore, appears that Lizzie Ellison, the beneficiary of the policy, undertook to assign and transfer an interest in the policy to one who had no interest in the life of the insured.

The theory of life insurance is that one who is interested in the preservation of the life of the insured may safely take and hold insurance, but that insurance in favor

of one who has no interest in the life of the insured, who would be interested in his early death, is contrary to good morals and a sound public policy. In the early case of *Life Insurance Company v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761, it was held that such insurance, if sustained, would open the door to speculation and traffic in human life, and invite to enter the most shocking of all crimes, and that, "of all wagering contracts, those concerning the lives of human beings should receive the strongest, the most emphatic, and the most persistent condemnation." The authorities generally unite in holding that one who has no insurable interest can no more take an interest in a policy, valid in its inception, by purchase and assignment than he could by direct issue from the insurer. In *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924, it was said: "The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. * * * If there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the insured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has an interest." It has been said that "the evil of wager policies would rather be aggravated than otherwise by such a rule, because speculators desiring to indulge in this species of gambling in human life could more easily purchase from embarrassed policy holders than procure the issue of such policies directly to themselves upon the lives of strangers. 'In either case,' as observed by a recent author in treating of this subject, 'the holder of such a policy is interested in the death rather than the life of the insured.'" *Helmetag's Adm'r v. Miller*, 76 Ala. 183, 188, 52 Am. Rep. 316. As tending to sustain the view that a person cannot take directly, or by assignment a policy of insurance on the life of one in whose life he has no insurable interest, see *Cammack v. Lewis*, 15 Wall. (U. S.) 643, 21 L. Ed. 244; *Gilbert v. Moose*, 104 Pa. 74, 49 Am. Rep. 570; *Carpenter v. Insurance Company*, 161 Pa. 9, 28 Atl. 943, 23 L. R. A. 571, 41 Am. St. Rep. 880; *Alabama Gold Life Insurance Co. v. Mobile Mutual Life Insurance Co.*, 81 Ala. 329, 1 South. 561; *Whitmore v. Supreme Lodge*, 100 Mo. 36, 13 S. W. 495; *Heusner v. Mutual Life Insurance Company*, 47 Mo. App. 336; *Thornburg v. Life Insurance Company*, 30 Ind. App. 682, 66 N. E. 922; *Bayse v. Adams*, 81 Ky. 368; *Roller v. Moore's Adm'r*, 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136; *Wilton v. New York Life Insurance Co.* (Tex. Civ. App.) 78 S. W. 403.

In this case the interest of Casper Ellison, who contracted with the beneficiary to pay all the premiums, would have been best subserved by the early death of Adolph Eli-

son; and in fact death did occur in less than five months. It was a matter of much concern to him whether he should get the contingent amount of \$1,000 for a few premiums, or whether he should be required to pay them during the period of 20 years. In this respect it was more mischievous and vicious in its tendencies than many of such arrangements, because, if the insured had lived until the maturity of the policy, the assignee would have been required to pay even more than he was to receive. In that event he would have paid \$1,116.80, saying nothing of interest, for the \$1,000 of insurance money which he would receive, and, while there would have been a profit in the early death of the insured, his living until the end of the 20-year period would have occasioned the assignee a substantial loss. Contracts of this character have been frequently denounced and held bad because they were regarded as wagers, but this court has declared them to be void on the broader ground that they are contrary to public policy. If the transaction is tainted as to the assignee who has no insurable interest, how does it stand as to the beneficiary in the contract of insurance who participated in the wrong? If the agreement which furnished an inducement to take human life and a temptation to commit the most atrocious of crimes was participated in by the beneficiary voluntarily, how can she escape the condemnation of the law? She not only signed the agreement, but it appears that she was to take an active part in carrying it out, and was to receive a share of the insurance to be secured through the payment of premiums by Casper Ellison. We have given much attention to the relation which Lizzie Ellison bore to the transaction, and, if we follow the rule of *Life Insurance Company v. McCrum*, 36 Kan. 146, 12 Pac. 517, 59 Am. Rep. 537, it must be held that the whole transaction was so tainted with illegality as to bar a recovery by her. There appears to be no substantial distinction between this and the cited case. There the insurance company issued a paid-up policy to Snyder, payable to his two daughters. He and the beneficiaries, for a valuable consideration, joined in an assignment of the policy to Mrs. Parker, who had no insurable interest in Snyder's life. After the death of Snyder Mrs. Parker, on learning that she could not collect the insurance, transferred the policy back to the beneficiaries, who in turn transferred it to McCrum, and he brought an action to recover upon the policy. It was held that McCrum stood in the shoes of the beneficiaries, that the transaction between the beneficiaries and the assignee was contrary to public policy, not to be tolerated by law, and that the policy was worthless and void, not only as to the assignee, but it was also void in the hands of the beneficiaries. In speaking of the participation of the beneficiaries in the tainted transaction it was remarked: "This policy was placed

in her (Parker's) possession, not only with the written consent of the beneficiaries, but upon a valuable consideration paid to them for the same. They therefore aided in creating in the mind of Mrs. Parker a desire for the early death of the insured. They held out to her the temptation to bring about the event insured against. * * * In making the transfer and assignment, and in receiving the money therefor, the beneficiaries, Elizabeth and Desylvia Snyder, were participants with Mrs. Parker in the attempted fraud upon the insurance company. The whole transaction between the beneficiaries and Mrs. Parker contravenes public policy, and the law leaves the parties as it found them."

Attention is called to the fact that in the McCrum Case the beneficiaries received a consideration, while nothing was paid by the assignee to the beneficiary in the present case. Here Lizzie Ellison procured Casper Ellison to pay the premiums upon the policy, in order to keep it alive that she might receive a share of the insurance money. The fact that the assignee did not pay her money directly for the transfer did not take the vice out of the transaction nor make it less hurtful in its tendencies. It, none the less, as was said in the McCrum Case, aided in creating in the mind of the assignee a desire for the early death of the insured, and held out to him the temptation to bring about the event against which the insurance was issued. In the McCrum Case the court further remarked: "If the party who attempts to speculate in human life cannot enforce the policy which he has purchased on the life of another, in whose life he has no insurable interest, the beneficiaries who knowingly and purposely sell and assign to such a person the policy on the life of another for a valuable consideration ought not thereafter to be permitted to enforce the same for their own benefit. * * * It is not for the sake of the insurance company that the transactions between the beneficiaries and Mrs. Parker are held wrongful, but such rule is founded on general principles of public policy forbidding speculative contracts upon human life. In all such cases the courts ought not to lend their aid to assist parties engaged in the perpetration or attempted perpetration of such wrongful speculations." *Powell v. Dewey*, 123 N. C. 103, 31 S. E. 381, 68 Am. St. Rep. 818, sustains the view taken in the McCrum Case. There *Powell* took out a policy of insurance on his own life, and assigned the same to the beneficiary named in the policy, who had no insurable interest. The assignee paid the premiums which accrued up to the death of the insured. Upon proofs of death the insurance company paid the amount of the policy to the assignee, and the executor of *Powell's* estate then brought an action on behalf of the estate against the assignee and the insurance company to recover the insurance money. The

court held that the policy was void because of the transfer to one having no insurable interest, that no action could be maintained upon it by the beneficiary against the insurance company, nor could the plaintiff, who was the representative of the insured, maintain an action, because, "looking at it in any view, it has its foundation on the policy which is void." See, also, *Hinton v. Insurance Co.*, 135 N. C. 314, 47 S. E. 474, 65 L. R. A. 161, 102 Am. St. Rep. 545. The McCrum Case is deemed to be a controlling authority in the present one, and the court is not inclined to overrule or modify that decision.

It follows that the judgment must be reversed, and the cause remanded, with directions to sustain the demurrer of the insurance company to the petition of Lizzie Ellison. All the Justices concurring.

THOMPSON v. TUCKER et al.

(Supreme Court of Oklahoma. Sept. 5, 1905.)

1. INJUNCTION—ADEQUATE REMEDY AT LAW.

An injunction should not issue in a case at the suit of a party wherein it is shown by the allegations in his petition that he has a legal remedy which is adequate and sufficient for the protection of his rights.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 15-17.]

2. SAME—PROSECUTION UNDER ORDINANCE.

A prosecution for violating a municipal ordinance will not be restrained because of the illegality of the ordinance, since the fact is available as a defense to the prosecution.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 179.]

(Syllabus by the Court.)

Error from District Court, Caddo County; before Justice F. E. Gillette.

Action by James Thompson against W. L. Tucker and others. Judgment for defendant, and plaintiff brings error. Affirmed.

Dyke Ballinger, for plaintiff in error.

BEAUCHAMP, J. This action was commenced by the plaintiff in error against the defendants in error, as officers of the town of Bridgeport, for an injunction against the enforcement of an ordinance. In the absence of the judge of the district court, on application a temporary injunction was allowed by the probate judge. Subsequently a demurrer to the petition was sustained, and the temporary injunction dissolved, and exceptions saved. Plaintiff in error brings the case here by petition in error and transcript.

It appears from the petition that the plaintiff in error, at the time that this suit was commenced, and prior thereto, was in the retail liquor business in the town of Bridgeport; that the defendants are the board of trustees, marshal, and city attorney of said town; that the town has passed an ordinance for the purpose of regulating the sale of intoxicating liquors, and providing that "it shall be unlawful for any person to sell any

intoxicating liquors within the corporate limits of the town without first obtaining a license from the board of trustees, and that no license shall be granted until the applicant shall have filed with the town clerk an application in writing, accompanied by a certificate of two resident taxpayers of the ward, that the applicant is a man of good moral character, and competent to conduct the business according to law, and that notice of the application shall be published for one week in a newspaper, and, if objections be filed, the same shall be heard and determined by the board of trustees, and, if the license shall be granted, it shall not issue until the applicant shall have paid the sum of \$500," and providing that "any person engaging in the business, without first securing a license, is guilty of a misdemeanor, and may be fined in any sum not less than \$10, and not more than \$500. And that a conviction for a violation of the ordinance shall work a forfeiture of any license held by the person convicted." It is alleged that this ordinance is void, and passed for the purpose of damaging the plaintiff by destroying his business. The only question necessary for our consideration at this time is the sufficiency of the plaintiff's petition.

Conceding for the purpose of this case that the ordinance is invalid as charged, still we think the petition not sufficient to entitle the plaintiff to the relief asked. It will not be questioned that an injunction should not issue, where there is a plain and adequate remedy at law, and the real question is, has the plaintiff, according to the allegations of his petition, a legal remedy which is adequate and sufficient for the protection of his rights? If the ordinance is invalid, as is claimed by him, that is a defense which can be interposed in any case that may be instituted against him. If he should be prosecuted for a violation of the ordinance, if the ordinance is invalid, this would be a complete defense, and we are unable to see wherein the plaintiff could suffer the irreparable injury claimed by him. The legality or illegality of the ordinance is purely a question of law, which it is competent for a court in a proceeding at law to decide. We cannot assume that the courts, where the question is properly presented, will not decide it correctly. A court of equity will not restrain a prosecution at law, when the question is the same at law as in equity. *Golden & Co. v. City of Guthrie*, 3 Okl. 128, 41 Pac. 350; *Wallack v. Society*, 67 N. Y. 23. The contention of plaintiff is that, if the ordinance is void, its enforcement should be restrained by injunction, and the principal ground relied upon by him for the injunction is the alleged illegality of the ordinance. It is well settled by a number of well considered cases that as a general rule an injunction will not lie to restrain prosecutions under a municipal ordinance upon the mere ground of its alleged illegality,

for the reason that the party proceeded against thereunder has a complete remedy at law, because he can avail himself of such illegality as a legal defense in prosecutions thereunder. *Poyer v. Village of Des Plaines*, 20 Ill. App. 30; *Levy v. City of Shreveport*, 27 La. Ann. 620; *City of Denver v. Beede* (Colo. Sup.) 54 Pac. 624; *Dill. Mun. Corp.* §§ 906, 908, note; *High on Inj.* (2d Ed.) § 1244; *Modern Law of Municipal Corp.* vol. 2, § 1623.

It is argued by plaintiff in error that he has no adequate remedy—that the illegality of the ordinance might be tested by habeas corpus proceeding; but before this remedy could be invoked plaintiff must first be humiliated by incarceration in the county jail. By this argument it is apparent that counsel is asking the court to assume that the plaintiff not only intends to violate the ordinance, but that the court that may try the case will not properly decide the law. If the position of the plaintiff in error is correct, that the ordinance is invalid, then he cannot be punished for violation of it; and we must assume that the courts will so decide. If the ordinance is valid, and the plaintiff is guilty of violating it, then he should be punished, and he would have no cause for complaint, no matter what hardships might be occasioned. If the plaintiff chooses to take chances on ultimately defeating the ordinance on the grounds of its invalidity, that is no reason for interference by injunction. Our attention has been directed to cases that hold that an injunction will lie to restrain action under a void city ordinance. Upon an examination of the authorities cited, it will be found that the injured party would not only not have an adequate remedy at law, but the enforcement of the void ordinance would result in irreparable injury. We do not desire to be understood as holding that no case could be presented in which an injunction should be allowed restraining the enforcement of a void ordinance, but, as before suggested, we cannot assume in this case that the plaintiff will violate the ordinance, and that, if he should, the court in which he may be tried for its violation will not hold it invalid, if that question should be raised; nor can we assume that the defendants will confiscate and destroy the property of plaintiff as alleged, for there is nothing in the ordinance complained of which would justify any such conclusion. We do not desire to be understood as holding that the ordinance complained of is invalid, as we think it unnecessary at this time, for the purposes of this case, to decide that question.

The judgment of the district court sustaining the demurrer, dissolving the temporary injunction, and assessing the costs to plaintiff in error, is affirmed, with costs to plaintiff in error. All the Justices concurring, except GILLETTE, J., who tried the case below, not sitting.

DAVIS et al. v. FITZMAURICE.

(Supreme Court of Oklahoma. Sept. 8, 1905.)

APPEAL—REVIEW—CONFLICTING EVIDENCE.

Where the testimony given on the trial of a case is conflicting, this court will not attempt to determine the weight to be given to the same.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3983.]

(Syllabus by the Court.)

Error from District Court, Noble County; before Justice Bayard T. Hainer.

Action by T. J. Fitzmaurice against A. A. Davis and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Doyle & McGraw and Cowley & Johnson, for plaintiffs in error. J. W. Quick, for defendant in error.

GILLETTE, J. This action was brought in the district court of Noble county by the defendant in error, to recover and quiet the title to four certain lots in the city of Perry, Okl. The petition alleges the deed to have been procured from the plaintiff by one of the defendants by fraud and misrepresentation, and that the consideration had wholly failed, which consideration was a deed and conveyance to plaintiff of the territory of the state of Kansas in and to a certain patent right, which territory had a short time previous been already conveyed to another party; that the defendants had bought an interest in said property with knowledge of the fraud; and that during all the time the plaintiff was the owner and in possession of the property; and that this particular property was not described in the deed conveying the same, because of the fact that said deed did not show the block in which the lots in question were situated. The plaintiffs in error answered, alleging that the defendant A. A. Davis, to whom said deed was made, went into possession of said premises at the date of said deed, and remained in possession up to the time of making the conveyance to the other defendants E. D. and B. M. Davis; that there was no failure of consideration in the conveyance of defendant in error, Fitzmaurice, to the plaintiff in error A. A. Davis; that said Davis paid therefor the sum of \$300, \$50 in cash and \$250 in shaft locks, articles manufactured under said patent, which consideration had never been returned. The defendants E. D. Davis and B. M. Davis filed in said cause a cross-petition, charging that there was a clerical error on the part of the notary drafting said deed; that the description therein was defective in not mentioning and setting forth the block in which said lots were located, and they pray a reformation and correction of the same in that respect. The reply was a general denial, denying all the allegations in the answer inconsistent with the statements of the petition. The deed of territory under said patent was tendered

back. On the issue so joined the case was tried to the court without the intervention of a jury, and judgment rendered quieting the title to the property in the plaintiff, Fitzmaurice, and requiring him to pay into court for the benefit of defendants the sum of \$58.50, found by the court to have been received by Fitzmaurice from A. A. Davis; \$50 of the above amount having been furnished to Fitzmaurice by Davis to enable him to start business in the state of Kansas, and \$8.50 was for money received by plaintiff on the sale of 15 shaft locks, which had also been furnished by Davis, the unsold shaft locks having been returned by plaintiff to defendants.

No brief has been filed in this court by the defendant in error, and the brief of plaintiff in error presents no question for the determination of this court, other than that the judgment of the court below was not supported by a preponderance of the testimony, or, in other words, what weight and effect shall be given to certain parts of the evidence? The testimony is conflicting upon every proposition presented. This court has too often declared, to require citation, that it is not its province to weigh conflicting testimony and measure thereby the correctness of the judgment of the court below. The trial court with the witnesses and parties before it has the better opportunity to weigh and give credence to testimony.

Following this oft-repeated determination, the judgment of the trial court must be affirmed, with costs. All the Justices concurring, except HAINER, J., who presided in the court below, not sitting.

GARRETSON v. WITHERSPOON et al.

(Supreme Court of Oklahoma. Sept. 5, 1905.)

1. APPEAL—RECORD—REVIEW OF EVIDENCE.

Assignments of error which necessitate a review or consideration of the evidence will not be considered by this court, unless the record affirmatively shows all the evidence taken upon the trial is included therein.

2. CANCELLATION OF INSTRUMENTS — WHEN GRANTED—REMEDY AT LAW.

Where there is an entire want of consideration for a note and mortgage, and the mortgage as recorded constitutes a cloud upon the title to real property, and the facts proved tend to taint the transaction with fraud, *held*, that such condition is sufficient occasion for invoking the equitable remedy of cancellation; and *held*, further, that under such circumstances a court will exercise its equitable jurisdiction to order a surrender of the note and decree cancellation of the mortgage, irrespective of any question of other remedies at law.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, §§ 1-12.]

(Syllabus by the Court.)

Error from District Court, Roger Mills County; before Justice C. F. Irwin.

Action by William D. Witherspoon and Lou F. Witherspoon against N. P. Garretson.

Judgment for plaintiffs, and defendant brings error. Affirmed.

George S. Green, for plaintiff in error.
Welty & Harrison, for defendants in error.

PANCOAST, J. This was an action to cancel a note and mortgage executed by defendants in error to plaintiff in error. The petition, among other things, charged defendant below with receipt of the instruments, and alleged the money for which the same were given had never been transmitted to the plaintiffs or received by them, and that the note and mortgage had not been assigned or transferred by the defendant. The answer admitted receipt of the instruments, denied the agency as to defendant of the intermediary who negotiated the loan, denied that the note and mortgage were mailed to plaintiff in error with the understanding he would mail draft to the mortgagors for the amount of the loan, and alleged an assignment of the instruments on the day of their receipt, which assignment the reply denied. Upon the issues thus joined a trial was had to the court. Judgment was rendered for surrender of the note and cancellation of the mortgage. From this judgment, plaintiff in error has appealed, and assigns for grounds of reversal certain errors arising on the evidence, and also that the judgment was "contrary to law."

There is nowhere in the record before us a recitation to the effect that all of the evidence taken upon the trial is included therein, nor does the record itself show that such is the fact; and, as this court has many times held, unless a case-made contains such a recitation, assignments of error which necessitate a review or consideration of the evidence will not be considered on appeal. *Exendine v. Goldstine*, 14 Okl. 100, 77 Pac. 45; *Frame v. Ryel*, 14 Okl. 536, 79 Pac. 97; *Ragains et al. v. Geiser Mfg. Co.*, 10 Okl. 544, 63 Pac. 687; *Pierce v. Engelkemeier*, 10 Okl. 308, 61 Pac. 1047, and many others. This court will not, therefore, undertake to determine such assignments of error as would, by their consideration, involve an examination of the evidence in the record.

Plaintiff in error attacks the judgment in this case under the general assertion that it is contrary to law, and in his brief addresses himself particularly to the proposition that the trial court was without jurisdiction, inasmuch as the plaintiff below had a plain and adequate remedy at law. The cases in which a court of equity exercises its jurisdiction to decree surrender and cancellation of written instruments are in general where the instrument has been obtained by

fraud, where a defense exists, which could be cognizable only in a court of equity, where the instrument is negotiable, and by the transfer the transferee may acquire rights which the first holder did not possess, and where the instrument is a cloud upon the title of the plaintiff, to real estate. 6 Cyc. 286 et seq.; *Venice v. Woodruff*, 62 N. Y. 467, 20 Am. Rep. 495. In this case, apart from any question of fraud, it would seem, in the light of authorities carrying weight in this jurisdiction, that upon nonperformance by the defendant, even without the additional ground that the recorded mortgage constituted a cloud on plaintiffs' title to the property, the aid of a court of equity was proper to be invoked to obtain surrender of the note and cancellation of the mortgage. 6 Cyc. 288; *Grand Haven v. Grand Haven Waterworks Co. (Mich.)* 57 N. W. 1075; *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677; *Angus v. Craven*, 132 Cal. 691, 64 Pac. 1091. And, while it is the general rule that a contract or conveyance which is improvident or based on an inadequate consideration will not be set aside for these reasons alone, yet, certainly, where as in the case at bar there is not only nonperformance and clouding of title, but an entire want of consideration, and proof of such facts as furnishes in itself convincing evidence of fraud, this court will not hesitate to deem such condition a sufficient occasion for invoking the equitable remedy of cancellation. In such a case, the exercise of equitable jurisdiction is not dependent upon the inadequacy of the legal remedy, but rescission and cancellation may be sought, irrespective of any question of a remedy at law. 6 Cyc. 291; *John Hancock Mut. L. Ins. Co. v. Dick*, 114 Mich. 337, 72 N. W. 179, 43 L. R. A. 586; *Ranney v. Warren*, 13 Hun (N. Y.) 11; *Holden v. Hoyt*, 134 Mass. 181.

The trial court has found the note and mortgage to be without consideration and void, and such finding, under the condition of the record as it exists now, will not be inquired into or disturbed by this court. The facts proved and proper to be considered by the court show, not only a failure of consideration, but entire want thereof, and circumstances attending the transaction—failure of the mortgagee to transmit the money after receipt of the papers, the attempted assignment before a maturity of the note, and the long, unexplained delay—are certainly sufficient upon which to base a finding of a lack of good faith amounting to constructive fraud. The judgment is affirmed.

IRWIN, J., who tried the case below, not sitting. All the other Justices concurring.

KRUG v. HENDRICKS.

(Supreme Court of Washington. Jan. 10, 1906.)

BROKERS—ACTION FOR COMMISSIONS.

In an action for broker's services, evidence held to sustain a finding that plaintiff had not established, by a preponderance of the evidence, that a contract existed between him and defendant for the sale of the property in question.

Appeal from Superior Court, Stevens County; D. H. Corey, Judge.

Action by August Krug against Elmer Hendricks. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Geo. A. Allen and W. H. Jackson, for ap-
pellant. C. A. Mantz, for respondent.

PER CURIAM. This suit was brought to recover the sum of \$325 alleged to be due the plaintiff from defendant as a commission for services of the former as a real estate broker. The cause was tried by the court without a jury, and judgment was rendered for the defendant, dismissing the action, from which judgment the plaintiff has appealed.

The only question involved in the case is one of fact. The trial court found that appellant had not established, by a preponderance of the evidence, that a contract existed between the parties by which appellant was authorized to negotiate a sale at the time he claims to have rendered the services for which he seeks to recover. We have read the statement of facts, and are satisfied that the court's finding is fully sustained by the evidence. There was conflict in the testimony. Appellant alone testified that there was any contract in existence at the time respondent sold his ranch. He was contradicted by respondent, and two other witnesses also testified as to admissions or statements made by appellant to the effect that he did not have the property listed at the time. Under such evidence we shall not say that the trial court erred in holding that the weight of the testimony was with respondent.

The judgment is affirmed.

JOHANSEN v. MULLIGAN.

(Supreme Court of Washington. Jan. 5, 1906.)

1. FISH—TRAPS—LOCATION—STATUTES.

Sess. Laws 1905, c. 140, p. 254, § 1, requiring a lateral passageway of at least 900 feet between all fish traps, means that every trap must be so located that there shall be no other trap within a distance of 900 feet laterally therefrom; and a trap was not properly located where a parallelogram, formed by lines 900 feet long projected at right angles to the ends of the trap and lines connecting the same drawn parallel to the course of the trap 900 feet on either side thereof, intersected traps previously located, though the trap in question did not intersect similar parallelograms of the prior traps.

2. INJUNCTION — PROTECTION OF FISHERY RIGHTS.

RIGHTS.
The owner of a fish trap is entitled to an injunction restraining the maintenance of an-

83 P.—27

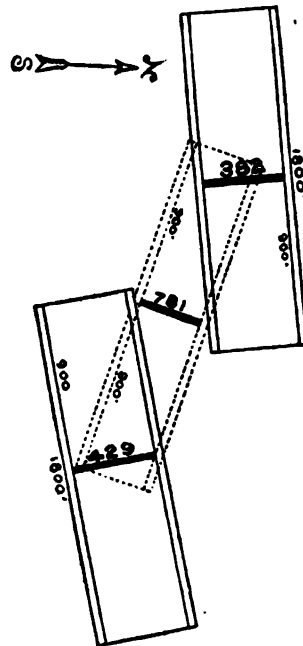
other trap, unlawfully located and which takes fish that, but for its existence, would have been taken by plaintiff's trap.

Appeal from Superior Court, Pacific County; A. E. Rice, Judge.

Action by Augusta Johansen against M. Mulligan. From a judgment in favor of defendant, plaintiff appeals. Reversed.

**McBride, Stratton & Dalton, for appellant.
B. F. Heuston and T. W. Hammond, for
respondent.**

HADLEY, J. This action involves a dispute concerning the lateral passageway between fish trap locations. The traps are located in the waters of Baker's Bay, near the mouth of the Columbia river. The plaintiff contends that the defendant's trap encroaches upon her own location, and also upon that of another. She has brought this action to enjoin defendant from maintaining his trap at its present location. The relative location of the traps mentioned in the complaint may be illustrated by the following diagram:



The heavy dark line numbered 429 represents the plaintiff's trap, that one numbered 781 represents the defendant's location, and the one numbered 382 represents the location of one Soderland. Traps 429 and 382 were located prior to 781, the defendant's trap. The following appears in defendant's answer: "Defendant, however, admits that if base lines were drawn at right angles with the general course of defendant's said trap No. 781, and intersecting the ends thereof, such base lines produced on the side towards

plaintiff's trap No. 429 would cut said trap No. 429 at a distance of from 750 to 875 feet. In other words, this defendant has allowed an area in the form of a rectangle having a total length of 1,800 feet, being 900 feet on each side of the trap and the length of the trap plus 30 feet on each end in width, as incident to each of said traps 429 and 382, which were the traps first originally established, within which area defendant has not located or attempted to locate a new trap; but if the court should hold it to be the law that there must be allowed, as incident to the trap last established, another and further lateral passageway in the form of a rectangle 1,800 feet in length, being 900 feet on each side of the trap and the length of the new trap in width, as incident to the new trap, within which area no part of any trap previously established might lawfully be, then defendant has not allowed such a lateral area for his trap No. 781 on the side thereof towards plaintiff's trap No. 429." From the foregoing it will be seen that the only question raised is whether there is a lawful lateral passageway between defendant's trap 781 and plaintiff's trap 429. The trial court overruled a demurrer to defendant's answer, and the plaintiff having elected to stand upon her demurrer, and having refused to plead further, judgment was entered dismissing the action. The plaintiff has appealed.

It is provided in section 1, c. 140, p. 254, of the Session Laws of 1905, as follows: "There shall be an end passageway of at least thirty feet, and a lateral passageway of at least nine hundred feet between all pound nets, traps, weirs, fish wheels, or other fixed appliances hereafter constructed and placed within the waters of the Columbia river and its tributaries." Such had also been the law since 1893. The contention in this case is as to the application that shall be made of that statute to the locations above described. It is the contention of respondent that the only lateral passageway to be considered is that incident to appellant's trap, designated in the space contained within the parallelogram formed by the two base lines drawn at right angles to the general direction of her trap 429, produced 900 feet on either side of the trap, and by the two lines connecting the same, drawn parallel to the course of the trap 900 feet on either side thereof, as indicated in the diagram. The same contention is made as to location 382, with reference to which a similar parallelogram is drawn in the diagram. It is urged that neither 429 nor 382 can complain of the location of any subsequent trap which falls entirely without those parallelograms, as it will be seen is true of respondent's trap 781. It will be further observed, however, that a similar parallelogram drawn with reference to 781

includes portions of traps 429 and 382. Respondent argues that, although the parallelogram that would under ordinary circumstances be allowed to him by law cuts the other locations, yet that it is his misfortune, due to his being the subsequent locator, and that the other locators cannot complain, since he is not in their territory. When the Legislature said "there shall be * * * a lateral passage way of at least nine hundred feet between all * * * traps * * *," what did it mean? Did it mean that such passageway and measurement shall be considered only with reference to two traps whose general directions are parallel, and whose lateral directions are therefore both facing or in front of each other? Did it mean that, when a trap is so located that it nowhere crosses the plane which extends laterally from another and prior trap and within 900 feet of it, there is no lateral passageway between the two?

Respondent's position is that it was simply intended to accord to each trap, as incident to it, an unobstructed parallelogram 1,800 feet in length, extending 900 feet laterally on either side of it, and that no further or other rights appertaining to lateral passageways are to be considered. This, he says, is true of the prior locator. But he contends that the subsequent locator may locate anywhere without the parallelogram of the former trap, and without reference to his lateral distance from such former trap. This, we think, is clearly unsupported by the statute. The lateral distance of 900 feet is an incident to the subsequently located trap, and must be observed. There is as certainly a lateral direction incident to the new trap as there is to the older one, and we think the statute requires, as plainly as simple Anglo-Saxon words can express it, that every trap shall be so located that there shall be no other trap within a distance of 900 feet laterally therefrom. There is a space between appellant's and respondent's traps. That space constitutes a passageway between the two traps. It is lateral to respondent's trap, and is therefore its lateral passageway. All traps must have a lateral passageway of at least 900 feet, whereas respondent's has less. It is contended that, to determine the location of the lateral passageway between two traps, measurements must be made at right angles from the prior trap only. There is nothing in the statute that warrants this contention. The statute in no way indicates that a subsequent locator shall not make similar measurements from his own trap in order to determine if another existing trap comes within a distance of 900 feet measured laterally from his own. Indeed, we think the manifest purpose of the statute cannot be met without his observance of such measurement, for it clearly means that there must be a distance of 900 feet between all

traps laterally considered from either one. It is argued that the Legislature of 1899 provided a method for measuring end passageways, which required the measurements to be made with reference to prior existing traps. While that is true, yet it has never provided any such method for determining lateral passageways and distances. Appellant cites the case of *Point Roberts Fish Co. v. George & Barker Co.*, 28 Wash. 200, 68 Pac. 438. The case is cited as showing that the court determined the passageway by measurements with reference to the prior trap. The court simply attempted to follow the method designated in the statute, which was complex and difficult to apply. That method was repealed at the session of 1905. But, whatever methods the Legislature may have adopted for determining end passageways, it has never designated any particular method for determining lateral distances and passageways. We see nothing in the above case, or in any others cited, to support respondent's view that he is not required to measure laterally from his own trap to determine if he is within 900 feet of another. Since less than that distance intervenes laterally between his and appellant's traps, both traps cannot lawfully be maintained. Respondent's trap, being the newer one, is therefore the unlawful one.

Respondent's answer admits that his trap has caught salmon that would otherwise, and but for the existence of his trap, have been caught by the appellant's trap; and it is also admitted that such will continue to be the case in the future, if respondent's trap is maintained at its present location. Under the previous decisions of this court appellant is therefore entitled to maintain this action to enjoin the maintenance of respondent's trap at its present location. What may have been the policy or purpose of the Legislature in requiring these passageways is immaterial. Appellant argues that, with reference to the waters of Baker's Bay and the Columbia river, it was for the purpose of giving a greater number of fish an opportunity to escape the traps and proceed up the river to spawn, thereby perpetuating a greater number of fish for future years. The additional argument might be applied to Puget Sound, that the larger passageways there required were intended to serve the purposes of navigation. But whatever may have been the purpose was a matter of legislative policy, and the duty of the courts is to see that the requirements are observed.

The judgment is reversed, and the cause remanded, with instructions to vacate the judgment and enter an order sustaining the demurrer to the answer.

MOUNT, C. J., and CROW, ROOT, and DUNBAR, JJ., concur.

(41 Wash. 314)

COOK v. STIMSON MILL CO.

(Supreme Court of Washington. Jan. 5, 1906.)

1. EVIDENCE—OPINION EVIDENCE—COMPETENCY OF WITNESSES.

A brakeman of something over 2½ years' experience and a fireman of about the same experience are not qualified as experts to estimate the speed of a logging train at the time it was wrecked, based on their observation of the conditions surrounding the wreck.

2. SAME—FACTS FORMING BASIS OF OPINION.

The opinion of a witness as to the speed of a train at the time it was wrecked by running into cattle on the track, based wholly on his observations of the conditions surrounding the wreck, and without taking into effect the facts attending on the operation of the train at the time it struck the cattle as to whether an effort was made to stop the train or whether it was thrown full speed ahead, and whether all the trucks left the track at the same time, was inadmissible.

3. APPEAL—SUBSEQUENT APPEALS—LAW OF THE CASE.

Where there is substantially no difference in the facts disclosed at two trials of a cause, the opinion of the Supreme Court on appeal from the judgment rendered at the former trial is the law of the case as to all questions therein decided.

Appeal from Superior Court, Snohomish County; George A. Joiner, Judge.

Action by Charles Cook, as guardian of Joseph Cook, a minor, against the Stimson Mill Company. From a judgment for plaintiff, defendant appeals. Reversed.

See 78 Pac. 39.

Graves, Palmer, Brown & Murphy and Robert A. Hulbert, for appellant. Cooley & Horan, for respondent.

RUDKIN, J. This is an action to recover damages for personal injuries suffered by Joseph Cook, a minor, while riding on one of the defendant's logging trains. The case was before this court on a former appeal, and will be found reported in 36 Wash. 36, 78 Pac. 39. We deem it sufficient to say, in addition to the statement of the case contained in the former opinion, that one of the grounds of negligence charged was that the train was running at an unusually high and dangerous rate of speed at the time of the accident, to wit, at the rate of 40 miles per hour. The plaintiff had judgment below, and the defendant appeals.

At the time of the accident which caused the injury complained of a logging train operated by the appellant, consisting of an engine, tender, and eight cars loaded with logs, was approaching one of its camps. As the train rounded a curve, the fireman, who occupied a position on the engine toward the inside of the curve, discovered some cattle on the track about 100 feet ahead of the train. He immediately sounded the whistle, and, by the time the engineer could see the cattle from his position on the engine toward the outside of the curve, the train was within about a rail's length of them. Be-

lieving that he could not stop the train before striking the cattle, and that any attempt on his part to do so would result in piling the logs from the cars on top of the engine, the engineer threw open the throttle in order to strike the cattle as hard as possible, deeming this the safest and best course under the circumstances. When, or soon after, the train struck the cattle, the forward trucks of the engine, the trucks of two of the cars, and one of the trucks of a third car left the rails. The engineer kept the engine moving ahead as best he could, to prevent the logs from piling on top of the engine. After the train had proceeded from 500 to 700 feet from where it struck the cattle it stopped, and the logs forced the tender up against the engine and crushed the respondent's foot or leg, causing the injury which constitutes the subject-matter of this controversy.

One of the controverted questions at the trial was the rate of speed at which the train was moving at the time the cattle were discovered on the track; the appellant claiming that the train was running from 12 to 15 miles an hour, the respondent claiming that the rate of speed was much higher. To prove the rate of speed, the respondent called two witnesses, neither of whom was present or saw the accident. The witness Friermood was in the employ of the appellant for about eight months in all. How long prior to the accident does not appear. His experience in railroading is shown by the following answer to a question propounded to him: "I was working in the shops for a while, I fired engine a while, and I was braking a while." Between the time of the accident and the second trial of this case the witness was in the employ of the Northern Pacific Railroad Company for a period of about 2½ years in the capacity of brakeman. The following are some of the questions propounded to this witness on his direct examination, together with the objections thereto, the court's rulings, and the answers given: "Q. What was the condition that you found there of the logs upon the first set of trucks back of the engine? A. When I got down there, I found they had shifted forward and shoved the tank into the cab, and some of them were as far as the front of the engine. Q. How do you mean? A. Shoved by the tank. Q. Pushed right by? A. Right by the tank, and as far as the front of the engine. Q. What would that indicate, if anything, as to the speed at which the train was going previous to the time when it was stopped, or at the time when the cattle were struck? (Mr. Graves: Objected to upon the ground that the witness has not shown himself competent to answer such a hypothetical question or give an opinion upon those facts. Overruled. Defendant excepts.) A. It looks to me like the speed would be rather swift down there; engine started suddenly and the logs shifted that way. Q. From the conditions that you found existing there at the

time when you went down to the wreck, the distance which the train had apparently run after striking the cattle, and the general condition in which you found it, could you form any opinion as to the rate of speed at which that train was running when it jumped the track? A. Well, I should think that— (Mr. Graves: Just answer 'Yes' or 'No.') Q. Yes; as to whether you can give an opinion. A. Yes, sir; I can give an opinion. Q. What, in your opinion, was the speed at which that train was running at the time when the cattle were struck? (Mr. Graves: We object to that, may it please your honor, that the witness has not shown that he is in any manner qualified to give an opinion upon such a state of fact, and that his opinion would be entirely valueless as to what the rate of speed might have been. Overruled. Defendant excepts.) A. In my opinion, the speed was about 30 miles an hour. Q. Now, in your opinion, was that a safe rate of speed to maintain in coming down that grade? A. No, sir. Q. Would the engineer have his engine under control going at that rate of speed? A. No, sir; not with a logging train. (Mr. Graves: We move to strike out this last answer and question the witness answered, upon the same ground as our objection to the questions above, that the witness is not competent to express an opinion, and the further reason that there is no one would be competent to express an opinion from such facts as this witness saw. The Court: Motion denied. Defendant excepts.) The experience of the witness Davis was about the same as that of the former, excepting that he was a fireman, instead of a brakeman. His testimony with the objections thereto was as follows: "Q. What, in your judgment, was the rate of speed at which that train was running when it jumped the track? (Objected to upon the ground that the witness is not competent, and there are no facts in the case or stated in the question that would enable a witness to form an opinion that would be of any value as evidence in this case. Overruled. Defendant excepts.) A. I should think 30 or 35 miles on hour."

It seems to us that the foregoing testimony was incompetent and should have been excluded. It either requires no expert knowledge to enable one to draw an inference as to the rate of speed of a train from the conditions surrounding a wreck caused by it, or the witnesses in this case were not shown to possess such expert knowledge. In the former case any inference to be drawn was for the jury alone and the testimony would be incompetent. In the latter case the witnesses themselves were incompetent and their testimony should have been excluded. Furthermore, all the conditions attending upon the stopping of the trains were not known to the witnesses, nor were they embodied in the questions propounded to them. Whether an effort was made to stop the train,

or whether it was thrown full speed ahead, and whether all the trucks left the track at the same time, would necessarily have an important bearing on the wreckage produced by the stoppage of the train, and yet these facts were wholly unknown to the witnesses and were not taken into consideration by them in forming the expert opinion. The question here involved was not the rate of speed of a train which a witness sees in motion and has an opportunity to observe, nor the distance in which a train may be stopped under ordinary conditions, nor any other question relating to the ordinary operation of trains, or the duties of trainmen, with which railroad men are presumed to be familiar. The conditions were abnormal and unusual, and it certainly cannot be said that a few months' experience around a logging camp, or a couple of years' experience in braking or firing of itself qualifies one to express an opinion in such a case. If expert testimony is competent at all to establish the rate of speed in a case like this, such testimony must come from witnesses whose knowledge is derived from the observance of similar wrecks under similar circumstances, where the witnesses are familiar with the causes which produced them.

In *Northern Pac. R. Co. v. Hayes*, 87 Fed. 131, 30 C. C. A. 576, the trial court permitted a person struck by a train to state his opinion as to the rate of speed of the train which struck him at the time of the accident. The Circuit Court of Appeals held that this was error, saying: "The speed of the train which backed into the yard that night, and which struck the plaintiff, was a material question at issue, and much disputed on the trial. The plaintiff did not see the train at all. He was walking in the same direction, ahead of it, and was struck in the back, and thrown, he thinks, 20 or 30 feet; and he says he was never struck by a train before in that way, and had nothing to judge of as to the speed, except that one blow. Nevertheless he was allowed, against the defendant's objection, to give his opinion of the speed of the train, which he says was very fast, and, he would judge, between 15 and 20 miles an hour. We think this was error. He was simply guessing at the distance he was thrown, and from this, and from the force of the blow on his shoulder, he guessed at the speed of the train. It can hardly be assumed that the jury would not be influenced in any degree by such testimony. Indeed, the very fact that it was held competent, and permitted to be given to the jury, would naturally be taken by them as a warrant that some credit might or should be given to an opinion so poorly founded. It is elementary that the admission of illegal evidence over objection necessitates a reversal. *Waldron v. Waldron*, 156 U. S. 330, 15 Sup. Ct. 383, 39 L. Ed. 453, and cases cited. In order that the court may not disturb a

judgment for error, it should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party objecting. *Railroad Co. v. O'Reilly*, 158 U. S. 337, 15 Sup. Ct. 830, 39 L. Ed. 1006." And yet it would seem that a person struck by a moving train could form as accurate an opinion as to the rate of speed as the witnesses in this case who simply viewed the wreck. In *Hellyer v. People* (Ill.) 58 N. E. 245, it was held error to permit physicians to testify as to whether certain injuries could have been inflicted by a railroad train running at the rate of 35 miles per hour. In *Chicago & A. R. Co. v. Lewondowski* (Ill.) 60 N. E. 497, it was held improper to permit railroad men or others to testify that a person could or could not be struck by a freight train running at the rate of 25 or 30 miles per hour and survive. In the former case the court said: "The subject of the proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a correct judgment. In regard to such matters experts are not permitted to state their conclusions. In questions of science their opinions are received, for in such questions scientific men have superior knowledge, and generally think alike. Not so in matters of common knowledge. *Railroad Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. 'Whenever the subject-matter of inquiry is of such a character that it may be presumed to lie within the common experience of all men of common education moving in the ordinary walks of life, the rule is that the opinions of experts are inadmissible, as the jury are supposed in all such matters to be entirely competent to draw the necessary inferences from the facts testified of by the witnesses.' *Rog. Exp. Test.* § 8; *Railway Co. v. Webb*, 142 Ill. 404, 32 N. E. 527. As a general rule, the opinions of witnesses are not to be received in evidence merely because such witnesses may have had some experience, or greater opportunities of observation than others, unless such opinions relate to matters of skill and science. *Robertson v. Stark*, 15 N. H. 109; *Marshall v. Insurance Co.*, 7 Fost. 157; *Insurance Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684; *People v. Bodine*, 1 Denio, 281; *Westlake v. Insurance Co.*, 14 Barb. 206; *Smith v. Gugerty*, 4 Barb. 614; *Folkes v. Chudd*, 3 Doug. 157; 1 *Smith, Lead. Cas.* (5th Am. Ed.) 630; *Daniels v. Mosher*, 2 Mich. 183." In *Briggs v. Minneapolis St. Ry. Co.*, 52 Minn. 36, 53 N. W. 1019, the court says: "Courts have gone far enough in subjecting life, liberty, and property to the mere speculative opinions of men claiming to be experts, and we are not disposed to extend the rule into the field of mere hypothetical conjecture, which, in the case like the present, must necessarily have been so uncertain and unreliable as to be purely conjectural, and utterly unsafe for either court or jury to adopt." See, also,

the following cases: *Hopper v. Empire City Subway Co.* (Sup.) 79 N. Y. Supp. 909; *Culbertson v. Metropolitan St. Ry. Co.* (Mo. Sup.) 36 S. W. 840; *Smith v. Minneapolis St. Ry. Co.* (Minn.) 97 N. W. 881; *Mammerberg v. v. Street Ry. Co.*, 62 Mo. App. 566; *Koehler v. N. Y. Steam Co.* (Sup.) 75 N. Y. Supp. 597.

All the other errors discussed were before this court on the former appeal. There is substantially no difference in the facts disclosed at the two hearings, and the former opinion has therefore become the law of the case as to all questions there decided.

For the error in the admission of testimony, the judgment is reversed and a new trial ordered.

MOUNT, C. J., and HADLEY, FULLERTON, CROW, and DUNBAR, JJ., concur. ROOT, J., having been of counsel, did not participate herein.

CLAMBEY v. CORLISS et al.

(Supreme Court of Washington. Jan. 5, 1906.)

MORTGAGE—RELEASE AND DISCHARGE—SURETYSHIP AGREEMENTS — PRIMARY OBLIGATIONS.

Where plaintiff, pursuant to agreement, advanced to defendant and a corporation a single sum of money, part of which was applied to the discharge of liens on lands owned by defendant, and another part was paid into the corporation's treasury to aid it in carrying on its business, and further transferred to defendant certain shares of stock, all in consideration of the delivery to plaintiff of first mortgage bonds of the corporation and the execution by defendant of a mortgage to secure such bonds, the mortgage executed by defendant was an original primary security for the repayment to plaintiff of the money furnished by him, and the payment to him of the value of the stock transferred to defendant, and was not a mere surety obligation to secure the debt of the corporation to plaintiff.

Appeal from Superior Court, Island County; Geo. C. Hatch, Judge.

Action by A. H. Clambey against Jennie Corliss and others. From a judgment in favor of plaintiff, defendant named appeals. Affirmed.

George McKay, for appellant. S. S. Langland and S. D. King, for respondent.

HADLEY, J. This action was instituted to foreclose a mortgage upon real estate. One of the defendants, Jennie Corliss, interposed a defense. She became the holder of the mortgaged land by virtue of a quitclaim deed executed by the mortgagor subsequent to the giving of the mortgage. In her answer she avers that the plaintiff has released and discharged the mortgage. The cause was tried upon an agreed statement of facts, which showed that, on April 24, 1902, the plaintiff in the action and the defendants C. W. Corliss and the Patentee's Manufacturing Company, a corporation, entered into a tripartite written agreement. By the terms of that agreement the plaintiff agreed and promised to pay to the other two parties to the agreement

the sum of \$5,200, of which sum the agreement states \$1,000 was to be paid to one Cantrell for a purpose specified, but not stating on whose account or for whose obligation it was to be so paid. It was also specified that such portion of the \$5,200 as should be necessary for the purpose should be applied to the discharge of all liens or claims against certain lands of said C. W. Corliss. All of the balance of the \$5,200 was to be paid into the treasury of said Patentee's Manufacturing Company to carry on its work of manufacturing. The agreement also provided that the plaintiff should assign to said C. W. Corliss all of plaintiff's stock in the Snoqualmie Boom Company. In consideration of the plaintiff's part of said agreement, viz., the payment of the \$5,200, and the assignment to said Corliss of the stock, the corporation agreed to issue bonds in the sum of \$10,000, secured by a first mortgage on all its property, and that it would deliver to the plaintiff bonds in the sum of \$6,000. Said Corliss also agreed that, to secure said \$6,000 of bonds, he would execute a mortgage to plaintiff upon certain land, and would also assign to him 55,000 shares of the capital stock of said corporation. Said agreement was fully carried into effect, and the mortgage given by Corliss in pursuance of the agreement is the one now sought to be foreclosed. Thereafter the said corporation was insolvent and unable to meet its obligations, and it entered into an agreement with creditors, including the plaintiff, whereby it transferred all its property to one Campbell, as trustee. In pursuance of the trust arrangement, the trustee sold the property and distributed the proceeds as provided in the agreement. The trustee paid to plaintiff \$898.75, to be applied upon the indebtedness represented by said bonds. It is stipulated that no release of the mortgage in suit was ever demanded, and that no release has ever been made, unless the facts agreed upon amount in law to a release. The court found that \$146.60 was paid by the trustee to unsecured creditors, and that as the plaintiff has an interest in the company's first mortgage upon all its assets securing the bonds to the extent of six-tenths thereof, that portion of said last-named sum should, therefore, have been applied to reduce the amount of plaintiff's claim as secured by the mortgage in suit; and it was accordingly so reduced. The plaintiff was awarded foreclosure for the unpaid balance, according to the terms of the mortgage. The defendant Jennie Corliss has appealed.

Appellant in her answer simply alleges that the plaintiff has released and discharged the mortgage. No other affirmative allegation appears in the answer. She does not contend that any release was ever entered of record, or that any other direct and specific release was made between the parties. Her contention is that the mortgage was given as a collateral or surety obligation only, to secure the debt of another owing to the

plaintiff, and that she, as the holder of the land, is entitled to urge the release of the mortgage as a surety obligation through operation of law, by reason of certain acts of the mortgagee done with the consent of the principal debtor. The facts upon which she bases her claim that the mortgage has been released are not pleaded in her answer. Inasmuch as she seeks to raise the question of suretyship, the respondent suggests that she has not sufficiently brought that matter into the issues made by the pleadings. In view of the statutory provision found in section 5707, Ballinger's Ann. Codes & St., it might be so argued; but as the case was tried upon an agreed statement of facts, we shall eliminate that subject from our discussion of the case. Appellant in her argument concedes that the questions raised by her are reducible to one, viz.: Was the plaintiff's mortgage discharged by reason of the facts? Her contention is that the mortgage given by Corliss, her grantor, was only a surety obligation given to secure the debt of the Patentee's Manufacturing Company. She urges that the transfer of the assets of that insolvent corporation to a trustee, the subsequent sale thereof, and the application of the proceeds upon the debt secured by its mortgage, without foreclosure of the latter, should be held to have discharged the mortgage in suit. She does not allege, and it is not shown, that the sale of the assets was not for reasonable value, or that she has been injured by a sale for an inadequate sum. She only contends that the mortgage is a surety contract, and that the contractual relations have been so modified and changed that the surety has been released. From the stipulated facts we do not think it should be held that the mortgage sustained the mere relation of a surety to the original transaction. The written agreement which led to the making of this mortgage states that it was made with both the manufacturing company and Corliss, and no reference is made to the former as a principal or the latter as a mere surety. It is drawn in form as an ordinary joint agreement, making no distinction as to the obligation of one from the other. It recites that the plaintiff agreed to pay to both parties, not to the company only, \$5,200. More than that, it specifically recites that a part of the money, the amount not specified, should be used to pay liens and claims against the land of Corliss. That was a direct consideration moving to Corliss and for his benefit. It also recites that the respondent should assign certain boom company stock to Corliss. With these specified considerations moving to Corliss, he agreed to and did execute the mortgage in suit. The respondent's relation to the matter was simply that he agreed to pay and did pay to both the other parties \$5,200, and he also assigned the boom company's stock to Corliss. It was to respondent a single and entire transaction, and he was to receive and did receive in return for what he paid and assigned, bonds of the

corporation in the face sum of \$6,000, secured by the company's mortgage on its assets, and by the Corliss mortgage on this land. We, therefore, think the Corliss mortgage was not collateral to the other, and that it was not intended as mere surety for the other, but that it was as much primary security to respondent as was the company's mortgage. There were simply two mortgages given by different parties to secure the same thing, viz., the payment of the money furnished by respondent, and the value of the assigned boom company's stock. Both mortgagors were beneficially interested in the thing secured. The company's mortgage secured \$4,000, in addition to the \$6,000 held by respondent; but the Corliss mortgage secured nothing but the \$6,000, which he agreed to secure, and which amount the agreement says was to be paid to both him and the company. Neither mortgage was collateral, but each was original, since it was made in consideration of a benefit and advantage peculiar to the mortgagor. Stearns on Law of Suretyship, § 39.

Since we view the relations of the parties as above stated, it is unnecessary for us to discuss other questions relating to the defense of suretyship, which have been discussed in appellant's brief. We think it was not error to decree foreclosure of the mortgage, and the judgment is affirmed.

MOUNT, C. J., and FULLERTON, CROW, RUDKIN, and DUNBAR, JJ., concur.

DOWNS FARMERS' WAREHOUSE ASS'N v. PIONEER MUT. INS. ASS'N.

(Supreme Court of Washington. Jan. 5, 1906.)

1. APPEAL — STATEMENT OF FACTS — SIGNATURE BY JUDGE.

Ballinger's Ann. Codes & St. § 5058, provides that, if no amendment to a proposed statement of facts be served within a specified time, it shall be deemed agreed to, and shall be certified by the judge at the instance of either party; and Sess. Laws 1901, p. 77, c. 57, § 2, provides that any judge of the superior court who shall have heard any cause in any county out of his district may decide the same in any county in the state. *Held* that, where a cause was tried before a visiting judge and no amendments were proposed to a proposed statement of facts, it was proper for the judge to certify it while in his own county and without the judicial district where trial was had.

2. INSURANCE — FIRE LOSS — SUBROGATION — INSURED'S INABILITY TO ASSIGN CAUSE OF ACTION.

Where insured, in a fire policy providing for an assignment to insurer of any cause of action for a loss by fire, agreed by contract with a railroad company to relieve it from liability for any damage to insured's building from fire set by sparks, etc., insured could not recover on the policy for a loss resulting from fire set by sparks escaping from a locomotive of the railroad company.

Appeal from Superior Court, Lincoln County; W. O. Chapman, Judge.

Action by the Downs Farmers' Warehouse Association against the Pioneer Mutual Insur-

ance Association. From a judgment in favor of plaintiff, defendant appeals. Reversed.

H. T. Granger, for appellant. Martin & Grant, for respondent.

CROW, J. This action was commenced by the Downs Farmers' Warehouse Association, a corporation, respondent, against the Pioneer Mutual Insurance Association, a corporation, appellant, to recover the sum of \$2,000, upon a fire insurance policy issued by appellant upon a certain warehouse and contents on the line of the Great Northern Railway, at Downs, in Lincoln county, which was totally destroyed by fire on June 6, 1904. The complaint was in the usual form for an action upon a fire insurance policy. Appellant, as an affirmative defense, alleged that said policy contained the following condition: "If this association shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this association shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the member for the loss resulting therefrom, and such right shall be assigned to this association by the member on receiving such payment." That subsequent to the issuance of said policy, and prior to the date of said fire, respondent entered into a certain written contract with the Great Northern Railway Company, for a license to enter upon and occupy the premises upon which said warehouse was located, which said contract in part provided as follows: "In consideration of the premises, said party of the second part does hereby consent and agree to and with the said party of the first part that it will forever protect, save harmless and indemnify said first party from all damages or liability whatsoever which shall or may be during the existence of this agreement, caused by or result from the frightening of horses or other animals of said second party or belonging to any other person while upon said premises, by locomotives or cars, fire, coal or sparks escaping or being scattered from the engines or trains of said first party while being operated on its main spur or side tracks, in hauling empty or loaded cars to and from said premises above described, or from engines on tracks passing said premises on said main or side tracks, and for said consideration said party of the second part does further consent and agree to defend and save harmless said first party from all suits, costs, damages and expenses, which may or shall be brought on account of or result from fire caused by sparks or coal escaping or being scattered from the engines and trains of the first party while operating its main or side tracks to, by or from said premises." That the party of the first part, in said contract mentioned, was the Great Northern Railway Company, and the party of the second part was respondent. That the fire which caused the destruction of said warehouse was caused by the act of the Great Northern Rail-

way Company by reason of sparks from an engine operated by it falling upon and igniting said building. That in its proof of loss respondent stated, under oath, that said fire was so caused, and that by reason of the contract between respondent and said railway company respondent has been prevented from assigning to appellant any right of action which it might otherwise have against said railway company for damages arising out of said fire, and appellant has been deprived of its right to be subrogated to such right of action. Trial was had before the court and a jury, and upon a verdict in favor of respondent final judgment was entered, from which this appeal has been taken.

Respondent has moved to strike the statement of facts, for the reason that the judge who certified the same was not in Lincoln county, the place of trial, nor in the judicial district of which said county is a part, at the time of making his certificate. In support of this motion respondent cites *Prospectors' Development Co. v. Brook*, 31 Wash. 187, 71 Pac. 774, in which it appears that the respondent had proposed amendments to the appellant's proposed statement of facts after it had been filed and served. Here no amendments were proposed, which fact differentiates this case. This cause was tried before Hon. W. O. Chapman, judge of the superior court of Pierce county, as visiting judge in Lincoln county. No amendments having been proposed to appellant's proposed statement of facts, it became the duty of the trial judge to certify said statement, without notice. *Ballinger's Ann. Codes & St. § 5058*. This being true, it was not necessary for the respondent to be present when such certificate was made, no hearing being contemplated; hence, said statement of facts was properly certified by said visiting judge while in his own county. Section 2, c. 57, Sess. Laws 1901, p. 77. The motion is denied.

After the evidence of appellant and respondent had been introduced, appellant challenged its sufficiency and moved the court to direct a verdict in its favor. This motion was denied, and appellant's only assignments of error are that the court erred in denying said challenge and motion, and in refusing a new trial. These assignments of error raise but one question: Was the evidence sufficient to sustain the verdict rendered or to justify the court in submitting any issue of fact to the jury? After a careful examination of the entire record, we conclude the court erred in refusing to sustain such challenge. There is no dispute but that the policy contained the clause above mentioned. The undisputed evidence fully sustains the allegation of the answer to the effect that respondent entered into the written contract with the railway company as pleaded by appellant. In its first letter to appellant, giving notice of the fire, respondent said: "Our warehouse burned last Monday evening between seven and eight o'clock. Caught

from east-bound passenger train. It threw sparks upon the roof." Thereupon appellant immediately sent its representative to Downs to adjust the loss, and wrote respondent, asking its co-operation in a joint action against the railway company for damages, and also in securing evidence to support such action. Considerable correspondence took place between the parties, when finally the president of the warehouse association, in a letter to appellant, inclosed what purported to be a written copy of its contract with the railway company. This copy, made by said manager himself, contained the identical clause pleaded in appellant's answer. On the trial there was some contention upon the part of respondent to the effect that it had not entered into any contract with the Great Northern Railway Company, but the undisputed evidence sustained appellant's allegation that such contract was made. As the evidence, therefore, shows the issuance of the policy with the clause above mentioned, and that respondent afterwards entered into said contract with the Great Northern Railway Company, it was impossible for respondent to assign to appellant any valid claim against the said Great Northern Railway Company for damages sustained by reason of said fire. The policy provided that, if the insurance association should claim the fire to have been caused by the act of any other person or corporation, then, on payment of loss, the assured should assign to said insurance association any claim against such other person or corporation. This is a valuable clause in the policy, and one which has been enforced by the courts. The effect of the assured releasing the railway company from liability was to put itself in a position where it could not comply with this subrogation clause, and for that reason the making of the contract with the railway company invalidated the insurance policy in the event of loss by fire caused by any act of the railway company. This destroyed a valuable right given to the insurance association by and through which it could otherwise sue the railway company and recoup itself for the loss which it might pay to the assured. "An insurance company which has indemnified the owner of property for loss incurred by him is entitled to all the means of indemnity which the latter had against the party primarily liable, to the extent of the payment, and it may therefore bring and control, in the name of the insured, a suit against the wrongdoer who has occasioned the loss." 4 Current Law, p. 220. "When the insured covenants that on receiving payment he will assign to the company any claims he may have against any one whose negligence or fault may have caused the loss, refusal of the insured to make the assignment before or concurrent with the payment is a good defense to a suit." 2 May on Insurance (4th Ed.) § 454, p. 1056. "The law

is well established that an insurance company which has been compelled to pay, or has paid, a loss covered by its policy, has, after such payment, a right of action against the person who wrongfully caused the fire and loss to the amount such insurance company paid, even without any formal assignment by the assured of his claim against the party primarily liable. And the courts have likewise been very firm in supporting the right of the insurance company to bring an action in the name of the assured, and will not allow the latter to defeat such action even by a release or discharge of the person by whose act the damage was occasioned." 2 Wood on Fire Insurance (2d Ed.) § 500, p. 1085. In *Kennedy v. Iowa State Ins. Co.* (Iowa) 91 N. W. 831, 832, the Supreme Court of Iowa said: "Whether an insurance company, having paid a loss under a policy issued by it, is entitled by subrogation to recover the amount paid by it from the railway company through whose negligence the fire occurred, although no provision is made for it in the policy, we are not called upon to determine. It was competent for the parties to incorporate such a provision in the contract of insurance, and that was done in this instance. Now, of course, there can be no such thing as subrogation where the party insured has contracted away all right of recovery as against the railroad company, and it follows in reason and from authority that, where it appears the insured has contracted away the right of the insurance company to subrogation without its knowledge and consent, he cannot recover, in case of loss, upon the policy." See, also, *Sims v. Mutual Fire Ins. Co.* (Wis.) 77 N. W. 908; *Bloomington v. Columbia Ins. Co.* (Sup.) 84 N. Y. Supp. 572.

Some contention is made by the respondent to the effect that it did not know of this clause in the policy, as its attention was not called to the same until after the fire. Respondent, however, sued upon the policy, and in its pleadings failed to allege such want of knowledge or any fraudulent act on the part of appellant. A contract of insurance, with or without such a clause, is a contract of indemnity. Under the law, an insurance company, upon payment of the loss, would be equitably entitled to be subrogated to all rights of an assured against any other person causing the fire, to the extent of such payment by the insurer. Any voluntary act upon the part of the assured destroying such right of subrogation should relieve the insurer from liability. We are unable to find any conflict in the evidence sufficient to authorize the submission of any issue of fact to the jury. The jury returned a verdict in favor of respondent. Such verdict is not supported by the evidence, and cannot be permitted to stand. The undisputed evidence, much of it in written form, taken in connection with conceded facts, constitutes a complete bar to any right of recovery on the

part of respondent. There was no question for the jury. It was simply the duty of the court to apply the law to undisputed facts. The challenge to the sufficiency of the evidence should have been sustained, and a verdict in favor of appellant should have been directed.

The judgment is reversed, and the cause remanded, with instructions to enter judgment in favor of appellant.

MOUNT, C. J., and ROOT, HADLEY, FULLERTON, and DUNBAR, JJ., concur.

VAKTAREN PUB. CO. v. PACIFIC TRIBUNE PUB. CO.

(Supreme Court of Washington. Jan. 5, 1906.)

APPEAL—ORDER STRIKING COMPLAINT.

An order striking the complaint from the files, on the ground that it contains several causes of action not separately stated, is not final, as plaintiff may file an amended complaint, and therefore is not appealable.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by the Vaktaren Publishing Company against the Pacific Tribune Publishing Company. From an order striking the complaint from the files, plaintiff appeals. Dismissed.

Gaffney & Berg, for appellant. Bausman & Kelleher, for respondent.

FULLERTON, J. The appellant and respondent each own and publish a newspaper in the city of Seattle. The appellant brought an action against the respondent, alleging that the respondent had by deceit and fraud obtained possession of the appellant's mailing lists, and had used the same for the purpose of enticing away its subscribers. It was further alleged that the respondent had sent its own newspaper to such subscribers, and had published therein false, defamatory, and scurrilous articles concerning the appellant's newspaper, and its management, standing, and integrity, and had thereby induced the appellant's subscribers to quit the appellant's paper and subscribe for the respondent's paper to the loss and damage of the appellant in the sum of \$20,000, in which amount it demanded judgment. In response to the summons served upon it, the respondent made a general appearance in the action, and moved the court to strike the complaint from the files of the court, for the reason that it contained two or more causes of action which were not separately stated. This motion was granted by the court, and the appellant conceiving itself aggrieved thereby has appealed therefrom.

The respondent moves to dismiss the appeal, on the ground that the order appealed from is not an appealable order. This motion must be granted. An order entered before final judgment, to be appealable un-

der the statute, must in effect determine the action and prevent a final judgment, or it must discontinue the action. This order, in effect, did neither. It simply determined that the complaint was insufficient in form, not that the appellant had no cause of action. The statute expressly provides that the court may allow an amended pleading to be filed where the original is stricken because it contains more than one cause of action or defense and the same are not pleaded separately. The appellant, therefore, had the right, when the motion to strike was sustained, to elect whether it would stand on its complaint and allow judgment to be taken against it, or whether it would amend and make its complaint conform to the court's idea of good pleading. As it did neither, the case was still pending in that court, neither discontinued nor determined, when it attempted to appeal to this court. It should have allowed judgment of dismissal to be taken against it, and appealed from that judgment. The condition of the case is analogous to that where a demurrer has been sustained to a complaint, and we have repeatedly held that an appeal will not lie from such an order. *McElwain v. Huston*, 1 Wash. St. 359, 25 Pac. 465; *Olsen v. Newton*, 3 Wash. St. 429, 30 Pac. 450; *Mason County v. Dunbar*, 10 Wash. 163, 38 Pac. 1003; *Padley v. Gregg*, 26 Wash. 322, 67 Pac. 72.

The appeal is dismissed

MOUNT, C. J., and ROOT, CROW, DUNBAR, and HADLEY, JJ., concur.

DURK v. SCULLY et al.

(Supreme Court of Washington. Jan. 5, 1906.)

1. APPEAL AND ERROR — JURISDICTION — AMOUNT IN CONTROVERSY.

Under Const. art. 4, § 4, providing that the appellate jurisdiction of the Supreme Court shall not extend to civil actions for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of \$200, where, after entry of a judgment and prior to the issuance of a writ of garnishment thereon, defendant debtor reduced by a payment the amount of the judgment to less than \$200, the Supreme Court was without jurisdiction of an appeal from a judgment in the garnishment proceedings.

2. SAME—RIGHT OF APPEAL.

A judgment in garnishment proceedings decreeing that an intervener therein was entitled to receive the money in controversy in the hands of the garnishee in a certain sum was not a judgment against the garnishee, from which the latter could appeal.

3. SAME—FAILURE TO AWARD COSTS—EFFECT AS TO RIGHT OF APPEAL.

Under Const. art. 4, § 4, limiting the appellate jurisdiction of the Supreme Court to civil actions wherein the amount in controversy exceeds the sum of \$200, the refusal to award costs to garnishee, even though he be entitled to them, does not give him the right of appeal from a judgment decreeing an intervener in the ac-

tion entitled to the sum of \$225 in the garnishee's hands.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by H. O. Durk against M. C. Scully and another; Fidelity Deposit & Trust Company, garnishee, and American Savings Bank & Trust Company, intervener. From the judgment, plaintiff and garnishee appeal. Appeal dismissed.

Allen, Allen & Stratton, for appellant Durk. Wilshire & Kenaga, for appellant deposit company. Roberts & Leehey and L. V. Ray, for respondent trust company.

PER CURIAM. In November, 1903, the appellant H. O. Durk recovered a judgment against M. C. Scully for the sum of \$250 and costs of action, amounting to \$17.20. Thereafter he sued out a writ of garnishment and caused the same to be served on the appellant Fidelity Deposit & Trust Company, requiring it to answer what amount, if any, it was indebted to Scully, and what effects, if any, it had in its possession or under its control belonging to Scully. The garnishee answered to the effect that it did not have any money or property which to its knowledge belonged to Scully, but that, to secure it against its liability for becoming surety on the bond of Scully, Scully had delivered to it a certified check of \$1,000 drawn on the American Savings Bank & Trust Company by the Queen City Cigar Company, which it had afterwards cashed; that after the service of the writ upon it, but prior to the time of the release of the obligation it had entered into on behalf of Scully, it had been notified that the money was the property of the Queen City Cigar Company and had been assigned and transferred to the American Savings Bank & Trust Company by the cigar company; that it had thereupon paid over to that company \$775 of the money, but held \$225 thereof pending the determination of the ownership of the same. Durk controverted the answer, contending that the money was the money of Scully, that Scully and the Queen City Cigar Company was one and the same person, and that the garnishee was liable to answer to the amount of his judgment, notwithstanding the assignment. Pending the trial of this issue the American Savings Bank & Trust Company asked and obtained leave to intervene in the proceeding, and thereafter filed its pleading therein, claiming to own the money by virtue of the assignment made to it by the Queen City Cigar Company. This pleading was also controverted by Durk. Thereafter the issues were tried out before the court, and resulted in the following judgment: "This cause having regularly come on to be heard, before the Honorable Arthur E. Griffin, one of the judges of this court, on the 13th day of September, 1904, * * * by agreement of all parties,

a jury was waived, and the case submitted for trial to the court. Plaintiff introduced his evidence and rested, intervener introduced his evidence and rested, and the garnishee, through its counsel, having stated to the court that it took issue with neither party, and the court, after having heard the evidence offered, the arguments of counsel, and being fully advised in the premises, finds upon the issues joined, that the money in question, to wit, the sum of two hundred twenty-five dollars, in the hands of the Fidelity & Deposit Company of Maryland, garnishee, belongs to the intervener, American Savings Bank & Trust Company, a corporation, and that said corporation is entitled to recover the same, and that the garnishee, the Fidelity & Deposit Company of Maryland, has not, and did not have, in its possession, or under its control, when served with garnishment summons, any money belonging to M. C. Scully, and was not indebted to him, and that said garnishee should be discharged as garnishee herein upon its answer, and the evidence offered. It is therefore ordered, adjudged, and decreed that the intervener, American Savings Bank & Trust Company, a corporation, is entitled to receive the money in controversy in the hands of the garnishee, in the sum of two hundred twenty-five dollars, and to recover from plaintiff herein its costs, taxed at \$——. That the garnishee, Fidelity & Deposit Company of Maryland, be, and is, hereby discharged as garnishee without costs of any kind to be taxed against said garnishee." From this judgment Durk and the garnishee both appeal.

On the trial it appeared that prior to the issuance of the writ of garnishment Scully had paid to Durk \$100, to be credited on the judgment, and that there was at the time the writ was sued out less than \$200 due thereon, and that the amount now in controversy in this proceeding is, and at all times has been, less than \$200. Based on this fact the respondent moves to dismiss this appeal on the ground that this court is without jurisdiction. We think the motion must be granted. This is an action at law to recover money, and, as the amount in controversy is less than \$200, this court is without jurisdiction by virtue of section 4 of article 4 of the state Constitution.

The garnishee appellant contends that as to it the amount in controversy is \$225, and that a judgment has been entered against it for that amount. But the appellant is mistaken as to the effect of the judgment rendered. It is not a judgment against it, and no execution could be issued against it for the money in its possession. True, costs were not awarded this appellant; but the refusal to award it costs, even though it were found to be entitled to them, does not give it the right of appeal.

The appeal is dismissed.

PALLIDY et al. v. BEATTY et al.

(Supreme Court of Oklahoma. Sept. 6, 1905.)

1. MANDAMUS—TO COUNTY COMMISSIONERS—ISSUE OF LIQUOR LICENSE.

Where an applicant files his petition for license to sell intoxicating liquors, and certain persons file their remonstrance against the issuance of such license, and the board, after a hearing upon the remonstrance, grants the petition, and the remonstrants duly appeal from such order to the district court, *held*, that mandamus will lie to compel said board to reconvene and revoke a license issued pending appeal.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 78.]

2. SAME—AFFIDAVIT OF ATTORNEY.

An affidavit, made by an attorney for the party applying for the writ, that the facts stated in the application are within his personal knowledge, states a sufficient reason why the attorney makes it.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Affidavits, §§ 6-10; vol. 33, Cent. Dig. Mandamus, § 310.]

3. AFFIDAVIT—CERTIFICATE OF OFFICER.

The words, "Subscribed and sworn to before me," in the certificate of the officer before whom an affidavit is made, are sufficient to comply with section 4317, Wilson's Rev. & Ann. St. 1903, requiring an affidavit to be "sworn to or affirmed" before the officer, and "signed in his presence."

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Affidavits, § 49.]

(Syllabus by the Court.)

Error from District Court, Caddo County; before Justice Frank E. Gillette.

Application by W. W. Beatty and others for writ of mandamus to A. J. Pallidy and others. Judgment for applicants, and defendants bring error. Affirmed.

Joseph G. Lowe and Glitsch & Glitsch, for plaintiffs in error.

PANCOAST, J. This is an appeal from an order of the judge of the district court of Caddo county, directing plaintiffs in error to assemble as the board of county commissioners of said county, and revoke a license therefore issued to one Frank Marshal for the sale of intoxicating liquors. Application was made to the board by said Marshal to sell intoxicating liquors. A remonstrance being filed, a hearing was had, and, from the action of the board granting the petition, an appeal was taken to the district court. After the appeal was perfected, a license was issued to the applicant by direction of the board. Upon application to the judge of the district court, an order was made requiring the commissioners to reconvene and revoke the license so issued, from which order the plaintiffs in error appeal, and assign as error, first, that the writ should not have issued in this case for the reason mandamus will not lie to correct errors or control judicial discretion, and, second, the insufficiency of the affidavit verifying the application for the writ.

As to the first ground relied upon, it may be stated that, aside from any general rule,

our statute provides that mandamus will not lie to control judicial discretion. Paragraph 686, art. 33, c. 66, Wilson's Rev. & Ann. St. 1903. That question, however, is not before us. The application here was, not to control the exercise of discretion lodged with the board, but to require the board to discharge a function which could be performed by it alone, and which a proper regard for the circumstances of the case required. An appeal was pending, upon the decision of which rested the right of the commissioners to direct the issuance of a license, the granting of which might defeat the object for which the appeal was taken. The taking of an appeal acted as a stay of all proceedings before the board, and the speedy revocation of the license prematurely issued was not only an act proper to be performed by the board, but a duty devolving upon it by law, and enjoined by the fact of the appeal. If the county board fails to perform any duty imposed upon it by law, either the petitioners or remonstrants, who are the parties to the proceedings, may have the aid of the court to compel said board by mandamus to perform such duty. It may be the incidental effect of the writ was to compel the undoing of an act already done, or the correction of an error of judgment after exercise of discretion, but the thing aimed at, and to which the writ was addressed, was the compelling of a positive act, which it was the duty of the board to perform, the discharge of a function enjoined upon it, and resulting from the office occupied. As was said by this court in the case of *Swan v. Wilderson, et al.*, 10 Okl. 547, 62 Pac. 422, "Our statute allows 20 days to appeal from the decision of the board of county commissioners. Where a remonstrance is presented and overruled, and license ordered to issue, if notice of appeal is given by remonstrants, the license should be withheld for the period of 20 days to enable the remonstrants to perfect their appeal. If the appeal is taken, then no license should issue until the case is determined in the district court. In such case it is not alone the decision of the board that entitles the applicant to a license, but such decision must be supplemented by the judgment of the judge of the district court before he is entitled to a license. If the appeal is taken before the time for perfecting an appeal has expired, and the appeal is duly perfected in time, the license should be at once revoked, and in such case, if the county board refuses to revoke the license, or delays for an unreasonable time in taking action, a mandamus will issue on petition of the remonstrants to compel the board to revoke and cancel such license." That case is decisive of the case at bar, so far as the question of the propriety of the issuance of the writ under the circumstances of this case is concerned, if the application for same is sufficient in its form and contents to give the court authority to act; and it is to the sufficiency of the affi-

davit verifying the application that the second assignment of error is directed.

In this connection it may be observed that section 4888, Wilson's Rev. & Ann. St. 1903, provides: "The motion for the writ must be made upon affidavit, * * * and the court may require a notice of the application to be given to the adverse party. * * *." In the case at bar, notice was given, and the affidavit attached to the application is made by the attorney for remonstrants, who says: "That he makes this affidavit for the reason that the facts herein are within his personal knowledge; that he prepared the above and foregoing application for writ of mandamus; that he knows the contents thereof, and that the allegations therein contained are true." And this is followed by the certificate of the officer that it is "subscribed and sworn to before" him. The objections that plaintiffs in error make to this under their second assignment of error are: First, that the affidavit, being made by attorney, does not comply with section 4318, Wilson's Rev. & Ann. St. 1903, specifying what the affidavit shall contain when made by attorney; and, second, that the certificate of the officer before whom the affidavit was made does not specify, as required by section 4317, "that it was sworn to or affirmed before him and signed in his presence." It seems to us that there is no merit in either of these contentions, as by a fair construction the language used, "subscribed and sworn to before me," may be deemed equivalent to that employed in the statute; and the recital in the affidavit that the facts are within the personal knowledge of the attorney making same is in exact conformity with the requirements of the section of the statute permitting affidavits to be so made.

For the reasons herein stated, the judgment of the trial court is therefore affirmed, at the cost of appellants.

GILLETTE, J., having presided in the court below, not sitting. All the other Justices concurring.

CITY OF LAWTON v. McADAMS.

(Supreme Court of Oklahoma. Sept. 5, 1905.)

1. TRIAL—SPECIAL INTERROGATORIES.

It is not error to refuse to submit to the jury a special interrogatory, when the interrogatories submitted cover every material point involved in the case.

2. SAME—MISLEADING INTERROGATORIES.

The object of the statute is to elicit material facts, and not mere fragments or items of evidence; hence interrogatories that are calculated to mislead, confuse, or harass the jury should not be submitted.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 823.]

3. APPEAL — DISCRETION OF COURT — WITNESSES—EXAMINATION.

Large discretion is lodged in the trial court in respect to the examination of a witness by counsel, and the court, in its discretion, may ar-

rest the examination of a witness, and the exercise of such discretion will not constitute reversible error, unless an abuse of such discretion manifestly appears.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3853-3856; vol. 50, Cent. Dig. Witnesses, §§ 792-797.]

4. TRIAL—INSTRUCTIONS.

It is not error to refuse to give an instruction as to the rules governing positive and negative testimony, where the evidence does not warrant such an instruction.

5. NEW TRIAL—MISCONDUCT OF COUNSEL.

It is not error for the trial court to refuse to grant a new trial on the ground of misconduct of the jury, where it appears that no prejudice could have resulted to the unsuccessful party.

(Syllabus by the Court.)

Error from District Court, Comanche County; before Justice Frank E. Gillette.

Action by Fannie L. McAdams against the city of Lawton. Judgment for plaintiff, and defendant brings error. Affirmed.

J. A. Baker and Young & Ellis, for plaintiff in error. F. P. Cease, H. N. Whalin, and Chas. Mitschrich, for defendant in error.

HAINER, J. This was an action brought by the defendant in error against the city of Lawton to recover damages for personal injuries alleged to have been sustained by her by reason of a defective ditch or sewer in one of the streets of said city. The defense consists of a general denial and contributory negligence. The cause was submitted to a jury, verdict returned in favor of the plaintiff for \$1,250, motion for new trial duly filed and overruled, and exception reserved, and judgment rendered for the plaintiff on the verdict. From this judgment the city appeals.

The first error assigned and argued is that the court erred in refusing to submit special interrogatory No. 3, which reads as follows: "In case you find for the plaintiff, how much is allowed her for injury to her nervous system?" It appears from the record that the court submitted 12 special interrogatories to the jury at the request of the defendant, which covered every material point involved in the case, and hence, in our opinion, it was not error to refuse interrogatory No. 3, which sought to require the jury to state the amount of damages they found for the plaintiff for injury to her nervous system. The case of *A., T. & S. F. R. Co. v. Chamberlain*, 4 Okl. 542, 46 Pac. 499, cited by counsel, is not in point. There it was held that it was error for the court to refuse to submit a special interrogatory as to the amount allowed for actual damages and as to the amount assessed for punitive damages. In the case under consideration no punitive or exemplary damages were asked for.

Under the instructions of the court the plaintiff was limited to the recovery of damages merely for physical injuries and suffering, and the special interrogatories submitted by the court we think sufficiently cover-

ed this branch of the case. Had the defendant desired to submit a specific question as to the amount allowed for permanent bodily injuries sustained by the plaintiff, we think it would have been error to refuse it, or as to the amount allowed for physical or mental pain and suffering. The jury, in answer to interrogatory 3, which was as follows: "If any amount is allowed plaintiff for bodily injury, please state of what such injury consists or consisted"—stated: "Bruises on body, extreme nervous shock, and injury to womb, which caused hemorrhage." Under the charge of the court but two elements of damages were submitted to the jury, viz. (1) physical injuries to the body, and (2) physical suffering. The former would necessarily include all injuries to the body, whether to the nervous system or to any other portion of the body. The manifest purpose of the statute is to elicit material facts, and not mere fragments or items of evidence. Interrogatories that are calculated to mislead or harass or confuse the jury should not be submitted. In *Louisville, N. A. & C. Ry. Co. v. Kane* (Ind.) 22 N. E. 80, Mr. Chief Justice Elliott, of the Supreme Court of Indiana, in discussing this subject, uses the following language: "It is not the object of the statute to permit many interrogatories to go to the jury, and certainly not to permit the repetition of questions. The statute was designed to elicit material facts, not mere items of evidence. It was not intended that interrogatories should be employed to harass or confuse jurors, but the purpose of the statute is to elicit the facts, so that the court may pronounce judgment upon them." See, also, *Railway Co. v. Hawk*, 39 Kan. 638, 18 Pac. 943, 7 Am. St. Rep. 566; also, *Marshall's Kansas Trial Brief*, p. 910.

In the second assignment of error it is urged that the court committed error in refusing to give sufficient latitude to the cross-examination of the expert witness Dr. Knee. We have carefully examined the testimony of this witness, and we are of the opinion that the objection is not well taken. On the contrary, we think that sufficient latitude was given to the cross-examination of this witness. Large discretion in this respect is lodged in the trial court, and, unless it appears that there has been an abuse of discretion, the exercise of it will not constitute reversible error. In *Thompson on Trials*, vol. 1, § 352, the rule has been laid down as follows: "It has been laid down generally that where in the progress of a trial it appears obvious that a party, either in the examination of his witnesses or in his argument, is consuming time unnecessarily, the court may, in its discretion, arrest the examination, and the exercise of this discretion will not be reviewed, unless its abuse manifestly appears. So, it is the obvi-

ous duty of the judge to interpose of his own motion, when a useless and irrelevant examination of the witness is going on, and prevent a waste of time and the distraction of the attention of the jury from the real issues."

It is next contended that the court erred in refusing to submit instruction 11 in regard to the rule governing positive and negative testimony. While the rule governing negative and positive testimony is correctly stated by counsel for plaintiff in error, we think it is inapplicable to the evidence adduced on the trial. Counsel for appellant assumes, for the purposes of this instruction, that the testimony offered on behalf of the plaintiff was negative, and that the testimony of the defendant was positive in reference to the condition of the street as to lights and guards at the time the injury occurred. However, the evidence of the plaintiff, and she is corroborated by a number of other witnesses, clearly establishes that the accident occurred about 9:30 o'clock Sunday night, on her return from church, where she had been accompanied by Mrs. Botner and Miss Thompson. These witnesses testify positively that it was dark at the place where the accident occurred, and that there were no lights, guards, or barriers to warn travelers of the existence of the sewer ditch or trench that was placed there by the city authorities. On the other hand, the city offered the testimony of the street commissioner, and other witnesses, that he had placed a danger light on the excavation on the evening of the accident, and that it was a lantern with a red handkerchief tied around it, and that he also put up a guard. It will thus be seen that upon this question the testimony was conflicting. However, we think the great weight of the testimony upon this point sustained the contention of the plaintiff. Hence the rule that applies to evidence of a positive and negative character had no application to the case under consideration, and instruction 11 was therefore properly refused by the court.

Finally it is contended that the court committed error in refusing to grant a new trial on the ground of misconduct of certain jurors. We have carefully examined the record with reference to this contention, and in our opinion it is insufficient to warrant a reversal of the case.

A review of the entire record leads us to the conclusion that no prejudicial error was committed in the trial of this cause; and, believing that the verdict of the jury and the judgment of the court rendered thereon were in consonance with right and justice, the judgment of the court below is affirmed.

GILLETTE, J., having presided in the court below, not sitting. All the other Justices concurring.

RUDD v. DUNLAP.

(Supreme Court of Oklahoma. Sept. 5, 1905.)

VENDOR AND PURCHASER—LIABILITY FOR TAXES.

Under the statutes of this territory lands or town lots are assessed to the owner thereof at their actual cash value on the 1st day of January of each year, and the owner on that day is liable for the tax of that year, and a grantor who sells real estate after that date, in the absence of an agreement to the contrary, is liable for the taxes on said real estate for said year.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 408-412.]

(Syllabus by the Court.)

Error from District Court, Pottawatomie County; before Justice B. F. Burwell.

Action by A. B. Dunlap against Louisa J. Rudd. Judgment for plaintiff, and defendant brings error. Affirmed.

J. G. Woods, for plaintiff in error. B. B. Blakeney and L. G. Pitman, for defendant in error.

GILLETTE, J. This action was heard and disposed of in the court below upon an agreed case, under sections 4419, 4420, and 4421 of the Statutes of 1893. The question submitted is as to whether the plaintiff in error or the defendant in error should, under the agreed facts and the law, pay the taxes for the year 1898 upon property sold. By the agreed case it appears that plaintiff in error, Louisa J. Rudd, in June, 1898, sold to the defendant in error, A. B. Dunlap, certain real estate situated in Pottawatomie county, and executed to him a deed of general warranty. This deed by express terms covenanted against taxes. The deed was executed and delivered June 20, 1898. At that time the assessment for 1898 had been made, and the city levy had also been made; but the levies for county and territorial purposes, which are made in July, had not yet been made, and the amount of the taxes for 1898 was not then known, and could not be ascertained until the levy had been made for that year. The taxes for 1898, amounting to \$180.49, not having been paid by Rudd, the grantor, were paid by Dunlap, the grantee, and he now seeks in this action to recover them, and insists that, under the law and the covenants against taxes contained in the deed, the grantor, Rudd, was and is clearly liable for them.

We think the contention is correct. While the levy had not been made, that fact went only to the question of amount, and did not in any way touch the question as to who would be liable for them when the levies had been finally made and the amount of the tax ascertained. Section 5579 of the Statutes of 1893 provides: "Lands and lots shall be assessed to the owner thereof at their actual cash value, on the 1st day of January of each year, and the owner on that day shall be liable for the tax of that year." By this statute a liability for taxes is definitely fixed on the

grantor, Rudd. It is fixed upon that date, before either the assessment or levies have been made; yet the liability is just as certain, though the amount thereof is as yet unknown. When Louisa J. Rudd, therefore, made her deed of general warranty, she was personally liable under the statute for the tax in question. She was liable for said tax independent of her deed, and liable for it even though the amount thereof had not been ascertained, and such liability, as between Rudd and the territory, continued until the tax was actually paid. In reaching the above conclusion we are not without precedent. The same question was before the Supreme Court of Nebraska under a statute essentially the same as ours, and that court reached the same conclusion we have arrived at. Under the statute of that state a personal liability for real estate taxes is fixed upon the owner of the real estate on the 1st day of April of each year. In July, 1882, the defendants, by their deed of general warranty, sold and transferred certain lands in that state to the plaintiff. The plaintiff paid the taxes of that year, and, as in this case, sued to recover them. In construing the statutes of that state Mr. Reese, C. J., said: "Section 138 of the revenue laws (Laws 1879, p. 332), provides that 'the taxes assessed on real property shall be a lien thereon from and including the 1st day of April in the year in which they are levied, until the same are paid.' Section 44 (page 294) provides that 'the owner of the property, on the 1st day of April in any year, shall be liable for the taxes of that year. The purchaser of property on the 1st day of April shall be considered the owner on that day.' The defendant, therefore, would be liable for the taxes for the year 1882, independently of the covenants in his deed, unless there was an agreement on the part of the plaintiff to pay them." *McClure v. Campbell*, 25 Neb. 57, 40 N. W. 595. See, also, *Reid v. Colby*, 42 N. W. 485, and *Campbell v. McClure*, 63 N. W. 920.

The plaintiff in error insists that, as the defendant in error, Dunlap, executed to her a mortgage on this same property, and in the same transaction, for a part of the purchase price, which mortgage contains covenants against taxes, the general covenants of the deed are qualified by the special covenants of the mortgage, and cites in support of his contention *Geer v. Redman*, 92 Mo. 375, 4 S. W. 745. The deferred payment in that case was represented by a deed of trust, which passed, under the laws of that state, the title to the land. The deferred payment in this case is secured by a mortgage, which by our law only creates a lien against the property, which may be foreclosed in case of a default in the payment of the taxes. By the terms of this particular mortgage also, the only effect of a default in the payment of taxes is to make the whole amount of the debt with interest at once due and payable. It would hardly be contended, as between gran-

tor and grantee, that the grantor, Rudd, could maintain a foreclosure because of unpaid taxes that she herself was liable for under the covenants of her deed of general warranty. The plaintiff in error is liable for the taxes in question, both under the statutes and by the terms of her deed of general warranty, and she should pay the same.

The judgment of the court below is affirmed. All the Justices concurring, except BURWELL, J., who tried the cause below, not sitting.

SPEAR et al., Board of State Harbor Com'rs,
v. REEVES, State Treasurer.

(Sac. 1,445.)

(Supreme Court of California. Jan. 18, 1906.)

1. STATUTES—ENACTMENT—PUBLICATION—AUTHORITY OF GOVERNOR TO PROVIDE FOR.

Const. art. 16, provides that the Legislature shall not create a debt exceeding \$300,000, unless the law providing therefor shall have been submitted to a vote at a general election and received a majority of the votes cast on the question, and declares that such law shall be published in each county for a specified period preceding the election. Article 5, §§ 1, 7, vests the executive power of the Governor and makes it his duty to execute the laws. St. 1903, p. 247, c. 211, providing for the issuance of state bonds for the payment of a debt not exceeding \$2,000,000 incurred in the erection of a sea wall, made no provision for the publication of the act. *Held*, that it was the duty of the Governor to provide for the publication of the act, and on his doing so the constitutional mandate was carried out.

2. SAME—AUTHORITY TO DIRECT SECRETARY OF STATE.

The Governor, in discharging the duty, could direct the Secretary of State, in whose official custody the act was, to provide for its publication.

3. SAME—PUBLICATION—SUFFICIENCY.

The publication of a law creating a debt for the time specified in Const. art. 16, requiring the submission of a law creating a debt in excess of \$300,000 to the voters and directing that such law shall be published in every county for a specified period before the election, is not insufficient for the failure of the Secretary of State providing for the publication to accompany the law with a certificate as to its authenticity.

In Bank. Application for mandamus by Charles H. Spear and others, constituting the board of state harbor commissioners, against Truman Reeves, to compel respondent, as State Treasurer, to sell certain state bonds. Writ granted.

Devlin & Devlin and William H. Davis, for petitioner. U. S. Webb, Atty. Gen., and George A. Sturtevant, Deputy Atty. Gen., for respondent.

LORIGAN, J. This is an application for a writ of mandate to compel the respondent, as State Treasurer, to proceed with the sale of certain bonds alleged to be salable under what is called the "San Francisco Sea Wall Act." This act was passed March 20, 1903 (St. 1903, p. 247, c. 211), and provided for the issuance and sale of state bonds, not exceeding the sum of \$2,000,000, for the payment

of indebtedness to be incurred in the erection of a sea wall and appurtenances in the city and county of San Francisco. As the indebtedness contemplated to be created by the act exceeded the sum of \$300,000, it was essential, under article 16 of the Constitution, that such act should be submitted to the people at a general election (and the act itself provided for such submission), and that it should receive a majority of all the votes cast for and against it at such election; the constitutional provision further declaring that "such law shall be published in at least one newspaper in each county, and city and county, if one be published therein, throughout the state for three months next preceding the election at which it is submitted to the people." At the general election held in the state November 8, 1904, the said act was submitted to the people for ratification. Prior to said general election the Governor of the state, in his proclamation calling for such election, included therein the submission of the said "San Francisco Sea Wall Act" to the people of the state, and such act was set out in full in said proclamation. Anterior to the issuance of said proclamation said Governor directed and empowered the Secretary of State of the state of California to take all necessary steps to provide for the publication and cause to be published the said act in accordance with said article 16 of the Constitution. This the Secretary of State did by causing said act to be published in a newspaper published in each of the counties of the state of California for a period of three months next before the said election of November 8, 1904, save in the county of Alpine, where no newspaper was then being published. At said general election held on November 8, 1904, the said act was ratified by the people, receiving 119,460 votes in its favor, the number of votes against it being 26,835, and in due time, and according to law, the Governor of the state issued a proclamation that said act was in full force and effect. Thereafter the respondent, the State Treasurer, having prepared suitable bonds of the state of California, in accordance with the provisions of the said act, the petitioners, constituting the board of state harbor commissioners, as authorized by said act to do, adopted a resolution requesting the sale of 250 of said bonds, and the Governor of the state, as the act provided he should, directed in writing the said respondent to sell at public auction to the highest bidder, for cash, 250 of the said bonds in one parcel, and that he give due notice of the time and place of the sale thereof, as provided in the act. The respondent having refused to take any steps towards the sale of said bonds, as requested by the state board of harbor commissioners, and as directed by the Governor of the state, petitioners make this application for a writ of mandate to compel him to do so, and the matter is now before us on demurrer to the petition. The demurrer is general, and but

one point is made under it, which is that the alleged "San Francisco Sea Wall Act" has never been legally published. In support of this contention it is claimed by respondent that, while the constitutional provision requires such an act to be published, no provision has in fact been made by law for such publication; that there is no statutory provision authorizing the Secretary of State, or any other officer or person, to make the publication provided for in the constitutional provision; and that the act of the Secretary of State in publishing the statute in question was unauthorized and nugatory in as far as it purported to be a step towards its legal enactment. In the same line it is further claimed that, assuming the act could have been legally published by the Secretary of State at the direction of the Governor, still the publication as made (a copy of which appears in the petition for this writ) should have been accompanied by some certificate or attestation showing that the Secretary of State was causing or directing the act to be published.

Neither of these points impress us as having any merit, and require but brief notice. It is true, as claimed by respondent, that the constitutional provision referred to is silent as to who shall make the required publication, and there is no general law upon the subject. The Legislature assumed, without making express provision in the act itself therefor, that some executive officer of the state was charged with the duty of making the publication in conformity to the constitutional requirement. Petitioners contend that this assumption was well founded, and that the Governor of the state, as its chief executive, in the absence of any direction to the contrary, was charged with this duty, and we think this position is sound. It is ordained by the Constitution (section 1, art. 5) that the supreme executive power should be vested in a chief magistrate, who shall be styled the "Governor" of the state of California, whose duty it shall be, among other things, to see (section 7, art. 5) that the laws are faithfully executed. This duty of enforcing or executing the laws enjoined on the Governor applies not only to legislative enactments, but to constitutional provisions which are equally laws—the organic law of the state—and it is his duty to see that all are faithfully executed. Now, the constitutional provision authorizing the Legislature to pass the act here in question conferred no power on that body to do anything relative to the publication of the act as far as the time or manner of its publication was concerned. The constitutional provision itself definitely fixed when and how that should be done, and the Legislature could not interfere in the matter at all. All that the Legislature could do, conceding it could do that, would be to make provision for the publication of the act. Such publication was made essential by the Constitution in order to render the ratification of the act by the people

effectual. Any direction which the Legislature might have given in the act as to such publication would have had the effect only of investing the officer, designated for that purpose, with the discharge of a mere executive duty—the duty of seeing that the law, the provision of the Constitution, as to publication was carried out. But it by no means followed that, because the Legislature in the act itself failed to expressly designate some particular officer to make the publication, the duty of doing so was not otherwise fully provided for. On the contrary, as the Constitution in another provision had made the Governor the chief executive officer of the state, to see that the laws were faithfully executed, and as this constitutional provision is one of the laws required by him to be so executed, it is quite obvious that, assuming the Legislature could have designated some other officer, still, in the absence of such designation, it was the duty of the Governor, in seeing that the laws were executed, to provide for the publication of the act, and, having done so, the constitutional mandate was legally carried out. In discharging his duty in this respect, it was not necessary that the Governor should personally attend to the publication. It was sufficient that he provided for its publication, and this was accomplished when he directed the Secretary of State to make it. As the original act of the Legislature was in the official custody of the Secretary of State, he was eminently a proper person to be designated to see that its correct publication was had.

Other reasons are urged by petitioners why the publication of this particular act, made by the Secretary of State under the direction of the Governor, should be sustained. It is insisted that as the act in question provided, in terms, for its submission to the people for ratification, and that the Governor should include the submission of it to the people in his proclamation calling for the general election of November 8, 1904, such requirements impliedly directed the Governor to take all necessary measures for a legal submission of it, including its publication, for the time and in the manner as directed by the constitutional provision.

It is further insisted that, when the Legislature at the session subsequent to the publication of the act (St. 1905, p. 111, c. 115) appropriated money to pay the advertising done by the Secretary of State in making such publication, this operated as a ratification of the action of the Governor and Secretary of the State in that regard, or, at least, was a recognition that their act in publishing it was valid, and within the scope of their executive duty—a recognition on the part of the legislative department of the state that the construction of the Constitution by the Governor in that particular was proper, and in accordance with the intention of the Legislature. While these suggestions have much persuasive force, we do not discuss or indorse them.

preferring to rest our conclusion upon the constitutional provision relative to the duties of the Governor as chief executive, and which, in our judgment, authorized and required him to direct the publication of the act as it was done.

As to respondent's claim that the act as published by the Secretary of State should have been accompanied by some certificate or attestation of that officer as to its authenticity: The demurrer concedes that a true copy of the act had been published for the required time and in the manner required by the Constitution. This was all that that provision required. It was the act as passed by the Legislature which was to be published. If it was contemplated that the act as published should be attested, the Constitution would have said so. Being silent upon the subject, it must be assumed that it did not so intend.

This disposes of the only points made by respondent upon the demurrer, neither of which in our judgment are tenable. As this application is for a peremptory writ after notice, and the matter is submitted on the pleadings, it is ordered that the peremptory writ of mandate issue as prayed for.

We concur: BEATTY, C. J.; SHAW, J.; MCFARLAND, J.; ANGELLOTTI, J.; HENSHAW, J.

148 Cal. 397

HARDING v. HARDING. (L. A. 1,170.)

(Supreme Court of California. Jan. 2, 1906.)

1. COURTS—WRIT OF ERROR—FEDERAL SUPREME COURT—REVERSAL—EFFECT.

Where a judgment of the state Supreme Court, affirming a divorce decree, was reversed on a writ of error to the federal Supreme Court, on the coming down of the remittitur from the federal court and the filing thereof in the state Supreme Court, the appeal from the decree was then pending in the state court for such further disposition as the court deemed proper, not inconsistent with the opinion of the federal court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4666.]

2. JUDGMENT—ESTOPPEL—WAIVER.

Where, in an action for divorce, defendant pleaded the proceedings and decree of the court of another state, in an action between the parties for maintenance, as a bar to and estoppel of the suit in question, she did not waive her right to rely on such judgment as an estoppel by failing to interpose any objection to plaintiff's evidence in support of the merits of his main case, and by cross-examining plaintiff's witnesses on such subject and introducing evidence on her own behalf tending to disprove the grounds for divorce alleged.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1149, 1282.]

3. PLEADING—DEFENSES—DENIAL—OPERATION OF LAW.

The defense of former adjudication pleaded by defendant, like other defenses, is deemed denied by operation of law, as provided by Code Civ. Proc. § 607, and is available only on proof thereof.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 821.]

On Rehearing.

4. APPEAL—REVERSAL—EFFECT.

Where, on appeal, the judgment was reversed, and the court held that on the facts presented a foreign decree was a complete defense to the action, but, the findings being insufficient to sustain a judgment for defendant, the case was remanded for a new trial, such determination did not preclude plaintiff on the new trial from showing, if possible, that there was no such foreign decree, or any other fact inconsistent with those alleged in support of the defense of estoppel by judgment, or anything legally avoiding such estoppel.

In Bank. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by George F. Harding against Adelaide M. Harding. From a judgment in favor of plaintiff, defendant appeals. After a remittitur of the United States Supreme Court had been filed, reversing the judgment of the California Supreme Court, defendant moved that the remittitur in the action be forthwith issued to the superior court of San Diego county, and plaintiff moved that the California Supreme Court proceed to hear and determine matters in the appeal not decided by the federal court. Defendant's motion denied. Plaintiff's motion granted. Judgment reversed. Modification of opinion denied.

T. W. Hubbard (Henry G. Tardy, of counsel), for appellant. M. L. Ward and Hunsaker & Britt, for respondent.

ANGELLOTTI, J. This case, after decision by this court, whereby the judgment of the superior court of San Diego county granting plaintiff a divorce from defendant on the ground of desertion was affirmed (140 Cal. 690, 74 Pac. 284), was carried to the United States Supreme Court by a writ of error. That court, upon the ground that this court, in affirming such judgment, had failed to give to a decree of the courts of the state of Illinois, rendered therein in an action for maintenance theretofore prosecuted by defendant against plaintiff, the due faith and credit to which it was entitled under the Constitution of the United States, reversed the judgment of this court, and remanded the cause to this court "for further proceedings not inconsistent" with the opinion filed by said Supreme Court. 198 U. S. 317, 25 Sup. Ct. 679, 49 L. Ed. 1066. Upon the coming down of the remittitur of the United States Supreme Court, a motion was made herein by defendant that "the remittitur in said action issue forthwith to the superior court in and for the county of San Diego, state of California." This motion was met by a counter motion on the part of plaintiff to proceed to hear and determine such matters involved in the appeal as have not been decided by the United States Supreme Court, and to take such further proceedings in accordance with the mandate of said court as are necessary for the proper disposition of the appeal of this court.

These motions have been submitted together.

It is apparent that, under the judgment of the United States Supreme Court, the appeal in this cause is now pending in this court, for such disposition as this court may deem proper, provided, always, that such disposition must not be inconsistent with the opinion filed by the federal court. The reversal of the judgment of this court was not a reversal of the judgment of the superior court. To effect such a reversal there must, under the circumstances here existing, be a judgment of this court reversing such judgment. Whether such a judgment of reversal must follow the action of the United States Supreme Court depends upon the answer to the question as to whether any other course would be inconsistent with the opinion of that court. That opinion admittedly finally established the fact that the final decree of the Illinois court, pleaded and established by evidence in this action, constituted a full and complete defense to the sole cause of action for divorce asserted by the plaintiff herein. Plaintiff, however, urged on the original hearing of this appeal that, if such Illinois judgment had this effect, the defendant had, by defending on the merits, waived the benefits of the estoppel arising on such decree. This contention was not noticed by this court in its former decision; the court putting its decision on the ground that the Illinois judgment could not have the effect attributed to it by defendant, even if the benefits of the estoppel arising on such decree had not been waived. It is now contended by plaintiff that this question of waiver has not been foreclosed by the decision of the United States Supreme Court, and that this court may and should consider it, and, if it finds upon the record that defendant has waived her rights under the Illinois judgment, it should affirm the judgment of the superior court. No other reason is suggested by plaintiff why the decision of the United States Supreme Court does not require a reversal of the judgment of the superior court.

We do not consider it necessary to here discuss the elaborate argument of counsel as to whether this question of waiver is now open to consideration by us, for, if we should conclude that it is so open, we are satisfied that it could not be held upon the record before us that defendant had waived the benefit of the Illinois judgment. The facts alleged to constitute such a waiver are few and simple. In her answer to the complaint for desertion, defendant, in addition to specially pleading with great minuteness the proceedings and decree of the Illinois court, and the judgment of the Supreme Court of that state on appeal, "as a bar to and estoppel of the said suit and supposed cause of action set up by the plaintiff herein," also denied plaintiff's residence in California (a thing essential to his right to

maintain the action) and the charge of desertion. Upon the trial in the superior court she did not object to evidence offered by plaintiff to sustain the allegations of his complaint, and she, through her attorneys, both cross-examined plaintiff's witnesses and offered certain evidence in response to the evidence adduced by him upon the merits of his cause. She at all times, however, insisted upon her claim that the Illinois judgment constituted a full defense, and introduced the record of the Illinois proceedings in evidence, and relied upon the same as a complete defense, and there is nothing to indicate any intention to waive the benefit of the Illinois judgment, unless such intention was manifested by defendant's failure to interpose any objection to such evidence as was offered by plaintiff upon the question of residence and desertion, her cross-examination of plaintiff's witnesses upon the subject, and the introduction by her of evidence tending to disprove the allegation of desertion. It is manifest that, under the circumstances, these facts indicated no intention on the part of defendant to waive the benefit of the Illinois judgment. Her failure to object to evidence offered by plaintiff to support the allegations of his complaint certainly indicated no such intent. It is apparent that any objection must necessarily have been overruled. The defense of a former adjudication pleaded by defendant was, like any other defense, deemed denied, and was available only upon proof thereof, which, in the natural order prescribed by our Code (Code Civ. Proc. § 607), would be made only after the plaintiff had produced the evidence on his part. In receiving the evidence offered by plaintiff, the trial court could not be called upon to anticipate the evidence of defendant. Any legal evidence offered by plaintiff in support of the allegations of his complaint was admissible, and any objection that might have been interposed thereto must necessarily have been overruled. Defendant, to save her right under the defense of former adjudication, was not compelled to make such untenable objections. It is equally clear that her cross-examination of plaintiff's witnesses, and the introduction of evidence tending to disprove their statements, indicated no intention of abandoning her other defense of former adjudication. She still affirmatively insisted upon that defense and introduced her evidence in support thereof. Under our system, she had the right to set forth, prove, and rely upon as many defenses as she had (section 441, Code Civ. Proc.; *Banta v. Siller*, 121 Cal. 414, 417, 53 Pac. 935; *Miles v. Woodward*, 115 Cal. 308, 315, 46 Pac. 1076), and we know of no rule of law that required her to elect between her two defenses, even had the plaintiff asked the court to compel her so to do, which he did not.

Plaintiff contends that it is otherwise established in this state, and cites the case of

Megerle v. Ashe, 33 Cal. 74, wherein it was said: "A party cannot rely upon a judicial determination of an issue by way of an estoppel, and also upon proof of the facts upon which the determination is based. The necessary effect of the estoppel is to preclude all inquiry as to the truth of the matter determined, and when a party who is entitled to set up the estoppel does open the inquiry into the truth of the matter, he cannot complain that the other party pursues it without regard to the estoppel." This language was used by a majority of the court in relation to a plaintiff who had endeavored to show that he had a valid pre-emption claim as a matter of fact, and also that it had been adjudicated by the Land Department, between him and defendant's grantor, that he had such a valid claim. The question was not important in that case, in view of the fact that the court held that defendant's grantor was not really a party to the other proceeding and that the record of the former adjudication was therefore not binding on him. We are at a loss to understand how the statement quoted, if it goes to the extent contended for by plaintiff, could be true under our system. In the later case of *San Francisco v. S. V. W. W.*, 39 Cal. 473, it was squarely held that a plaintiff, by attempting to plead the facts upon which an adjudication was based, and also pleading the adjudication, did not waive the benefit of the adjudication, and that, although the facts pleaded did not state a cause of action, the allegations of prior adjudication did, and that a demurrer interposed to the complaint should have been overruled. It was said of *Megerle v. Ashe*, supra, in the opinion, that such case "only decides that a party may waive the benefit of an estoppel to which he is entitled, and that he does so when he does not rely upon it, but takes issue upon the facts upon which the adjudication is based." The court further said: "The most usual manner in which it has been held that an estoppel is waived is by omitting to plead it. In this case the plaintiff has certainly not waived the benefit of the estoppel." It is somewhat difficult to see any distinction in principle between the case of one who asserts both claims in his pleadings and one who does the same thing by his evidence. If one is a waiver of the estoppel, the other would appear to be the same. But whatever construction may be put upon *Megerle v. Ashe*, supra, and the later case of *Hicks v. Lovell*, 64 Cal. 14, 22, 27 Pac. 942, 49 Am. Rep. 679, where something is said that might be construed as an approval of the statement quoted from the former case, we are satisfied that, under our system, a defendant does not waive his rights under a judgment pleaded in bar, by the mere act of also contesting the claim of the plaintiff upon the merits. We can see no valid reason in such a case for any exception to the general rule applicable in this state,

to the effect that a defendant may plead any and all of the defenses that he may have, that he may pursue and rely upon all of his defenses so pleaded to the end, and that, if any defense so pleaded is found to be good, he is entitled to prevail. If there be anything inconsistent with this in the two California cases relied upon by plaintiff, it must be considered as overruled.

The contention made as to waiver not being tenable, there can be no doubt that, under the decision of the United States Supreme Court, the judgment and order of the superior court must be reversed.

The following order is therefore made: The remittitur from the United States Supreme Court, reversing the judgment of this court and remanding the cause to this court for further proceedings not inconsistent with the opinion filed by said United States Supreme Court, having been produced and filed, and it appearing to this court that thereunder the judgment and order of the superior court in said cause must be reversed, it is ordered that the judgment and order denying the motion for a new trial be, and the same are hereby, reversed, and the cause remanded to the superior court of San Diego county for further proceedings not inconsistent with the opinion of the United States Supreme Court and this opinion; further ordered, in accordance with the mandate of the United States Supreme Court, that defendant have execution from said superior court for her costs expended in said United States Supreme Court, amounting to \$629.75, and also that she recover her costs on this appeal.

We concur: BEATTY, C. J.; McFARLAND, J.; LORIGAN, J.; SHAW, J.; VAN DYKE, J.; HENSHAW, J.

On Rehearing.

ANGELLOTTI, J. The application for a rehearing on modification of opinion is denied. What was said in the opinion to the effect that the opinion of the United States Supreme Court "admittedly finally established the fact that the final decree of the Illinois court, pleaded and established by evidence in this action, constituted a full and complete defense to the sole cause of action of divorce asserted by the plaintiff herein," was said solely with reference to the conditions shown by the record on appeal. Upon that record, there was absolutely no defense to the estoppel in the slightest degree intimated, other than the alleged waiver urged in this court and disposed of by our opinion. If the findings of the trial court had been such as to justify that course, this court would have ordered judgment entered thereon in favor of defendant. There was, however, no finding broad enough to warrant this, and for that reason the cause was remanded for further proceedings not inconsistent with the opinions of the Supreme Court of the United

States and this court. 25 Sup. Ct. 679, 49 L. Ed. 1066; 74 Pac. 284. Upon the new trial which must necessarily follow, plaintiff may undoubtedly urge any defense that he may have to the alleged estoppel. What was finally established by the opinion of the United States Supreme Court is that the allegations of the answer, and the evidence in the record in support thereof, showed an estoppel, constituting a full defense to the sole cause of action for divorce asserted by plaintiff.

We have determined that the benefit of the estoppel was not waived by the acts of the defendant on the trial in the superior court. So much is the law of the case. If, on a new trial, defendant can show that there was no judgment of the Illinois court, or any other fact inconsistent with those alleged in the answer in support thereof, or anything which legally avoids the estoppel, he will doubtless be allowed to do so, and there is nothing in the opinion already rendered which would preclude such showing.

We concur: BEATTY, C. J.; SHAW, J.; HENSHAW, J.; McFARLAND, J.

148 Cal. 418

PEOPLE v. McCLURE. (Cr. 1,268.)

(Supreme Court of California. Jan. 8, 1906.)

1. CRIMINAL LAW — OTHER OFFENSES — EVIDENCE OF OFFENSE CHARGED.

Where defendant shot Z. immediately before he shot deceased and as a part of the same transaction, so that it would be difficult to give an intelligent description of the occurrences resulting in decedent's death without referring to the shooting of Z., and the motive for the killing of both was the same, it was not error to admit evidence concerning the shooting of Z. in a prosecution for the killing of deceased.

2. SAME—BURDEN OF PROOF—INSTRUCTIONS.

Where, in a prosecution for homicide, the evidence disclosed a willful murder of deceased, it was not error to charge Pen. Code, § 1105, declaring that on a trial for murder, the commission of the homicide by defendant being proven, the burden of proof of circumstances in mitigation, justification, or excuse is on defendant, unless the proof on the part of the prosecution tends to show that the crime only amounts to manslaughter or that defendant was justified or excusable.

3. SAME—INSTRUCTIONS.

In a prosecution for homicide, the court charged that evidence had been admitted relating to the shooting of Z. at the time it was claimed defendant shot deceased; that the only relation of such testimony was to illustrate or establish the intent or motive with which the shooting of deceased was done, if any; that before the jury could consider the shooting of Z. they must be satisfied beyond a reasonable doubt that defendant shot Z. willfully, unlawfully, and intentionally; and that if they had a reasonable doubt they should disregard all of the testimony on such question. *Held*, that such instruction was not prejudicial to defendant.

In Bank. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

John McClure was convicted of murder, and he appeals. Affirmed.

W. F. McLaughlin, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

McFARLAND, J. Defendant was charged with the murder of one Jerry O'Shea, and the jury found him guilty of murder in the first degree and imposed the death penalty. He appeals from the judgment, and from an order denying his motion for a new trial.

There is no foundation for the contention that there was not sufficient evidence to justify the verdict of murder in the first degree; and the only point which calls for special notice arises out of the contention that the court erred in allowing evidence that appellant, in addition to killing O'Shea, also shot another man named Zodikoff. Of course, the general rule is that upon the trial of a defendant on an indictment charging him with one offense, it is not admissible to introduce proof of another and entirely distinct offense merely for the purpose of prejudicing the jury against the defendant. But where the evidence objected to is pertinent to the main issues in the case, and is, in itself, competent, relevant, and admissible, it cannot be excluded simply because it happens incidentally to include the commission of another offense; nor where the facts touching the other offense are so intimately connected with facts constituting the offense charged as to make both parts of one transaction—so that there could not well be an intelligent statement of the one which did not allude to the other.

The main features of the case are these: The homicide—that is, the killing of O'Shea—occurred about a quarter past 6 o'clock in the morning of Monday, the 12th day of December, 1904, in a livery stable on San Pedro street, in the city of Los Angeles, kept by two men named Bennett and Zodikoff, and known as the "Exchange Livery & Feed Stable." About three days before said December 12th the defendant had sold to Bennett and Zodikoff a horse and wagon. The sale of the property was consummated in front of the livery stable, and defendant drove the horse and wagon into the stable to be delivered to the purchasers. He went with Bennett into the office of the stable to make a bill of sale and received the purchase money, and took with him a certain halter which he claimed was reserved from the sale, but which Zodikoff claimed to be included in the property sold. After defendant and Bennett concluded their business, defendant discovered that his halter had disappeared, and Bennett told him that Zodikoff had taken it. Defendant was persistent in his demands for the halter and showed anger about the matter. Bennett told him to come the next day and he would tell Zodikoff to give it to him, as it was a small matter. After that defendant made several

visits to the stable to get the halter; sometimes he saw O'Shea, who was employed in the stable as a hostler, and sometimes Zodikoff, both of whom refused to give him the halter, and he had warm words about the matter with both O'Shea and Zodikoff. On Monday morning, about 5:30 o'clock, defendant was seen by a witness looking into the Exchange Stable through a ventilating hole, and when asked what he was doing answered that he was "looking for somebody." About a quarter past 6 o'clock on the same morning there were in the Exchange Stable the defendant, Zodikoff, O'Shea, and a man named McAfee, who was a witness for the prosecution. Defendant and Zodikoff were near each other, and O'Shea was a little further toward the rear of the stable shaking up some straw in one of the horse stalls. McAfee testified that he heard one voice say, "I come to get the halter," and another voice said, "You don't get it." Then came the reply, "I am a son of a bitch if I don't get it," and another answer, "I am God damned if you do." The witness testified that then "defendant pulled a revolver and fired. He fired at Zodikoff." The bullet struck Zodikoff, who ran past McAfee towards the street. McAfee testified that "then the defendant stepped about three feet in that direction and fired three times toward the back of the stable. I did not see what he was firing at. Immediately before I saw him fire in the rear of the stable three times, I saw him shoot at the man Zodikoff. * * * Immediately after he fired these three shots, I saw a man fall immediately after those three shots were fired." He further testified that "defendant stepped across the body, and used a large knife upon it," and the defendant stabbed the knife into the body six times. The witness then went into the street, but returned in about 10 minutes and found the dead body of O'Shea "lying in the same place where I saw the defendant plunging the knife into him." In another part of his testimony he stated that "one minute would take the whole time that it took to stand there and watch it all and start to the street." Other witnesses who were in the vicinity, some of them being in another livery stable called the "Ascott," just across the street opposite the Exchange Stable, testified to hearing the shots. One witness said that "it was seemingly no time after I heard the first shot until I heard the others." Other witnesses speak of the time between the first and second shots as "less than half a minute." These witnesses testified that immediately after hearing the first shot Zodikoff came running out into the street crying: "I am shot! Help!" One of these

witnesses, after hearing the first shot, went to the stable and was there in time to see defendant plunging the knife into the body of O'Shea. Another witness who was in the Ascott stable testified that after hearing the first shot, he saw the defendant stab O'Shea. It is quite clear, therefore, that the shooting of Zodikoff so immediately preceded the shooting and stabbing of O'Shea as to form part of the same transaction, and it also appears that the motive for killing both was the same. It is, indeed, difficult to see how the witnesses could have given an intelligent statement of the occurrences which resulted in the death of O'Shea, without reference to the shooting of Zodikoff. As was said in *People v. Linares*, 142 Cal. 17, 75 Pac. 308: "No matter at what point the narrative had commenced, it in the end would almost necessarily have reached these connecting facts." Our conclusion is that appellant's objections to the said evidence touching the shooting of Zodikoff are not maintainable, and that the court did not err in the ruling complained of. See *People v. Walters*, 98 Cal. 138, 32 Pac. 884; *People v. Suesser*, 142 Cal. 362, 75 Pac. 1093; *People v. Linares*, 142 Cal. 17, 75 Pac. 308.

Appellant, in his briefs, objects to two of the instructions given to the jury. The first is a mere copy of section 1105 of the Penal Code; and we see nothing in the case at bar which made the giving of that section improper. The other instruction is as follows: "Gentlemen of the jury, there has been offered and admitted some testimony in this case relating to the shooting of one Zodikoff at the time it is claimed the defendant shot Jerry O'Shea. The only relation or object in considering such testimony was to illustrate or establish the intent or motive with which the shooting of Jerry O'Shea was done, if any, and before you can consider the question of the shooting of said Zodikoff you must be satisfied beyond a reasonable doubt that the defendant shot said Zodikoff willfully, unlawfully, and intentionally; and if you have such reasonable doubt you are instructed to entirely disregard all the testimony you heard on that question." Whatever grounds of objection this instruction might have presented to the prosecution, it could in no way have been prejudicial to appellant.

There are no other points calling for notice.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

148 Cal. 426

WEISSER v. SOUTHERN PAC. RY. CO.
(L. A. 1,413.)

(Supreme Court of California. Jan. 13, 1906.)

1. APPEAL—RECORD—ORDER GRANTING NEW TRIAL.

A copy of a letter written by the judge to appellant's counsel, stating the grounds upon which he granted the new trial, which grounds were not shown in the order for new trial, constituted no part of the record on appeal.

2. NEW TRIAL — ORDER — STATEMENT OF GROUNDS.

A general order granting a new trial entered on the minutes of the court cannot be limited by an independent writing stating the grounds on which the new trial is granted.

3. APPEAL—REVIEW—GROUNDS OF ORDER FOR NEW TRIAL.

Though an order for new trial specifies the grounds upon which it was granted, the action of the court in stating such grounds cannot restrict the Supreme Court to the grounds so specified for the purposes of ascertaining whether or not a new trial should have been granted, except upon the single question as to the sufficiency of conflicting evidence.

4. SAME—REVIEW OF DISCRETION—GRANTING NEW TRIAL.

Though there may be some conflict in the testimony, it is the duty of the trial court to grant a new trial on the ground of the insufficiency of the evidence whenever the judge is convinced that the verdict is clearly against the weight of the evidence, and his action in that regard will not be disturbed on appeal, unless it is apparent that there has been an abuse of discretion.

5. MASTER AND SERVANT—FELLOW SERVANTS —PERSONS SERVING APPRENTICESHIP.

A student brakeman, on freight trains of defendant at his own request and by permission of defendant, for the purpose of gaining experience to render him competent to act as a regular brakeman, and who was entirely subject to defendant's orders, and was required to perform such ordinary duties of brakeman as were allotted to him, was a fellow servant of the other trainmen, although he was receiving no pecuniary compensation.

Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Lawrence Weisser against the Southern Pacific Railway Company. From an order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

S. V. Landt and M. E. C. Munday, for appellant. Bicknell, Gibson & Trask, for respondent.

ANGELLOTTI, J. This is an action for damages for personal injuries alleged to have been suffered by plaintiff through the negligence of defendant while he was engaged in the service of said defendant. The jury impaneled to try the cause rendered a verdict in favor of plaintiff for \$9,000, and judgment was entered accordingly. Defendant regularly made a motion for new trial on practically all the grounds authorized by statute, including that of insufficiency of the evidence to justify the verdict, and in its statement on motion for new trial specified with great particularity the particulars wherein it was claimed that the evidence

was insufficient. The trial court disposed of such motion by making a general order granting the same, the minute order being as follows, viz.: "Defendant's motion for new trial ordered to be and the same is hereby granted." Plaintiff appeals from such order granting defendant's motion for new trial.

It is suggested by plaintiff that the order of the trial court was based upon two grounds only, viz., error in admitting certain evidence, and insufficiency of the evidence to sustain a conclusion that the plaintiff was not guilty of contributory negligence, and that this court is limited to a consideration of these questions upon this appeal. In support of his claim that the order was made for these reasons alone, he sets forth in his brief a copy of a letter written to his counsel by the judge of the trial court, some months after the granting of the new trial. This letter, of course, constitutes no part of the record on appeal, and could not be made a part thereof. *Hanna v. De Garmo*, 140 Cal. 172, 174, 73 Pac. 830. Even if the same had been written and filed at the time of the granting of the new trial, it could not have operated to limit the effect of the general order entered on the minutes of the court, which order so entered is, under the decisions, the only record of the court's action. Any limitation, to be effectual, must be specified in the order. *Ben Lomond Wine Co. v. Sladky*, 141 Cal. 619, 621, 75 Pac. 332; *Newman v. Overland Pac. Ry. Co.*, 132 Cal. 73, 64 Pac. 110. Furthermore, even if the trial court in this case had effectually specified in its order the grounds upon which it granted the new trial, its action in this regard could not have restricted this court to the grounds so specified in its examination of the record, for the purposes of ascertaining whether or not a new trial should have been granted, except upon the single question as to the sufficiency of the evidence where it was conflicting. *Thompson v. Cal., etc., Co.* (Cal. Sup.) 82 Pac. 367; *Kauffman v. Maier*, 94 Cal. 269, 276, 29 Pac. 481, 18 L. R. A. 124. As it is admitted that one of the grounds upon which the trial court based its action in granting a new trial was that the evidence was insufficient to sustain a conclusion that plaintiff was not guilty of contributory negligence, what has been said herein as to the questions reviewable upon this appeal is unnecessary for the purposes of the decision, and has only been said in view of the apparent misconception of the rules applicable in such matters.

Upon the question as to whether plaintiff was guilty of contributory negligence, there was apparently some conflict in the testimony. This, however, was not sufficient to prevent the trial court from granting a new trial, on the ground of the insufficiency of the evidence. It is established by numerous decisions in this court that, although there may be some conflict in the testimony, it is the duty of the trial court to grant a new trial on such ground, whenever the judge is

convinced that the verdict is clearly against the weight of the evidence, and his action in that regard will not be disturbed, unless it is apparent that there has been an abuse of the discretion confided to him. See *Green v. Soule*, 145 Cal. 96, 102, 78 Pac. 387; *Bates v. Howard*, 105 Cal. 173, 178, 38 Pac. 715; *Mock v. L. A. Trac. Co.*, 139 Cal. 616, 73 Pac. 455; *Bjorman v. Fort Bragg R. Co.*, 92 Cal. 500, 28 Pac. 591. The record on this appeal affords no basis for any claim that there was any such abuse of discretion in this case. It is therefore manifest that regardless of other reasons that may exist, the order granting a new trial must be affirmed. While it is unnecessary, for the purposes of a decision of this appeal, to consider any of the other points made in support of the order, the question as to whether plaintiff was a "fellow servant" of the employé of defendant on the train upon which he was engaged and by which he was injured, and therefore not entitled to recover from defendant if the injuries were wholly caused by the negligence of any such employé in the operation of the train (section 1970, Civ. Code), has been discussed by counsel, and its determination may be necessary for the purposes of a new trial.

From the evidence of plaintiff it appears that, at the time of the accident, and for some time prior thereto, he was acting as a "student brakeman" on freight trains of defendant, at his own request and by permission of defendant, for the purpose of gaining such experience and knowledge of the work on defendant's road as would, in the opinion of the defendant, render him fit and competent to act as a regular brakeman thereon, and to receive for his work a regular brakeman's pay. As such "student brakeman" he was entirely subject to the orders of defendant, and was required to perform such ordinary duties of brakeman as were allotted to him, just as fully as if he had been assigned regular employment for a pecuniary compensation by defendant. It is difficult to conceive of any reason why one, situated as these circumstances show plaintiff to have been, should be held to be other than an employé of the defendant, subject to all the obligations imposed by that relation. He was certainly in the service of defendant, regularly engaged in the doing of the defendant's business. The simple fact that he was not to be paid any money for his services cannot affect the question. It was perfectly competent for him to agree to serve an apprenticeship without pecuniary consideration. The important thing is that he voluntarily entered and was engaged in the service of the defendant upon such terms as he had seen fit to agree to. While so engaged in such service, there was no distinction, material to the question under discussion, between his situation and that of the other employés on the train. They were all regularly engaged in the service of defendant, in the common employment of operating a train for defendant. In other words, they were fellow serv-

ants. Plaintiff had the same right as the other employés to be indemnified for all injuries caused by the defendant's negligence, but his rights in this regard were no greater than those of the other employés, and, as in the case of such other employés, the defendant could not be held liable to him for injuries caused solely by the negligence of his fellow employés in the same general business, except in the cases specified in section 1970, Civ. Code. No case has been cited by plaintiff on this point which is contrary to the views here expressed. On the other hand, the case of *Millsaps v. Louisville, etc., Ry. Co.*, 69 Miss. 423, 13 South. 696, is squarely in point. There, one working as fireman on defendant's engine, with the permission of the defendant, for the purposes of learning the business, was killed in a collision caused by the negligence of a paid employé claimed to be a fellow servant. The Supreme Court held, under these facts, that plaintiff's intestate was the servant of the defendant and the fellow servant of the other employé, and that, consequently, no recovery could be had. The case of *Barstow v. Old Colony Railroad Co.*, 143 Mass. 535, 10 N. E. 255, is also in point. See, also, *Ladd v. Brockton St. Ry. Co.* (Mass.) 62 N. E. 730; *Wischem v. Richards* (Pa.) 20 Atl. 532, 10 L. R. A. 97, 20 Am. St. Rep. 900.

Under our views of the law upon this proposition, the trial court erred in the matter of instructions to the jury thereon, and this also is a sufficient reason for affirming the order granting a new trial. We do not consider it necessary, for the purposes of a new trial, to consider any of the other questions discussed.

The order granting a new trial is affirmed.

We concur: SHAW, J.; McFARLAND, J.

148 Cal. 443

BILTON v. SOUTHERN PAC. CO.
(L. A. 1,437.)

(Supreme Court of California. Jan. 15, 1906.)

1. RAILROADS—OPERATION AT CROSSINGS—MEASURE OF CARE REQUIRED.

Where the view of a railroad track near a street crossing is so obstructed that a person lawfully using the street cannot, before passing from a place of safety to a place of danger, see an approaching train in time to escape it, if it moves at a high rate of speed, it is the duty of the railroad either to moderate the speed of the train accordingly or make the approach of the train reasonably apparent by other methods.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 963, 972-980, 1001, 1003.]

2. SAME—NEGLIGENCE—EXCESSIVE SPEED—QUESTION FOR JURY.

Whether or not the rate of speed of a train at a street crossing is so dangerous or excessive as to constitute negligence depends upon the circumstances there existing, and is a question for the jury, if those circumstances are such that reasonable and impartial men may

differ as to the conclusion to be drawn therefrom.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1164½.]

3. SAME—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for the death of a driver of a wagon who was struck by a train at a street crossing, where his view of the train was obstructed, evidence held sufficient to show that the train, in running at a rate of speed of 35 miles an hour at the place in question, was negligently operated.

4. SAME—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad for the death of a driver of a wagon, who was struck by a train at a street crossing where his view of the approaching train was obstructed, evidence held insufficient to show that the deceased was guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1163.]

5. SAME—"LOOK AND LISTEN" RULE.

The track of a steam railroad is of itself a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains, and if the view of the track is obstructed he should take greater pains to listen.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1057-1060.]

6. SAME.

It is not essential to the exercise of ordinary care on the part of one crossing the track of a railroad with a team at a crossing that he should stop and listen for any particular length of time; but if he looks and listens attentively, and cannot see or hear an approaching train, he is not guilty of negligence as a matter of law in starting forward to cross the track, and thereby leaving his place of safety and entering upon a place of danger.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1173.]

7. SAME—ACTIONS IN PERILOUS SITUATION.

One who has started to cross the track of a railroad, after having failed to see or hear an approaching train for which he looked and listened, and who is suddenly confronted with imminent peril by the appearance of the train after he has reached a place of danger on or near the track, need not exercise all the presence of mind and carefulness which are required of a prudent man under ordinary circumstances, but is only required to do what is reasonable under the existing circumstances.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1027.]

8. SAME—QUESTION FOR JURY.

In an action against a railroad for the death of the driver of a wagon, who was struck by a train at a street crossing where his view of the train was obstructed, whether the efforts of deceased to escape danger from the approaching train were reasonable, in view of his peril and the other circumstances of the case, held a question for the jury.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1177.]

Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Leonard Bilton against the Southern Pacific Company. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

Rehearing denied February 13, 1906.

W. H. Spencer, for appellant. William J. Herrin and B. V. Bouldin, for respondent.

ANGELLOTTI, J. This action was brought by plaintiff to recover damages resulting from the death of his minor son, alleged to have been caused by the negligence of defendant. The case was tried by a jury, which rendered a verdict in favor of plaintiff for \$3,000, upon which judgment was entered. Defendant appeals from such judgment, and from an order denying its motion for a new trial.

It is earnestly contended that the evidence was insufficient to sustain the verdict, for the reasons, first, that it failed to show any negligence on the part of defendant, and, second, that it showed that the deceased was guilty of contributory negligence precluding a recovery. The deceased, a boy within a few days of his seventeenth birthday, and possessed of all his faculties, was driving, in a light spring wagon, filled with groceries and drawn by one horse, across defendant's railroad track, where the same crosses Twelfth street, in the town of Paso Robles, when the wagon was struck by one of defendant's locomotives, and he was instantly killed. The locomotive was attached to a south-bound passenger train, which was coming into the town several minutes late, and there was evidence to the effect that it was running at an unusually high rate of speed for that place; some of the witnesses testifying to 35 miles an hour, and the evidence as to the space within which the train was brought to a stop tending to corroborate this. The Twelfth street crossing was about 1,200 feet north of the railroad station. The town was, according to the census of 1900, a place of 1,224 inhabitants. There was some testimony to the effect that the whistle of the locomotive was not sounded at the customary place, some blocks north of Twelfth street, and that the bell upon the locomotive was not rung. The evidence indicated that at the time of the accident, by reason of an embankment and a curve in the railroad track, one approaching the crossing on Twelfth street from the west, as was deceased, could not obtain a view of the track to the north of Twelfth street until within 30 or 40 feet of the crossing, and that from that point to a point 8 or 10 feet from the track one could see the track to the north only for a distance of about 120 feet. Changes have since been made, making the crossing less dangerous, but there appears to be no serious contention that at the time of the accident the situation was not as already stated. Fronting on the west side of the railroad right of way, and within 200 feet of the south side of Twelfth street, was a flour mill, the machinery of which was in operation at the time of the accident. There was evidence to the effect that the grade of Twelfth street from a point about 125 feet west of the crossing to the track is a downgrade of about 8 to 8½ feet to the hundred. The railroad track approaches this crossing from the north on a very slight upgrade. The accident occurred on the westerly one of the three tracks of the defendant cross-

ing Twelfth street. The deceased had resided in Paso Robles for many years, and had been driving this wagon (a grocery delivery wagon) for several months, and was well acquainted with the crossing. There was evidence introduced on behalf of the plaintiff to the effect that the deceased drove his wagon down Twelfth street toward the track at a slow trot, until he came within about 8 or 10 feet thereof, when he brought his horse to a walk, momentarily paused, looked up the track, and apparently listened, and then proceeded on a walk across the track. The evidence of plaintiff's principal witness showed that after the train reached a place where it could be seen from within a few feet of the track, which must have been within 120 feet of the crossing, two or three short sharp blasts of the whistle were sounded as an alarm, and this is also the evidence of the engineer of defendant's train. If the train was traveling at the rate of 35 miles an hour, as we must assume it was in view of the verdict and the order of the trial court denying the motion for a new trial, it took only the merest fraction over two seconds to reach the crossing after the giving of such blasts.

There was a sharp conflict in evidence upon some of the points stated above, but, in view of the verdict and the order of the trial court denying the motion for a new trial, we must here assume the truth of the evidence most favorable to plaintiff. Upon these facts we have no doubt that the evidence was sufficient to support a finding that defendant was guilty of negligence. The crossing at Twelfth street was, in view of the facts already stated, an exceedingly dangerous one. The curve in the track and the embankment obstructing the view at a point 120 feet north of such crossing made it incumbent on defendant to exercise more care in approaching the crossing than could have been reasonably expected at a crossing where the view was unobstructed for a long distance. The obligation rested upon it of taking such care to prevent injury by its trains to those passing over the crossing as would, under the existing circumstances, be reasonable, and if the view of its track was so obstructed that a person lawfully using the street could not, before passing from a place of safety to a place of danger, see an approaching train just beyond the obstruction, in time to escape it, if it moved at a high rate of speed, it was its duty to moderate the speed accordingly, or make the approach of the train reasonably apparent by other methods to the user of the street. It is true that, in the absence of any statute or ordinance on the subject, no rate of speed is negligence per se. When taken in connection with other circumstances, however, the situation is very different. We can conceive of cases where, independent of any statute or ordinance, a speed of 35 miles an hour in approaching a crossing would, under the circumstances there existing, be so dan-

gerous as at once to force all sensible and impartial men to the conclusion that those operating the train were not using reasonable care to avoid injury to others, and thus constitute negligence per se. However this may be, there can be no doubt that the question as to whether or not a rate of speed at a crossing is so dangerous or excessive as to constitute negligence must depend upon the particular circumstances there existing, and, if the circumstances are such that reasonable and impartial men may well differ as to whether the speed maintained at the particular place showed a want of reasonable care, the question as to whether the railroad company was guilty of negligence in maintaining such speed is one for the jury. See *Elliott on Railroads*, §§ 1160, 1161; *Cooper v. Los Angeles, etc., Co.*, 137 Cal. 229, 232, 70 Pac. 11.

Assuming that no warning was given of the approach of the train before it came into sight around the embankment, except such warning as was caused by the mere operation of the train over the track, and this, as already stated, must be here assumed in view of the evidence and the verdict, the jury were amply warranted in concluding that the situation at this crossing was such as to render the maintenance of this rate of speed negligence on the part of the company. Not more than the merest fraction over two seconds would elapse between the coming into sight of the train and the moment when it would reach the crossing, an interval so slight as to give one incumbered with a horse and vehicle very little opportunity to cross in safety, or withdraw, if, after stopping and listening, he had commenced to move forward and was already practically in a place of danger. In our opinion, the evidence was not such that it can be held as a matter of law that the deceased was guilty of contributory negligence.

Defendant relies upon the rule to the effect that, where a person about to cross a railroad track fails to take such precautions as the courts declare are as a matter of law essential to the exercise of ordinary care on the part of one so situated, the courts will hold as a matter of law that such person has been guilty of negligence. Those precautions, as stated by this court in *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 230, 53 Pac. 651, are as follows, viz.: "The railroad track of a steam railway must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains. What he must do in such a case will depend upon circumstances. If the view of the track is obstructed, he should take greater pains to listen. If, taking those precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precautions." The rule here laid down must be considered the settled rule of this state (see *Green v. Los Angeles, etc., Co.*,

143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68), and, if the evidence compelled the conclusion that the deceased failed to observe its requirements, there could be no escape from the conclusion that he was guilty of contributory negligence as a matter of law.

There was, however, evidence tending to prove that deceased took every precaution required by this rule. If he had not done this, but had continued on a trot across the track, without stopping, although he would have been guilty of negligence, he probably would have escaped injury. As, because of the obstruction to the view, he could not see up the track any considerable distance, it was doubtless his duty, on approaching the crossing, to reduce the speed of his horse and take greater pains to listen, and, perhaps, to stop, so that his hearing might not also be obstructed by any noises under his own control. *Pepper v. S. P. Co.*, 105 Cal. 389, 399, 38 Pac. 974; *Fleming v. W. P. R. Co.*, 49 Cal. 253; *Blackburn v. S. P. Co.*, 34 Or. 215, 221, 55 Pac. 225. There was evidence tending to show that he did all this at as late an opportunity as was given him, viz., within 8 or 10 feet of the track. According to that evidence, he there brought his horse to a walk, and then momentarily paused, facing partially in the direction from which the train was coming. The evidence warranted the conclusion that he could not then see the train. Unless we can say as a matter of law that the noise of the approaching train must necessarily have been apparent to him, if, while pausing, he had listened for it, we cannot assume that he was not listening. Apparently he was taking every precaution to observe whether or not a train was approaching. There was no evidence as to whether there was any wind. The train, it must be assumed, was behind a high embankment, which might have obstructed the sound of its movement on the rails, and did not indicate its approach by the ringing of bell or sounding of whistle. The machinery of a flourmill was in operation within a few hundred feet. Under all these circumstances we do not feel warranted in saying that the mere operation of the train over the rails must have been apparent to one listening from a point 8 or 10 feet west of the crossing. It was not essential to the exercise of ordinary care on the part of deceased that he should stop and listen for any particular length of time. If he looked and listened attentively, and could not see or hear the train, and proceeded to leave his place of safety and enter upon a place of danger only after so doing, it cannot be held that he was guilty of negligence as a matter of law in starting forward to cross the track.

Having once started, although not at once upon the track, he was already in a place of danger. It must be borne in mind that

we are not considering the case of a pedestrian who is not in any danger until he has stepped within the reach of the train, and who, up to the very moment of so doing, has a sure and certain mode of escape clearly open to him, but the case of one on a loaded grocery wagon, driving a horse attached thereto, who has commenced to move down a grade toward a railroad track, and is already within a very few feet thereof. Probably the locomotive flashed into view of the deceased and gave its sharp alarm blasts before his horse was actually on the track, but it does not follow that he was guilty of negligence in attempting to escape the threatened danger by crossing in front of the train. The evidence warranted the conclusion that at this time the deceased was, without any negligence on his part, already in a position of great peril, and that immediate action on his part was necessary to avoid injury. Bewildered as he must have been by the sudden appearance of the train and the threatened peril, he was not required to exercise all that presence of mind and carefulness which are required of a careful and prudent man under ordinary circumstances. *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 521, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85. He was only required to do what was reasonable under the existing circumstances. It is possible that he might still have been able to so stop, back, and turn his horse and wagon as to entirely escape injury, although the evidence is not such as to make this clearly appear. The case was undoubtedly one where the reasonableness of the effort to escape injury after discovery of the danger was a question for the jury, to be determined by them in view of all the circumstances shown by the evidence. See *Harrington v. L. A., etc., supra*; *Liverpool, etc., Ins. Co. v. S. P. Co.*, 125 Cal. 434, 439, 58 Pac. 55. The evidence is such as to preclude us from disturbing their finding thereon.

In the matter of instructions to the jury there was no prejudicial error. The first instruction complained of, wherein the court stated the nature of the action, cannot reasonably be construed as assuming any wrongful act or negligence on the part of defendant. It may be conceded that the second instruction complained of stated a proposition of law that was "purely abstract as far as this case is concerned," but it was of such a nature that it could not have operated to the prejudice of defendant. The requested instruction as to the duty of one approaching a railroad crossing, taken from the opinion in *Herbert v. S. P. Co.*, *supra*, was fully covered by other instructions given.

The judgment and order denying the motion for a new trial are affirmed.

We concur: SHAW, J.; HENSHAW, J.

148 Cal. 423

CARPENTER v. ASHLEY. (Sac. 1,236.)
(Supreme Court of California. Jan. 13, 1906.)

1. SLANDER — PRIVILEGE — QUESTION FOR COURT.

Where the facts and circumstances under which alleged slanderous words were spoken are undisputed, the question whether they were privileged or not is a question of law for the court.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 362.]

2. SAME—COMMUNICATIONS IN JUDICIAL PROCEEDINGS—IRRELEVANT MATTER.

Under Civ. Code, § 47, providing, *inter alia*, that a privileged communication is one made in any legislative or judicial proceeding, but irrelevant or immaterial matter voluntarily or maliciously published in the course of judicial proceedings is not privileged, a district attorney conducting a criminal case in a justice's court is not privileged to charge opposing counsel with perjury or subornation of perjury.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 117-123.]

3. SAME—EVIDENCE.

In an action for slander, newspaper articles with which defendant had no connection, but which purported to narrate what he said, were not admissible in evidence against him.

Department 2. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by A. H. Carpenter against A. H. Ashley. From a judgment for defendant, plaintiff appeals. Reversed.

A. H. Carpenter, *in pro. per.* R. C. Minor and Nicol & Orr, for respondent.

McFARLAND, J. Action of slander. The verdict and judgment were for defendant; and from the judgment, plaintiff appeals.

It was averred in the complaint: That on January 23, 1901, at the city of Stockton, in the presence and hearing of divers persons, defendant spoke and published concerning plaintiff the following words: "You have committed perjury." "You have committed subornation of perjury." "You are guilty of subornation of perjury." "I charge you with subornation of perjury." "I will have your case presented to the grand jury." That on the next day, January 24, 1901, he spoke and published said words in the presence of divers persons. That said words were false, etc. Defendant, in his answer, denies that he spoke the words, and upon that issue the evidence was conflicting, so that if the only question in the case was whether the words were spoken as charged, the verdict and judgment could not be disturbed. There are, however, other questions in the case. The record presents numerous exceptions to rulings of the court in passing upon the admissibility of evidence, and instructing the jury; but the only point made by appellant which calls for much consideration arises out of the instructions to the jury on the subject of "privileged publications." Respondent set up as a defense

that whatever words were spoken by him at the time stated in the complaint were privileged publications, because made in the "proper discharge of official duty," and in a "judicial proceeding," within the meaning of the provisions of section 47 of the Civil Code. The jury may have found that the words were spoken, as alleged, but were privileged; and therefore the instructions as to the privilege are important.

The facts and circumstances under which the words were spoken were undisputed; and therefore the question whether they were privileged was a question of law for the court to determine. The words were spoken by respondent, if at all, while, as district attorney, he was conducting in a justice's court the trial of the criminal case of the People against Arthur Ennis, charged with petit larceny; and the plaintiff Carpenter, who is an attorney at law, was conducting the defense of said Ennis. He was not a witness in the case. During the progress of that trial the defendant herein directed the sheriff to arrest one Stennett for an alleged crime, and plaintiff herein characterized the act of ordering the arrest as going beyond legitimate means and "bulldozing"; and thereupon—if the averments of the complaint herein and the testimony of plaintiff are true—defendant herein used the words above quoted. Sometimes the question of privilege is one of mixed fact and law, and in such case it is proper for the court to submit it to the jury with proper instructions; but where, as in the case at bar, the facts touching the circumstances under which the alleged defamatory words are spoken are not in dispute, the question is for the court. In Townsend on Slander & Libel (3d Ed. p. 332) the rule is correctly stated as follows: "The facts being uncontroverted, the court is to determine whether or not the publication is privileged." But in the case at bar the court refused to determine whether the publication was privileged, and left that question to the jury; and in so doing the court erred. This ruling was made in various forms. In the first place, defendant asked for several instructions which should have been given as presented; but the court, against the objections of plaintiff, inserted in them the qualifications "that said words were not privileged," and "unless the jury find the publication thereof was privileged." The court refused to instruct, at plaintiff's written request, that if the alleged words were spoken during the trial of People v. Ennis, as hereinbefore stated, they were not privileged. The following instruction asked by plaintiff was refused: "The jury are instructed that the question of whether the plaintiff had committed perjury or subornation of perjury was not under consideration in the case of People v. Arthur Ennis, wherein the slanderous words are alleged to have been spoken

by the defendant herein, and therefore anything that the defendant in this case may have said at that trial, in the presence of others in relation to whether the plaintiff had committed perjury or subornation of perjury would not be privileged." The court also instructed the jury, at the request of defendant, as follows: "No action will lie against a public officer for any words spoken or published by him in the proper discharge of his official duty. No action will lie against a district attorney for any words spoken or published by him during the proper discharge of his official duties as district attorney and in the course of a judicial proceeding in which he in his official capacity is engaged." There were other instructions and refusals to instruct on the same lines as the above; but the foregoing references are sufficient to show that the court left to the jury the whole question whether or not the alleged defamatory words were privileged.

There is some authority to the point that the privilege of counsel when trying a case to speak defamatory words is unqualified and absolute; that is, that he has free unbridled license to defame whosoever he pleases, whether or not the person defamed be a witness or party in the pending action or a stranger, and whether or not the defamatory matter be in any way pertinent or relevant to the subject-matter of inquiry in the action or has any reference thereto. This doctrine would work intolerable wrong to innocent persons who would be without any remedy, or, as said in *Hastings v. Lusk*, 22 Wend. 410, 84 Am. Dec. 830, it would be to furnish counsel "with a shield of Zeus, and thereby to enable them with impunity to destroy the character of whosoever they please." The great weight of authority, however, is that this privilege is not absolute, but is limited to words which have some reasonable pertinency, or relevancy, or reference to the matter involved as the subject-matter of the pending action. Blackstone (book 3, p. 29) says: "A counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions, although it should reflect upon the reputation of another, and even prove absolutely groundless; but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured." In *Hastings v. Lusk*, supra, Chancellor Walworth said: "Upon a full consideration of all the authorities on the subject, I think that the privilege of counsel in advocating the causes of their clients, and of parties who are conducting their own causes, belongs to the same class where they have confined themselves to what was relevant and pertinent to the question before the court." There are numerous authorities to the same point; but as they are

nearly all referred to and collated in the leading case on the subject of *Maulsby v. Reissnider*, 69 Md. 143, 14 Atl. 505, we will content ourselves with referring to that case, and the authorities there cited; and we agree with the court in that case in holding that "the privilege of counsel in the trial of a cause is not absolute and unqualified, and slanderous words spoken by him having no relation or reference to the cause in hand or to any subject-matter involved therein are actionable." And it is quite clear that in the case at bar the defamatory words alleged to have been spoken by the defendant of plaintiff, who was simply an opposing attorney in the case at hand, had no pertinency, relevancy, or reference, to the charge of larceny in the pending action of *People v. Ennis*, which was the subject-matter of inquiry in that action; he had no more privilege to use the defamatory words alleged than he would have had to charge plaintiff with robbery, rape, or murder.

There are no other points calling for much special notice. The record contains a great deal of irrelevant matter. The court was right in excluding certain newspaper articles purporting to state what the defendant had said; he was not responsible for those articles, and they were not admissible evidence against him. We see no errors in the other instruction, at least none of any consequence, except, of course, those which come within the rule above stated as to privileged publications. And if there should be another trial, no doubt, much of the matter which appears in the present transcript will be left out of the evidence. There were no rulings on the admissibility of evidence which seem to be important or material, at least, as the case was presented; but, of course, on another trial the case might assume a different phase, and the rulings have more significance.

The judgment appealed from is reversed.

We concur: LORIGAN, J.; HENSHAW, J.

148 Cal. 480

SOUTHERN PAC. R. CO. v. LIPMAN.
(L. A. 1,482.)

(Supreme Court of California. Jan. 17, 1906.)

1. APPEAL—FINDINGS—SUFFICIENCY OF EVIDENCE — SPECIFICATIONS OF ERROR — REVIEW.

Where, on appeal from an order denying a new trial, the questions presented by assignments that the findings of the trial court were not sustained by the evidence were available to appellant under its exception to the ruling of the trial court in the admission of evidence and to the denial of plaintiff's motion for a judgment of nonsuit on appellee's counterclaims, it was immaterial that such assignments of error did not sufficiently specify wherein the evidence was insufficient to sustain the findings.

2. PUBLIC LANDS—RAILROAD GRANTS—CONGRESSIONAL ACTS—EFFECT.

Grants under Act. Cong. 1866 authorizing the Atlantic & Pacific Railroad Company and the Southern Pacific Railroad Company to

each construct a railroad in the state of California, and granting public lands in aid of the construction of each of such roads, were grants in present, which, when maps of definite location were filed and approved, took effect by relation as of the date of the act.

3. COURTS—DECISIONS—CONCLUSIVENESS.

Where, on an issue involving a railroad company's rights in certain public land under a congressional grant, the court based a finding that the railroad company had no rights in the land on certain federal decisions, a decision of the Supreme Court of the United States, though rendered subsequent to the decision in question, holding that the railroad company and the United States were tenants in common in a large tract, including the land in question, was available on appeal as a conclusive authority that the finding of the trial court was erroneous.

4. EVIDENCE—JUDICIAL NOTICE.

A letter of the commissioner of the General Land Office with reference to lands within the limits of a railroad grant is a public document of which the courts will take judicial notice.

5. PUBLIC LANDS—RAILROAD GRANTS—PURCHASERS FROM RAILROAD.

In a suit to cancel the rights of vendees in certain lands within an alleged railroad grant, sold before the issuance of a patent, findings that it had been finally determined that the railroad company had no interest in the land and should not receive a patent therefor *held* not sustained by the evidence.

6. SAME.

Where a contract for the sale of railroad lands, prior to the issuance of a patent, required the railroad company to exercise reasonable diligence to obtain patents for the land, and the delay which intervened was occasioned by the failure of the Land Department prior to 1897 to approve the report of commissioners appointed to inspect the railroad constructed, on which approval alone patents could be issued, and by litigation arising in the federal courts relating to plaintiff's right to patents, which was prosecuted by the railroad company as diligently as possible, a finding that the railroad company did not use ordinary diligence to procure patents for the land was erroneous.

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Suit by the Southern Pacific Railroad Company against Louis Lipman. From an order denying plaintiff's motion for a new trial, it appeals. Reversed.

Rehearing denied February 15, 1906.

William Singer, Jr., H. V. Reardan, and Guy Shoup, for appellant. Bigelow, Dorsey & Titus, for respondent.

LORIGAN, J. This is an appeal from an order denying the motion of plaintiff for a new trial.

On September 6, 1888, plaintiff and defendant entered into six contracts for the sale and purchase of real property situated in Los Angeles county, this state. Each contract related to a separate quarter section of land and the first four—Nos. 9,886, 9,887, 9,888, and 9,889—embraced all of section 27, township 6 N., range 10 W., San Bernardino base and meridian. The other two—Nos. 9,890 and 9,891—embraced the N. $\frac{1}{2}$ of section 27, township 8 N., range 10 W., same base and meridian. All these contracts were identical in terms, save as to the property

described in each. The purchase price fixed was \$400 per quarter section, part—\$80—payable on the execution of each contract, and the balance—\$320—on or before September 6, 1893, with interest thereon payable annually in advance until paid. Defendant paid interest under each of the contracts up to September 6, 1895, but paid no further interest, or any part of the purchase price, save the original payment of \$80. Each of these contracts provided that upon payment of interest and the full purchase price by defendant plaintiff would execute to him a deed of conveyance of the premises described therein, after receipt by it of a patent therefor from the United States, and relative to the procuring of such patent each contract contained the following covenants: "It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that as, in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore nothing in this instrument shall be considered a guaranty or assurance that patent or title will be procured; that, in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay (without interest) to the party of the second part all moneys that may have been paid to it by him on account of any of such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof. It is further agreed that if the party of the first part shall obtain patents for part of the lands herein described, and shall fail to obtain patent for the remainder of them, this contract shall in all its provisions be and remain in full force and virtue as to the tracts patented, and shall, except as to repayments herein provided for, be null and void as regards those tracts for which it shall be finally determined that patents cannot be obtained."

On February 8, 1899, plaintiff brought this action to obtain a decree foreclosing the rights of defendant to purchase the land described in such contracts, unless all sums due the plaintiff thereunder were paid within such reasonable time as the court might allow, and for general relief, alleging that it had complied with all the conditions of the several contracts, and that defendant had failed and neglected to make the payments provided for therein to be paid on his part. By way of answer and counterclaim, defendant denied that plaintiff had any title or interest whatever to any of said

lands, and alleged that it had been finally determined by the Supreme Court of the United States, and by the Land Department of the United States, that patent shall not issue to plaintiff for any part of the land embraced in the contracts, and that plaintiff had failed to use ordinary diligence to procure patents for them; these several allegations being based upon the covenants in the contracts heretofore quoted. He further alleged that he had, on October 18, 1898, notified plaintiff that he had elected to rescind such contracts, and asked for judgment against plaintiff for repayment of the amounts paid it thereunder. The court made its findings in favor of the defendant upon all the issues made by the pleadings, and entered its judgment in his favor for the sum of \$1,184, the aggregate amount paid by the defendant to the plaintiff under the terms of the contract. The plaintiff's motion for a new trial was based, among other things, upon alleged insufficiency of the evidence to sustain certain findings made by the court, and on account of errors of law alleged to have been committed during the trial.

The findings particularly attacked, and a consideration of which are involved upon this appeal, were to the effect that when the contracts in suit were entered into—September 6, 1888—plaintiff had no right, title, or interest to the land described therein; that it had not done or performed any or all of the things required by the terms and conditions of the several contracts; and a general finding "that all the allegations of the defendant's answer as to the several counterclaims therein alleged and set forth are true." This general finding necessarily included particular findings in favor of defendant's allegations that it had been finally determined that no patent should be issued to plaintiff for the lands described in the contract, and that plaintiff had failed to use ordinary diligence to procure them. Considering all these findings together, they amount to but the same thing—two findings to the effect, first, that when the contracts were made plaintiff had no interest in the land described, because it had since been finally determined that patent therefor shall not issue to it; and, second, that plaintiff had not complied with the conditions of its contract because it had not used ordinary diligence to procure such patents. Whether these findings are sustained by the evidence is the main and controlling question on this appeal. At the threshold of this inquiry it is insisted that these findings cannot be considered because there are no sufficient specifications of the insufficiency of the evidence to sustain them. We think, however, that under the liberal rule now followed by this court (*Bell v. Staacke*, 141 Cal. 186, 74 Pac. 774; *Jones v. Goldtree*, 142 Cal. 383, 77 Pac. 939) the specifications are sufficient. We do not dwell on this point, because, even if it be conceded that they were not sufficient, still the ques-

tions which are sought to be raised under them are equally available to the appellant under its exception to the ruling of the court in the admission of evidence, under the agreed statement of facts hereafter referred to and upon which alone the findings can be sustained. It is equally available under the exception of plaintiff to the ruling of the court denying its motion for a judgment of nonsuit upon the counterclaims of defendant, which motion was based on the grounds that there was no evidence showing neglect in an effort to procure patents, and no proof that it had been finally determined that plaintiff was not entitled to them. The commission of error in its rulings by the superior court in both these particulars were grounds upon which appellant moved for a new trial, and are grounds urged for a reversal here. So that, even if the specifications were insufficient, still the legal result which is sought to be accomplished by a successful attack on them—a reversal of the order denying the motion for a new trial—would be as fully secured if the correctness of either of these rulings could not be sustained. But we are satisfied that the specifications are sufficient, and, as the main question in the case is whether the evidence was sufficient to sustain either of the findings, we will address ourselves to a consideration of that point.

The lands described in the several contracts were claimed by the plaintiff as part of the lands to which it was entitled under an act of Congress of 1866. That act authorized the Atlantic & Pacific Railroad Company and the plaintiff—the Southern Pacific Railroad Company—to each construct a railroad in the state of California, and provided a grant of lands for the purpose of aiding in the construction of each of said roads. The grants to both the companies were grants in present, which, when maps of definite location were filed and approved, took effect by relation as of the date of the act. *U. S. v. S. P. R. R. Co.*, 146 U. S. 595, 13 Sup. Ct. 152, 36 L. Ed. 1091. Each of the companies above designated filed in the office of the Commissioner of the General Land Office maps of definite location of the routes of their respective roads; the plaintiff making such filing January 3, 1867, and the Atlantic & Pacific Railroad Company on March 9, 1872. These maps, and the general routes designated thereon, were approved by the United States on the respective dates of filing thereof, and the Commissioner of the General Land Office and the Secretary of the Interior withdrew from sale all odd sections of land within 30 miles on each side of the designated route of each company. The route designated on the map of the Southern Pacific from Mohave to Needles was on the same general course and contiguous to the line adopted by the Atlantic & Pacific Railroad Company. In 1871 Congress, by act of that year, incorporated the Texas Pacific Railroad Company, and granted it public lands to aid in the construction of its road.

This act also authorized the Southern Pacific Railroad Company to construct a road from Tehachapi Pass to meet the Texas Pacific Railroad near the Colorado river, and the act extended to it the same rights, grants, and privileges as were given it under the act of 1866, with a proviso, however, that such rights granted should in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company. The grant of public lands to plaintiff by this later act is known as the branch line grant, and under it plaintiff constructed its branch line road as contemplated in the act from Mohave through Los Angeles to Yuma. Under the act of 1866, known as the "main line grant," plaintiff constructed its main line of road on the general route as designated upon its map filed and approved under that act from Mohave to Needles. The lands described in the several contracts are within the primary or indemnity limits of such main line grant to plaintiff under the act of 1866, and within the limits of the grant to the Atlantic & Pacific Railroad Company under the same act, but none of them are within the limits of the grant under the act of 1871. The plaintiff, as we say, built its main road in California, as contemplated by the act of 1866, but the Atlantic & Pacific Railroad Company, though it filed its map of definite location in 1872, never did in fact construct any road in California, and in 1886 Congress declared forfeited the land grant made to the Atlantic & Pacific Railroad Company in aid of the contemplated construction by it of such road.

We have referred to the matter of these respective grants in a general way, as bearing on the question at bar. A more particular discussion of them will be found in *Wilson v. Southern Pacific Railroad Company*, 135 Cal. 425, 87 Pac. 688, a case, in its general aspect, similar to the case at bar, and in a letter of Secretary Bliss of the Interior Department (In re Southern Pacific Railroad Company, 25 Land Dec. Dept. Int. 223). Both the *Wilson Case* and the secretary's letter deal with the history of these grants, the protest of the Atlantic & Pacific Railroad Company to the Land Department against the issuance of patents to the plaintiff for any lands within the conflicting limits of both grants, under either the act of Congress of 1866 or the act of 1871, and the litigation between plaintiff and the United States as to the title of plaintiff to these lands upon the forfeiture by Congress of the grant made to the Atlantic & Pacific Railroad Company.

With this preliminary statement of the general history of these grants we now approach a consideration of the findings. The only evidence in the case in support of the finding that it had been finally determined that patent should not issue to plaintiff for the lands described in the contracts, and a portion of the evidence offered in support of the finding that plaintiff had not used

ordinary diligence to procure such patents, is contained in the following agreed statement of facts offered by defendant upon the trial and admitted in evidence over plaintiff's objection and exception reserved: "It is hereby stipulated by the parties to the said action that all of the land mentioned and described in the pleadings herein is situated within the primary limits of the grant made by the United States by act of Congress approved July, 1866, to the Atlantic & Pacific Railroad Company; and that the land described in contracts Nos. 9,890 and 9,891 is within the indemnity limits, and the rest thereof within the primary limits of the grant made to the plaintiff herein by the act of Congress above mentioned, as the lines of railroads of said respective companies were definitely located, as shown by the records and maps of the United States Land Department; and that the plaintiff had no other title or claim to said lands save that derived from such grant under said act. It is further stipulated that plaintiff selected the land described in contracts Nos. 9,890 and 9,891 for patent in its main line list No. 80 on May 15, 1893, and not prior thereto; and said selection was approved by the register and receiver of the United States land office at Los Angeles on August 11, 1893; and that plaintiff selected all the rest of the land described in this action for patent in its main line indemnity list No. 50 on August 31, 1894, but that plaintiff has never received any patent from the United States for any part of said lands. It is further stipulated that the allegations in the answer that it has been finally decided that patent for said lands should not issue to the plaintiff herein has no support other than the decisions rendered by the Supreme Court of the United States in the cases of *United States v. Southern Pacific Railroad Company*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091, *United States v. Colton Marble & Lime Company*, and *United States v. Southern Pacific Railroad Company*, 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104, and *Southern Pacific Railroad Company v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; and that no part of any of the lands in this suit was involved in either or any of said cases. It is further stipulated that none of the land involved in the first three cases above mentioned as being found in 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091, was situated within either the primary or indemnity limits of the above-mentioned grant to the Southern Pacific Railroad Company made by act of Congress of July 27, 1866, but was situated within the limits of its branch line grant made by act of Congress approved on March 3, 1871; but that in said last-mentioned case of *Southern Pacific Railroad Company v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, about six sections of the land involved were situated within the primary limits of said grant of July 27, 1866, to the

plaintiff, as well as within the limits of the said branch line grant of March 3, 1871, to the plaintiff, but that in the pleadings in said action no mention was made of said grant, nor did the plaintiff herein in its answer in said case assert any right to any of the land therein involved under its said grant of 1866, nor was any evidence introduced by either party tending to show any part of said six sections within the limits of the plaintiff's said grant by the act of July 27, 1866."

It will be observed (as this stipulation contains the only evidence on the point) that the finding that it had been finally determined that patents for these lands shall not issue to plaintiff, is rested entirely upon the conclusion of the lower court that the several decisions of the Supreme Court of the United States, referred to therein, so held. But, as is pointed out in *Wilson v. S. P. R. R. Co.*, supra, the only question presented for determination in those cases was the right of the plaintiff to the lands there involved under the branch line grant act of 1871. In those cases it was simply held that upon the filing of its map of definite location by the Atlantic & Pacific Railroad Company, and the approval thereof by the United States government, the grant in present took effect by relation as of the date of the passage of that act; that as the title had thus vested in the Atlantic & Pacific Railroad Company in 1866, the act of 1871 could not operate upon any land within the limits of the grant under the act of 1866; that under the act of 1866 forfeiting the grant of the Atlantic & Pacific Railroad Company, these lands became restored to the public domain unaffected by any claim of the Southern Pacific Railroad to them under the act of 1871. None of these cases involved any question as to the claim or right of plaintiff to lands (including those described in the contracts here under consideration) under the main line grant in the act of 1866, and as that point was not involved in those cases, they necessarily did not determine that plaintiff was not entitled to patents for those lands under that act, but only that it was not entitled to them under the branch line grant act of 1871.

While the motion for a new trial in the case at bar was pending before the lower court, disposition of it was held in abeyance pending the decision of the Supreme Court of the United States in the case of *Southern Pacific Railroad Co. v. United States*, on appeal from the Circuit Court of the United States for the Ninth District, which involved the right of the plaintiff to these lands under the main line grant act of 1866. That suit was brought by the United States to quiet title of the government against the Southern Pacific Railroad Company to all the odd-numbered sections of land in California, within the conflicting primary and indemnity limits of the grant made by Congress to the Atlantic & Pacific Railroad Company and the

Southern Pacific Railroad Company under the act of 1866. It included the lands in the case at bar. The Southern Pacific Railroad Company in that action asserted title to all the lands involved under the act. A statement of the different classes of land claimed will be found in 98 Fed. 27. The Supreme Court of the United States decided the appeal from the Circuit Court January 6, 1902, and the case is reported in 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307. In its decision that court held that as to the lands within the conflicting primary limits of the grant (which includes section 27, township 6 N., range 10 W., described in the first four contracts numerically mentioned above) the United States and the Southern Pacific Railroad Company each owned an undivided moiety of such lands and dismissed the complaint as to all other lands involved in the action (including those within the indemnity limits of the grant) without prejudice to further action or suit. In that decision the Supreme Court of the United States referred to the cases cited in the agreed statement of facts and expressly held that none of those cases adjudged that plaintiff had no title to any land by virtue of the act of 1866.

Subsequent to this decision the trial court in the case at bar denied the motion for a new trial, and in a short opinion which embraced the order of denial stated that as to this latest decision of the Supreme Court: "In so far as it related to equal moiety in the lands it amounted to a confirmation of the original decision that no patent should issue for the whole of the land, and that it is not sufficient that by any decree or construction of a grant they were awarded a lesser amount." In reaching this conclusion, however, the lower court inadvertently overlooked the provision in each contract that if "the party of the first part shall obtain patent for part of the lands herein described, and shall fail to obtain patent for the remainder of them, this contract shall in its provision be and remain in full force * * * as to the tracts patented and shall be void * * * as regards those tracts for which it shall be finally determined that patent cannot be obtained." As the decision of the Supreme Court was to the effect that the United States and the plaintiff took each an undivided moiety of the lands within the conflicting primary limits, it could not be determined what particular portion of the lands the plaintiff would be awarded until a partition was had. So that if the decision proceeded no further than to declare that the plaintiff and the United States were tenants in common in equal undivided moieties of these lands within the primary limits of the grant, it would still leave the question undetermined as to the particular tracts to which plaintiff would ultimately be entitled to a patent within those primary limits and to which the contracts would apply. The decision, how-

ever, did not rest with adjudging the respective interests of the parties. In addition to that, the court said: "The United States and the Southern Pacific being, therefore, tenants in common for a large body of lands a partition is necessary, it was suggested by Secretary Lamar * * * that the Southern Pacific take only every other alternate odd-numbered section. We see no impropriety in such mode of partition, though under the case as it stands we can make no order to that effect. In whatever way partition may be had, equity requires that the lands which the Southern Pacific has assumed to sell and which were excepted by the Circuit Court from the decree in favor of the United States, to which they took their cross-appeal, must be among those set off to the Southern Pacific, and thus the title to the purchasers be perfected," and that the adjustment of the grant is properly to be had in the Land Department. In conformity with this equitable requirement, it appears from a certified copy of a letter of the Commissioner of the General Land Office to the register and receiver of the land office at Los Angeles, dated February 28, 1903 (filed in this court upon the oral argument), that the lands in the case at bar which are within the conflicting primary limits—all of section 27, township 6 N., range 10 W.—have been selected by plaintiff and will be set off to it in due course of time, and patents therefor will be issued to the plaintiff.

It is insisted by counsel for respondent that neither the decision of the Supreme Court in 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307, nor the commissioner's letter can be taken into consideration as evidence because the decision of the Supreme Court of the United States was rendered and the letter written subsequent to the decision in the case at bar, and, as counsel say, have "no legal significance in the determination of the motion for a new trial." But they are not considered as evidence at all. The decision is taken as conclusive authority that the conclusion reached by the trial court that it had been finally determined by the prior decisions of the Supreme Court, cited in the agreed statement of facts, that patent shall not issue to plaintiff for these lands within its main line grant, was wrong. And the letter of the Commissioner of which we take judicial notice (S. P. R. R. Co. v. Wood, 124 Cal. 475, 57 Pac. 388) is considered in connection with that decision, as showing that the government has conformed to the equitable requirement declared therein and partitioned between itself and plaintiff the lands within the conflicting primary limits of the grant, so as to set off to the plaintiff the lands in the case at bar within such limits which it had assumed to sell, in order that, as the court said: "Thus the title to the purchasers be perfected."

So far we have considered only the right of plaintiff under the decision of the Supreme Court of the United States relative to the

lands described in the contracts in question which lie within the conflicting primary limits of the grant made by the act of Congress of 1866. Now, as to the indemnity lands. These consist of the lands described in the contracts numbered 9,890, 9,891, as the N. $\frac{1}{2}$ of section 27, township 8 N., range 10 W. It is insisted by respondent that, as these lands are within the primary or place limits of the forfeited grant to the Atlantic & Pacific Railroad Company, they cannot be selected by plaintiff as indemnity land within said forfeited limits. We do not deem it necessary to discuss this point to any extent, or refer to the authorities cited by counsel. The right of plaintiff to these lands under the act of 1866 was not involved in any of the cases cited in the agreed statement of facts, nor was the right to them, asserted under the act of 1866 by the plaintiff, determined one way or another by the Supreme Court of the United States in the decision in 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307. That decision dealt with the primary lands only. As to the right of plaintiff to the lands within the indemnity limits of the grant under the act of 1866, presented for consideration in that case, the court declined to pass upon it, but dismissed the complaint without prejudice to any suit or action relative to them. As far, then, as the decision of any court is concerned, there has been no final determination that patent shall not issue to plaintiff for these lands. Neither has the government determined that plaintiff is not entitled to patent for them. On the contrary, such action as the government has taken would indicate that plaintiff is entitled to a patent for them. It is admitted in the agreed statement of facts that as to these indemnity lands in the case at bar the plaintiff made the selection of them for a patent in its main line list numbered 80 on May 15, 1893, and that the register and receiver of the United States land office at Los Angeles approved such selection on May 11, 1893. In the case of *Wilson v. Southern Pacific R. R. Co.*, 135 Cal. 421, 425, 67 Pac. 688, 689, this court said, in speaking of an approval by the local land officers of a selection similar to the one under consideration here: "The acceptance and approval by the land officers and the selection thus made on April 23, 1885, was the recognition by the government officers having the power and jurisdiction to dispose of the question of the right of the defendant to a patent. It was in the nature of a judgment determining their right to a patent, and conclusive in their favor until set aside by some higher authority." The record in this case does not disclose that the approval of the selection of these indemnity lands in the case at bar has ever been set aside by any higher authority, and such approval, as it stands undisturbed, is, upon the record here presented, conclusive evidence of the right of the plaintiff to a patent for such indemnity lands. As it appears, then, that as to the primary lands

described in the contracts at bar it has been judicially determined that plaintiff is entitled to an undivided moiety thereof as tenant in common with the United States, and that in the general partition between these co-tenants of the large body of land within the conflicting primary limits of the grant under the act of 1866, the plaintiff has selected all the primary lands described in such contracts, and that the same will be set off and patented to it, and as it further appears that as to the indemnity lands described in such contracts the local land officers have, by their approval of plaintiff's selection, recognized its right to a patent therefor, it necessarily follows that the finding of the trial court that it had been finally determined that plaintiff shall not receive a patent for said lands is not sustained by the evidence.

As to the finding of the court that the plaintiff had not used ordinary diligence to procure patents for such lands, less need be said. There is no evidence in the case to sustain this finding, but, on the contrary, what evidence was introduced on the subject (and it was all introduced by the plaintiff) shows that for several years prior to the execution of these contracts, and continuously thereafter, plaintiff at all times vigorously asserted its claim for all the lands, primary and indemnity, to which it claimed title under the act of 1866, and as early as 1888 it made application to the Land Department under the act of 1866 for patents to lands of similar character, and similarly situated to those described in the contracts here. These applications were based upon a favorable report on the construction of plaintiff's road from Mojave to Needles, made to the Interior Department about 1885 by the commissioners appointed by the President to examine it. Upon the filing of the report, a protest against the acceptance or approval of it was filed by the Atlantic & Pacific Railroad Company, and thereupon action on the report of the commissioners was suspended. Until such report was accepted and approved by the Secretary of the Interior, patents could not be issued, and hence the application of 1888 for them was refused. It was not until September, 1897, that the Interior Department finally accepted the commissioners' report and approved the construction of the road. It was only then that it became possible for the plaintiff to obtain patents for such lands, and any application for them prior to that time would have been futile. While it appears that the plaintiff in fact filed its lists of selections of the lands described in the contract here in question in 1893 and 1894, the ordinary diligence to procure them which it contracted for would have been fully discharged had the application not been filed until the acceptance and approval by the Secretary of the Interior of the commissioners' report, which was the earliest possible time an application could

have been effective and a patent procured upon it. Aside from the proceedings before the Interior Department, involving plaintiff's right to patents for these lands, we have seen that its rights thereto were also a matter of litigation in the federal courts, culminating in the decision found in 188 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307, which we have heretofore referred to and discussed.

It will be thus observed that whatever delay in the procurement of patents for these lands occurred was occasioned, not by any want of ordinary diligence on the part of plaintiff, but from the failure of the Land Department, until 1897, to approve the report of the commissioners, upon which approval alone patents could be issued, and on account of the litigation arising in the federal courts relative to plaintiff's right to patents. *Wilson v. S. P. R. Co.*, supra. From these considerations it is obvious that the finding that the plaintiff did not use ordinary diligence, as provided in the contracts, to procure patents for these lands also finds no support in the evidence.

Several other points are made in the briefs of counsel, but, as the controlling one on this appeal is the sufficiency of the evidence to sustain the findings, we perceive no reason for discussing the others.

As the point that the evidence does not sustain the findings is well taken, the order denying the motion for a new trial is reversed, and the cause remanded that a new trial may be had.

We concur: McFARLAND, J; HENSHAW, J.

SOUTHERN PAC. R. CO. v. STRAUSS et al.
(L. A. 1,481.)

(Supreme Court of California. Jan. 17, 1906.)

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Suit by the Southern Pacific Railroad Company against Max Strauss and others. From an order denying plaintiff's motion for a new trial, it appeals. Reversed.

Rehearing denied February 15, 1906.

William Singer, Jr., H. V. Reardan, and Guy Shoup, for appellant. Bigelow, Dorsey & Titus, for respondents.

PER CURIAM. There is no substantial difference between the appeal in this case and that in the case of *Southern Pacific Railroad Company v. Louis Lipman* (L. A. 1,482, this day decided) 83 Pac. 445. It only involves different land. The appeal in this case was submitted on the briefs and argument in the Lipman Case, and on the authority of that case the order denying the motion of plaintiff for a new trial is reversed, and the cause remanded, that a new trial may be had.

SOUTHERN PAC. R. CO. v. GOLDMAN.
et al. (L. A. 1,480.)

(Supreme Court of California. Jan. 17, 1906.)

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by the Southern Pacific Railroad Company against Max Goldman and others. From an order denying plaintiff's motion for a new trial, it appeals. Reversed.

Rehearing denied February 15, 1906.

William Singer, Jr., H. V. Reardan, and Guy Shoup, for appellant. Bigelow, Dorsey & Titus, for respondents.

PER CURIAM. There is no substantial difference between the appeal in this case and that in the case of Southern Pacific Railroad Company v. Louis Lipman (L. A. 1,482, this day decided) 83 Pac. 445. It only involves different land. The appeal in this case was submitted on the briefs and argument in the Lipman Case, and on the authority of that case the order denying the motion of plaintiff for a new trial is reversed, and the cause remanded, that a new trial may be had.

SOUTHERN PAC. R. CO. v. WILLARD et al.
(L. A. 1,479.)

(Supreme Court of California. Jan. 17, 1906.)

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by the Southern Pacific Railroad Company against M. Willard and others. From an order denying plaintiff's motion for a new trial, it appeals. Reversed.

Rehearing denied February 15, 1906.

William Singer, Jr., H. V. Reardan, and Guy Shoup, for appellant. Bigelow, Dorsey & Titus, for respondents.

PER CURIAM. There is no substantial difference between the appeal in this case and that in the case of Southern Pacific Railroad Company v. Louis Lipman (L. A. 1,482, this day decided) 83 Pac. 445. It only involves different land. The appeal in this case was submitted on the briefs and argument in the Lipman Case, and on the authority of that case the order denying the motion of plaintiff for a new trial is reversed, and the cause remanded, that a new trial may be had.

148 Cal. 495

ROBINSON v. EBERHART et al. (L. A. 1,462.)

(Supreme Court of California. Jan. 17, 1906.)

1. APPEAL—TIME FOR TAKING PROCEEDINGS.

Under Code Civ. Proc. § 939, subd. 1, allowing six months for an appeal from a judgment, an appeal taken after that time must be dismissed.

2. SAME—QUESTION CONSIDERED—APPEAL FROM ORDER DENYING NEW TRIAL.

The insufficiency of the evidence to sustain the findings is available on an appeal from an order denying a new trial.

3. PUBLIC LANDS—DISPOSAL OF LANDS OF STATE.

Pol. Code, § 3495, defining land suitable for cultivation, is invalid as affecting Const. art. 17, § 3, providing that lands belonging to the state which are suitable for cultivation shall be granted to actual settlers in quantities not exceeding 320 acres to each, since the Legislature has no power to limit the effect of the Constitutional provision.

4. SAME.

A section of land absolutely unfit for cultivation, unless by the boring of artesian wells water may in the future be developed in such quantities as to render it possible to artificially irrigate it, is land not suitable for cultivation, within Const. art. 17, § 3, providing that lands belonging to the state, suitable for cultivation, shall be granted only to actual settlers in quantities not exceeding 320 acres to each, and Pol. Code, § 3495, providing that land suitable for cultivation may be sold in quantities not exceeding 640 acres to any one person.

Department 1. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by M. H. Robinson against O. C. Eberhart and another. From a judgment in favor of defendants, and an order denying a new trial, plaintiff appeals. Appeal from judgment dismissed, and order denying a new trial affirmed.

Collier & Carnahan, Withington & Carter, and Victor E. Shaw, for appellant. E. A. Meserve, E. E. Powers, C. F. Holland, Powers & Holland, and D. M. Hammack, for respondents.

ANGELLOTTI, J. This is an action instituted in the superior court of Riverside county, under an order of reference made by the surveyor general, to determine the conflicting claims of plaintiff and defendant Eberhart, as to their respective rights to purchase from the state a half section of state school land, the E. ½ of section 36, T. 6 S., R. 7 E., S. B. M. Johnson has some claim under Eberhart, arising from a contract of sale. The judgment was in favor of defendant, and plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The appeal from the judgment was taken more than six months after the entry thereof, and must therefore be dismissed. Code Civ. Proc. § 939, subd. 1. The point made by appellant against the judgment, insufficiency of evidence to sustain certain findings, is, however, available on the appeal from the order denying the motion for new trial. Eberhart's application to purchase was for the whole of said section 36, and was first in point of time. It was made upon the theory that the land was not "suitable for cultivation," his affidavit stating that it was not suitable for cultivation, and failing to show that he was an actual settler thereon, and the application being for 640

acres; and he in all respects complied with the law applicable to the sale of lands not suitable for cultivation. Section 3495, Pol. Code. If the land was not "suitable for cultivation," within the meaning of those words as used in section 3 of article 17 of the Constitution, which section provides that "lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding 320 acres to each settler, under such conditions as shall be prescribed by law," it is conceded that Eberhart's application and showing were such as to entitle him to purchase the whole section. Section 3495, Pol. Code, provides that: "Land unsuitable for cultivation may be sold in quantities not exceeding 640 acres to any one person, under the restriction other than as to actual settlement prescribed for the sale of cultivable lands." If, on the other hand, the land was "suitable for cultivation," within the meaning of the constitutional provision, the proceedings taken by him were ineffectual for any purpose. The finding of the trial court was that the whole of said section was, at the time of Eberhart's application, and ever since has been, land "unsuitable for cultivation." If this conclusion of the trial court is sufficiently sustained by the evidence, it is conceded that the order denying a new trial cannot be disturbed.

The land in question is a portion of what is known as the "Colorado and Salton Desert," and is generally known and designated as "desert land." It is situated 90 feet below the level of the sea. It is conceded that the evidence conclusively shows that the land is not suitable for cultivation, save and except by artificial irrigation, the supply of water for which can only be obtained by means of artesian wells, tapping water-bearing strata underlying the land at a depth varying from 300 to 500 feet. The average annual rainfall is so small as to be of no practical value for agricultural purposes. At the time of the making of Eberhart's application, there was no available water on said land, or in the vicinity thereof, except such as might be obtained in the future by the boring of artesian wells. No experiments in that direction had then been made on this land, and whether or not sufficient water-bearing strata could be found thereunder to enable this land, or any considerable portion of it, to be successfully cultivated, was necessarily uncertain. Without such a supply of water, it was clear to any one that the land was absolutely uncultivable. Even if water could be so obtained, much of the land was of such a character, owing to the presence in the soil of large quantities of alkali, that it was valueless for purposes of agriculture. Under these circumstances Eberhart made his application in the year 1900 to purchase this land, as land not suitable for cultivation.

The most that he then knew of the possibility of obtaining water was that, by artesian well-boring, some water had been discovered in the vicinity, and that some attempts in the vicinity to thus obtain water had failed, and that, if he could obtain a sufficient quantity by the same method, he might successfully cultivate portions of the land. He had one well bored at a cost of \$300, and at a depth of 340 feet found some water. Five other wells were subsequently bored, varying in depth from 300 to 600 feet, and four of these produced water. There was evidence to the effect that at the time of the trial, July, 1902, the wells were producing about 21½ inches of water, and there were two parcels of the section, aggregating 20 to 24 acres in area, situated in different legal subdivisions thereof, under cultivation. In no legal subdivision of the section was half of the acreage under cultivation. The wells produced not more than sufficient water to irrigate the land under cultivation. Other land, to the extent of about 85 acres, had been cleared and an attempt made to cultivate the same, but the attempts had been unsuccessful. Much of the land was found to contain alkali in such quantities as to make it valueless for agricultural purposes, even if sufficient water could be obtained. There was evidence to the effect that the flow of water from the wells had decreased to some extent, and whether or not additional water, in any sufficient quantity, could be obtained by the boring of other wells, is a question that can only be answered after the boring of such wells.

It is apparent that this land was not suitable for cultivation, when tested by the requirements of section 3495, Pol. Code, which provides: "That any smallest legal subdivision of school lands shall be deemed suitable for cultivation if any part not less than one-half of its area will, without artificial irrigation, but with or without the clearing of timber or other growth therefrom, by the ordinary processes of tillage, produce ordinary agricultural crops in average quantity." It is, however, contended, and the contention appears to be fully supported by the decisions, that the Legislature has no power to limit the effect of the constitutional provision, by prescribing requisites not included therein. It is settled that no narrow construction of the only words in the constitutional provision open to construction, "suitable for cultivation," should limit the general policy evidenced by the Constitution that lands should be held in small tracts and constitute homes for the owners. It was said by this court, in *Albert v. Hobler*, 111 Cal. 308, 400, 43 Pac. 1104, 1105: "The Constitution classifies all lands as suitable or not suitable for cultivation. For the purposes of this section, neither the Legislature nor the courts can classify them otherwise, and it must follow that whether a particular

tract belongs to the one class or the other must always be a question of fact." See, also, *Jacobs v. Walker*, 90 Cal. 43, 48, 27 Pac. 48; *Fulton v. Brannan*, 88 Cal. 454, 456, 28 Pac. 506; *Manley v. Cunningham*, 72 Cal. 236, 13 Pac. 622. The words "suitable for cultivation," contained in the constitutional provision, have been construed by this court to include "all lands ready for occupation, and which by ordinary farming processes are fit for agricultural purposes." *Manley v. Cunningham*, supra; *Fulton v. Brannan*, supra. This, in view of the general policy of the state already referred to, appears to be a reasonable construction of the words used. It could never have been intended by the framers of the Constitution to have included, within the class of lands open in small subdivisions only to actual settlers, lands that may in the future be made available for successful cultivation only by an extensive system of reclamation, in which the co-operation of the owners of other lands is essential, or by some costly system of artificial irrigation, not ordinarily within the reach of the actual settler seeking to make a home on which he may reasonably expect to obtain a living.

If it be conceded that sufficient water could in the future be obtained on the land in question, by artesian well-boring, which, if used in irrigating the same, would render any considerable part of it fit for agricultural purposes, and this the evidence utterly fails to show, the question would then remain as to whether the development of water in this way could be considered an ordinary farming process. We have no hesitation in answering this question in the negative. An attempt to so develop water has nothing whatever to do, like the clearing land of timber, or even surface water, with the preparation of the soil for agricultural purposes. It is in no proper sense of the word "farming." It is more in the nature of a speculative and very costly effort to discover an element which, when discovered, and, by artificial methods, combined with the soil, will render it amenable to ordinary farming processes. The question as to whether water in sufficient quantities will be found several hundred feet below the surface of any particular land, and, if found, whether the supply will continue, must always be more or less uncertain of determination, and especially uncertain in land of the character of, and situated as, the land in controversy. However liberally the words "ordinary farming processes" may be construed, we are satisfied that they cannot be held to include such a method for the development of water.

There is no analogy between this case and that of *Fulton v. Brannan*, supra, strongly relied on by plaintiff. The question in that

case was whether land which had been ceded to this state as swamp land, could, under any circumstances, be held to be land "suitable for cultivation," within the meaning of our constitutional provision. It was found that the land there in question had already been reclaimed by natural causes, and by ordinary farming processes could be made suitable for cultivation, and that it was, therefore, as matter of fact, land "suitable for cultivation," within the meaning of the Constitution, and could be disposed of only as therein provided. It was further declared in the opinion, in effect, that the mere drainage of land, so as to render it fit for the plow, where the same could be accomplished without the co-operation of others, and without an expenditure greater than could reasonably be expected from a settler upon a tract of 320 acres, was an ordinary farming process, just as was the clearing the land of timber (*Manley v. Cunningham*, supra; *Jacobs v. Walker*, supra), or the grubbing up of trees and brush. We have no disposition to question the correctness of this statement. There is, however, a clear distinction between the removal from the surface of the land of things interfering with the cultivation thereof, such as timber, brush, and water, and the attempted development, by artesian well-boring, of a sufficient supply of water with which to irrigate land absolutely unfit for agricultural purposes unless artificial irrigation can be had. The former is well recognized as an ordinary incident of the work of the farmer, and the effect of the proposed work can be foreseen with certainty. As was said in *Fulton v. Brannan*, supra: "Probably there are few farms in this state thoroughly cultivated, some portion of which has not been drained. And the drains must be constantly looked after." The latter is simply a speculative attempt involving a very considerable expenditure to obtain an element essential to render the land at all suitable for cultivation.

We are satisfied that land, absolutely unfit for cultivation, unless, by the boring of artesian wells, water may, in the future, be developed in such quantities as to render it possible to artificially irrigate the same, is land not suitable for cultivation, within the meaning of our constitutional provision. This was the situation as to the land in controversy at the time that Eberhart made his application to purchase, and went upon the land and commenced to improve it.

Our conclusion upon this question makes it unnecessary to consider any other question presented.

The appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

We concur: SHAW, J.; McFARLAND, J.

LITLAND v. EBERHART et al. (L. A. 1,461.)

(Supreme Court of California. Jan. 17, 1906.)

Department 1. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by T. T. Litland against O. C. Eberhart and another. From a judgment in favor of defendants, and an order denying a new trial, the plaintiff appeals. Appeal from judgment dismissed, and order denying a new trial affirmed.

Collier & Carnahan, Withington & Carter, and Victor E. Shaw, for appellant. E. A. Meserve, E. E. Powers, C. F. Holland, Powers & Holland, and D. M. Hammack, for respondents.

PER CURIAM. This case is in all material respects the same as that of Robinson v. Eberhart et al. (L. A. 1,462, this day decided) 83 Pac. 452. For the reasons stated in the opinion filed in that case, the appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

2 Cal. App. 351

DANERI v. GAZZOLA et al.

(Court of Appeal, Third District, California, Dec. 6, 1905. On Rehearing, Jan. 8, 1906.)

1. DEEDS—DELIVERY—PRESUMPTIONS—STATUTE.

The presumption of law stated in Civ. Code, § 1055, that a grant duly executed is presumed to have been delivered at its date, not being expressly made conclusive, it may by the express provisions of Code Civ. Proc., § 1961, be controverted by other evidence direct or indirect.

2. ATTORNEY AND CLIENT—STIPULATIONS—ENTRY ON MINUTES OF COURT.

Code Civ. Proc. § 283, gives an attorney authority to bind his client by his agreement filed with the clerk or entered on the minutes of the court. *Held*, that the statute refers to executory agreements, and where by a verbal stipulation one party has received an advantage for which he entered into it, or another party has at his instance given up some right or lost some advantage, so that it would be inequitable for him to insist that the stipulation was invalid, he will not be permitted to repudiate it on the ground that it was not entered on the minutes of the court.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 155-158; vol. 44, Cent. Dig. Stipulations, §§ 16-21.]

3. SAME—EFFECT—RELIEF FROM ADMISSION.

In an action by an administrator on a note payable to the intestate, the denials of the answer raised an issue as to ownership of the note, and a separate defense was that during his lifetime the intestate had by deed conveyed all his personal property to his wife. For the purpose of such defense plaintiff's attorney admitted that the deed was "duly executed and delivered," and the court erroneously sustained a demurrer to the separate defense. Plaintiff's attorney at the time was ignorant of the facts in regard to the deed, and before the next trial served a notice that he would not renew any admission previously made as to evidence. *Held*, that it was not an abuse of discretion for the court on the second trial

to relieve plaintiff from the admission and to admit evidence of persons who were present at the deathbed of intestate, where the deed was drawn, showing that the deed was never completed or delivered in the lifetime of intestate, though, presumably owing to the admission, defendant had not called the scrivener on the first trial, and he had since died.

4. DEEDS—PARTIAL EXECUTION—DELIVERY.

A deed to the grantor's wife having been signed and acknowledged by the grantor and witnessed, the grantor directed the scrivener to get the description of the property and then to return the deed to him, but the grantor died before the deed was returned, and after his death the scrivener inserted the description in the deed and caused it to be recorded, and it was then sent to a son of the grantee, who retained it. *Held*, that there was no conveyance of the property to the grantee; it not having been completed nor delivered in the lifetime of the grantor.

5. DEEDS—PARTIAL EXECUTION—DELIVERY.

A deed to the grantor's wife having been signed and acknowledged by the grantor and witnessed, the grantor directed the scrivener to get the description of the property and then to return the deed to him, but the grantor died before the deed was returned, and after his death the scrivener inserted the description in the deed and caused it to be recorded, and it was then sent to a son of the wife. The son testified that the grantor told the scrivener that the wife was to have that property, and it appeared that the members of the family supposed that the property had been conveyed to the wife, and it appeared that the son acted as the wife's agent and received rent for the land, and that he had been in possession of the deed ever since delivered to him by the scrivener. *Held* that, notwithstanding the agency of the son, there was no conveyance as the deed was not completed or delivered in the lifetime of the grantor.

6. BILLS AND NOTES—ASSIGNMENT.

Where a husband undertook to convey all his property to his wife, but the deed was neither completed nor delivered within his lifetime, a note constituting a part of his property did not pass thereby to the wife as by an assignment.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by Ambrose Daneri, as administrator of the estate of John Daneri, against James S. Gazzola, as administrator of the estate of John B. Gazzola, deceased, and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Rehearing denied by Supreme Court February 2, 1906.

J. L. Maddux and John A. Wall, for appellants. Congdon & Congdon, for respondent.

CHIPMAN, P. J. Action on a promissory note executed by John B. Gazzola in his lifetime as principal, and defendants as sureties, and delivered to plaintiff's intestate as payee. Defendant Cuneo died before service of summons, and his representative was not made a party. The action was originally commenced in the name of John Daneri, but before the trial he died, and plaintiff was substituted in his stead. Defendant John B. Gazzola died pending an appeal to the Supreme Court from the judgment given at the first trial, and by supplemental complaint

his administrator was substituted in his stead. At the first trial the court sustained a demurrer to certain defenses interposed by answer of defendants. This was held error and a new trial ordered. 139 Cal. 416, 73 Pac. 179. At the second trial plaintiff had judgment, from which, and from the order denying their motion for new trial, defendants appeal.

The principal defense made and now urged is that plaintiff's intestate had, before his death, conveyed all his property, including the note in question, to his wife, Angella, and that the administrator could not maintain the action, as the note did not belong to the estate, but was the property of Angella Daneri. This contention rests upon the presumption that the deed of conveyance was deemed executed and delivered (Civ. Code, § 1055), and on the admissions made by plaintiff's attorneys at the first trial that the deed was duly executed and delivered. It appears that some 20 days before his death plaintiff's intestate, being then mortally ill, was informed by the attending physician, Dr. Wheeler, that he could not recover, and was by him advised to make such disposition of his business as he thought proper. Deceased accordingly told Dr. Wheeler to send for one Murphy, a justice of the peace, who came the same day (December 5, 1899), and at the request of deceased Murphy prepared the deed in question; it being entirely in his handwriting, except the signature. Ambrose Daneri, son of deceased, testified: "Mr. Murphy came December 5, 1899. At the direction of my father Mr. Murphy prepared the deed you have shown me and the deed was all completed before Murphy went away, excepting the description (describing certain land). Before Murphy left my father signed his name to the deed and acknowledged the same. The witnesses also signed at the same time. My father told Murphy to get the description in the deed, and then Murphy was to return the deed to my father—my father never saw the deed again. * * * Shortly after his death I obtained the description I have designated and gave it to Mr. Murphy, who inserted the same in the deed, put the necessary stamps on the paper, and also his acknowledgment, and sent the deed to Mr. Bondshu the recorder of Mariposa county. A few weeks afterwards I received the deed by mail from Mr. Murphy." The widow of deceased testified that the deed was not delivered to her, that she never saw it until shown her at the trial, and that she knew nothing about the note. Deceased died December 25, 1899, and the deed was indorsed: "Filed for record at the request of J. S. Murphy, Jan. 29th, A. D. 1900." It was understood by the family of deceased that he had deeded all his property to his wife Angella.

The statement on motion for new trial made on the first appeal was offered in evi-

dence by defendants for the "particular purpose of showing that at the former trial the plaintiff admitted in open court that the deed dated December 5, 1899, by John Daneri to Angella Daneri, was duly made, executed, and delivered by said John Daneri." By this statement it appears that, when defendants offered the deed in evidence, plaintiff objected as irrelevant, incompetent, and immaterial, which objection was sustained. The record then shows that before the ruling of the court "it was admitted that the instrument was duly executed and delivered by the said John Daneri, and that there was no objection to the introduction of the instrument on the ground that the proper foundation was not laid." Before the second trial was commenced plaintiff gave notice of a motion for leave to file a second supplemental complaint, and the notice stated as follows: "The plaintiff hereby gives notice that the plaintiff will not make any admission or renew any admission heretofore made as to evidence." When the statement on motion for new trial on the first appeal was offered, counsel for plaintiff asked and obtained permission to state the facts as to the admission made at the first trial. Attention was called to the above notice given 22 days before the second trial, and counsel testified that the admission was made "to enable appellants to present the question of law fairly, and not otherwise. We consented out of good nature, and not believing it any way material. We knew nothing of the facts about the matter, it was wholly immaterial, as the court had ruled against the allegations of the answer on that subject on the demurrer, and had wholly rejected the evidence when offered. I thought the deed all right—it came to plaintiff's attorneys from plaintiff himself. I never investigated any of the facts concerning the making, executing, and delivering of the deed until after the decision of the Supreme Court reversing the judgment in the former trial." The court found as follows: "The facts covered by such admission had been offered and ruled out by the court under previous rulings of the court, and that the admission itself was made under ignorance of the real facts, was wholly irrelevant and immaterial, was wholly unnecessary, was improvidently and carelessly made, and subserved no useful purpose whatever, and that the plaintiff gave due and timely notice of withdrawal." On the evidence the court found that the deed in question was never completed or delivered to the grantee named therein during the lifetime of the grantor and never took effect as a conveyance.

1. The presumption of law stated in section 1055, Civil Code, that "a grant duly executed is presumed to have been delivered at its date," is not expressly made conclusive, and, unless so made, "may be controverted by other evidence, direct or indirect." (Code Civ.

Proc. § 1961; McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778.

2. Appellants contend that the admission made at the first trial was on a material question, namely, the ownership of the note sued upon, and that, if the ownership was in Angella Daneri, the plaintiff was not entitled to maintain the action, for to do so he must be the legal owner with right of possession of the instrument; citing *Kiel v. Reay*, 50 Cal. 62; *Woodsum v. Cole*, 69 Cal. 145, 10 Pac. 381. We think the denials of the answer, apart from the special defense set up as to the execution and delivery of the deed to which the demurrer was sustained (erroneously, as was decided by the Supreme Court), raised an issue of ownership. Defendants had a right to rebut the presumption of ownership and possession of the estate of John Daneri, deceased, which arose from the possession of the note by the administrator; and we think the deed on its face, its delivery admitted, tended to rebut that presumption. While this is true, it is manifest that the admission was made with reference to the special defense pleaded, and to which a demurrer was sustained. As the court refused to admit the deed as evidence for any purpose, though erroneously, we cannot see that the admission by counsel that the deed was duly executed and delivered should now, under the circumstances disclosed, estop plaintiff from showing the truth concerning the fact. The deed was admitted in evidence at the last trial, and the only question now is, did the court err in permitting plaintiff's counsel to withdraw the admission made at the first trial and to show the true facts in the case? Section 288, Code Civ. Proc., provides: "An attorney and counsellor shall have authority: 1, to bind his client in any steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise." In this case, no question arises as to the making of the admission, for it appears in the record. It has been held, under this section, that it refers to the executory agreements, and not to those which have been, wholly or in part, executed, and that the section does not require a construction that in no instance shall the attorney's agreement made in behalf of his client be binding, unless entered in the minutes of the court or filed with the clerk. But where by a verbal stipulation one party has received the advantage for which he entered into it, or the party has, at his instance, given up some right or lost some advantage, so that it would be inequitable for him to insist that the stipulation was invalid, he will not be permitted to repudiate the obligation of his own agreement upon the ground that it had not been entered in the minutes of the court. *Reclamation District v. Hamilton*, 112 Cal. 603, 609, 44 Pac. 1074; *Hearne v. De Young*, 111 Cal. 378, 43 Pac. 1108; *Smith v. Whittier*, 95 Cal. 279, 287, 30 Pac. 529. The only suggested advantage which defendants

have suffered is that since the first trial Murphy had died, and that he was not called at the first trial presumably because of the admission, and his testimony has thus been lost to defendants. It is not claimed that Murphy would have testified to the undisputed facts different from those narrated by three sons of deceased as to what occurred when the deed was executed. The admission was not of the character referred to in the above cases, and did not partake of the nature of mutual contract, as in some cases; nor does it fall under another class mentioned in the cases where the attempted withdrawal is manifestly to inconvenience the other party or would tend to defeat the ends of justice.

There is a still further class of admissions mentioned in the cases, a general admission in the course of the trial which obviously could not have been intended to hold good at a second trial—admissions made to facilitate the trial. It was said in *Weisbrod v. Chicago, etc., R. Company*, 20 Wis. 421: "Such admissions are frequently made for the purpose of saving time where counsel are confident of success upon some other point; and when so made they are always understood to have reference to the trial then pending, and not as stipulations which shall bind at any future trial." There was nothing connected with the circumstances or reasons for making the admission which indicated that plaintiff's attorneys made it with knowledge of the facts, and the uncontradicted testimony is that plaintiff's attorneys were then ignorant of the very important facts subsequently brought to their knowledge. If defendants' attorneys were also ignorant of the facts, which is altogether probable, there would be injustice in allowing them to profit by the mutual ignorance of counsel for both parties. If they knew the facts and concealed them from plaintiff's counsel (which we are unwilling to believe), it would be equally unjust to hold the admission to be irrevocable. It cannot be assumed that Murphy, if alive, would have testified directly opposite to the witnesses who were present at the bedside of John Daneri, or would dispute the testimony of his widow, the grantee of the deed, whose statements were against her interest. The grantor lived for 20 days after the date of the acknowledgment (December 5th), and it is altogether probable that the deed was not completed and delivered during this time, or it would have been sooner recorded than January 29th following. There can be little doubt that the deed was not completed prior to the grantor's death, that it was never shown him after December 5th, and that it was never, in fact, delivered to the grantee, nor to any person for her. Certainly the trial court was fully warranted from the evidence in finding the facts as it did. A deed has no validity without delivery. *Gould v. Wise*, 97 Cal. 582, 82 Pac. 576, 33 Pac. 323; *Black v. Sharkey*, 104 Cal. 279, 37 Pac. 989;

Whitney v. Am. Ins. Co., 127 Cal. 464, 59 Pac. 897. There not only is evidence of delivery wanting, but positive evidence that there was no delivery, and evidence, also, that the deed was to have been returned to the grantor when completed. He, in fact, never lost control of it.

In Scaife v. Western M. C. L. Co., 90 Fed. 238, 33 C. C. A. 47, a bill of exceptions, in which the agency of one Flemming was admitted, the bill was admitted at the second trial to show this admission. The court said: "Admissions of a party are always competent evidence against him, and there seems to be no reason why a distinct and formal admission signed by an attorney of record upon a former trial, and not withdrawn or modified, should not be competent evidence." But here the admission was withdrawn some days before the trial. In Voisin v. Commercial Mut. Ins. Co. (Sup.) 22 N. Y. Supp. 348, at a former trial the genuineness of a certain paper was admitted by the defendants' counsel. The court said: "We think that without at least some notice of the withdrawal of this admission the counsel for the plaintiff have a right to rely thereon on any subsequent trial." Mr. Jones says: "Admissions made by parties or their attorneys in their pleadings in the action, or by stipulations as to facts, or by dispensing with certain proofs, may be withdrawn if not true, provided there remains sufficient time for the other party in which to prepare his case, and provided such party has not been injured by relying on such admissions. Such admissions will not be allowed to be withdrawn, however, if the situation of the parties has been substantially changed, as by the death of a party or of a witness." 1 Jones on Ev. § 276. In Franklin v. National Ins. Co., 48 Mo. 491, there was an express agreement by stipulation of counsel for both parties that "appellant might withdraw its answer and interpose a demurrer to the petition; and, should it be overruled, then the appellant was to allow final judgment to be entered thereon, retaining the right to appeal." The demurrer was overruled and final judgment rendered thereon. Afterwards appellant moved the court for leave to withdraw its stipulation and also its demurrer and for leave to answer. The motion was denied. The court, in sustaining the ruling, said: "A party cannot be allowed to make an express agreement and avail himself of its advantages if it resulted in his favor, but not be bound by it if it happens to prove disadvantageous." It is stated in 1 Am. & Eng. Ency. p. 699, that "admissions may be proved even on a subsequent trial of the cause, if, from the language used at the time and the surrounding circumstances, they appear not to have been limited to the former trial." See note 2, citing many cases in support of the text. In a clear case of mistake, or for other good cause, the court may allow a party to recede from his stipulation. 20 Eng. Pl. & Pr. p. 613, and note 6.

We think it quite obvious, from the circumstances disclosed here, that the admission was made with reference to the then pending trial, as well, also, as to a particular defense then made which the court at the time held not to be good. Furthermore, the admission was made under mistake of fact, from which, we think, the court could relieve plaintiff, and in doing so did not abuse its discretion.

Appellants claim that nothing in the record shows any order of the court allowing the withdrawal of the admission. It was so treated at the trial, and, besides, we do not think an order was necessary in view of all the facts.

The judgment and order are affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

Petition for Rehearing.

CHIPMAN, J. In the application to have the evidence re-examined our attention is called to certain facts which were not mentioned in the opinion. But they do not change the fact, found by the court on sufficient evidence, that the deed was not completed nor delivered in the lifetime of deceased, Daneri. Whatever claim the widow had to the note, or the chose in action (the suit on the note at Daneri's death), came through the deed. The testimony of Frank Daneri that his father told Murphy he wished his mother to have all the property was no doubt true, but that is precisely what Murphy undertook to bring about by the deed conveying all the property, but failed. Mrs. Daneri testified that all the property belonged to her "and family." But it was because it was supposed that the deed conveyed the property that she claimed it. At the same time she testified that she knew nothing about the note. It is true, also, that the members of the family supposed that the property had been deeded, and it is true that the validity of the deed was not questioned until after Murphy's death. There was evidence that Ambrose Daneri had acted as his mother's agent, and had received rent for the land and paid it to her, and that he had been in possession of the deed ever since Murphy delivered it to him, and that his mother had received payments on the note. There was no evidence as to the scope of the agency referred to above. But if it be assumed that it was an agency to manage the property for his mother, and if the other facts above narrated be admitted, still the controlling fact remains that the attempt to convey the property to Mrs. Daneri was abortive.

The point is now made for the first time that the deed was sufficient to carry an assignment of the chose in action, and it is immaterial that it was incomplete as to the land, and that manual delivery of the note was not essential: citing Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471. This case is instructive and covers some of the features of

the present case. If the deed in question had been completed and delivered, we would have the case discussed in *Driscoll v. Driscoll*. But the grantor here told the notary to complete it and return it to him, presumably for his examination, and thereafter to be delivered, should he determine to so dispose of it. He never saw it afterwards, and it was not completed or delivered until after his death, and was then delivered to the son, and never was delivered to the grantee. We are unable to discover any legal ground upon which the deed can be held to have conveyed the note or the chose in action. Upon the other point in the case we also adhere to our former decision.

Rehearing denied.

We concur: McLAUGHLIN, J.; BUCKLES, J.

2 Cal. App. 515

PACIFIC PAVING CO. v. VIZELICH et al.
(Court of Appeal, Third District, California.
Dec. 20, 1905.)

1. ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY—EVIDENCE.

Evidence examined, and held to justify the court in finding that a defendant knew that he was represented by a firm of attorneys, that they had filed a stipulation for judgment, and that he had made no objection to their action, so that he was bound thereby.

2. TRIAL—FINDINGS—SUFFICIENCY.

Where the trial court properly found, on motion to set aside a stipulation for judgment filed on behalf of a defendant, that the attorneys filing the stipulation had authority from him and that the stipulation was binding, it was not necessary to make findings on issues raised by pleadings filed by him.

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by the Pacific Paving Company against Nicholas Vizelich and George Finkbohner. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant Finkbohner appeals. Affirmed.

See 74 Pac. 352; 82 Pac. 82.

J. B. Webster and C. H. Fairall, for appellant. W. J. Bartnett and Loutitt & Loutitt, for respondent.

CHIPMAN, P. J. Appeal by defendant George Finkbohner from a judgment and order denying motion for a new trial in an action upon a street assessment. The judgment was entered on a stipulation of attorneys assuming to represent defendants, including Finkbohner. The authority of attorneys so to act is disputed by Finkbohner. His motion to vacate and set aside the stipulation under which judgment was entered against him was denied. He appeals from the judgment; also from the order denying his motion for a new trial, and the principal question is, did the court err in refusing to vacate and set aside the stipulation?

There was an appeal to the Supreme

Court from the judgment; the purpose being to cause the reversal of the order of March 12, 1900, refusing to vacate and set aside as void the stipulation on which judgment was entered, and also to cause the reversal of the order dismissing the action as to Finkbohner. The court reversed the judgment of dismissal, but did not set aside the stipulation. The court, however, on the facts there presented, held that the trial court "was not warranted in finding, upon his [Finkbohner's] motion, that there was no appearance made by said defendant, even although the attorneys had not been authorized to appear for him." But the court said: "We see no reason why said defendant may not renew his motion to set aside the stipulation." 141 Cal. 4, 74 Pac. 352. At the retrial the court, on July 29, 1904, made findings and entered judgment. The court found: "That the above-named parties on the 28th day of April, 1897, signed and filed herein a stipulation in the words and figures following, to wit: 'It is stipulated and agreed: That the defendants in the above-entitled action need not file an answer in said actions, but that the said actions shall abide by the result of the action of the Pacific Paving Company v. J. L. Mowbray, 5,163, and whatever judgment may be finally entered in said action shall be also entered in each of the above-entitled cases, whether the same be in favor of the plaintiff or defendant; and if in favor of the plaintiff, then in each case according to the prayer of the complaint. Dated April 23, 1897. James A. Loutitt, Attorney for Plaintiff. F. H. Gould and James H. Budd, Attorneys for Defendants.' That the judgment was finally entered in said action of Pacific Paving Company v. J. L. Mowbray, Number 5,163, in favor of the above-named plaintiff. That thereafter, to wit, on the 12th day of September, 1900, judgment herein was duly given, made, and entered according to said stipulation in favor of plaintiff and against said Nicholas Vizelich * * * and for the foreclosure of the lien mentioned in the complaint." As conclusions of law "from the foregoing facts the court decides that plaintiff is entitled to judgment herein against said defendant Geo. Finkbohner, on said stipulation," etc. Judgment followed accordingly. The second appeal from the judgment was heard in this court and the judgment was affirmed July 6, 1905. *Pacific Paving Co. v. Vizelich*, 82 Pac. 82. The appeal from the order denying new trial comes up on a separate transcript, and is the matter now before us.

Respondent makes the point that under section 951, Code of Civil Procedure, and rule 29, the bill of exceptions is insufficient. The view we have taken of the case makes it unnecessary to consider the point. The complaint was filed December 2, 1903, and summons issued January 6, 1894. The re-

turn of the summons was made December 19, 1899, by affidavit of the person who served it. It stated that service was made "by delivering to said George Finkbohner personally on said 13th day of January, 1894, in said county of San Joaquin, a copy of said summons, to which was attached a copy of the complaint filed in the said action." There were several landowners, defendants in numerous similar actions, who under a written agreement formed a committee to conduct the defense. This agreement was signed by all of the defendants, including defendant Vizelich, but defendant Finkbohner did not sign the agreement. Messrs. James H. & J. E. Budd appeared for all the defendants, and in this action, on January 22, 1894, filed a demurrer to the complaint, which was on January 29, 1894, overruled, and defendants given 20 days to answer, which was extended 20 days by stipulation. Lis pendens was recorded on January 28, 1896. The stipulation in this action and 18 other actions hereinbefore set forth, dated April 28, 1897, was filed in this action on April 28, 1897, signed by James A. Loutitt, attorney for plaintiff, and F. H. Gould and James H. & J. E. Budd, attorneys for defendants. It appears that Vizelich was the owner of the property involved when the action was commenced, and on April 11, 1896, deeded it to Finkbohner, who "held a mortgage before this suit was brought and until he got the deed." Defendant Finkbohner made affidavit in support of his motion in which he deposed that he never employed or authorized the employment of F. H. Gould, James H. & J. E. Budd, or either of them, or any other attorney or person, to appear for him in this action or to file a demurrer or to enter into or file any stipulation whatever, until the 29th of November, 1899, when he employed J. B. Webster, an attorney of the court, to appear for him therein; that he did not know that any demurrer or any stipulation had been made or filed or any appearance entered for him prior to said date, and, on being informed on that day by said Webster that said stipulation had been entered into, he instructed said Webster to take immediate steps to set the same aside. The first step taken, so far as the record shows, was the motion of March 12, 1900, on that day denied, and it was this motion that was renewed by service of notice March 16, 1904, heard on "the ——— day of March, 1904, and denied on June 13, 1904. The affidavit of Finkbohner used at that hearing is dated in November, 1899. John E. Budd testified at a former hearing that he never had any conversation with Finkbohner touching the agreement signed by Vizelich and the other defendants, parties to it. James A. Loutitt made affidavit that he was a member of the law firm having charge of the action for plaintiff until January 1, 1894, when the firm was dissolved, and that thereafter he

had and now has exclusive charge of the action for plaintiff as one of his attorneys. He sets forth certain proceedings in the case heretofore stated, including service of summons and other steps taken, and that the firm of Budd & Budd were duly licensed attorneys at law of good standing and repute. His affidavit made at the first hearing of the motion and on its renewal is dated December 13, 1899, and states that during the pendency of the action and since the service of summons he "has had no less than half a dozen interviews with said George Finkbohner in regard to said litigation and the status of said Finkbohner to the same, and in such interviews had from time to time, as the same arose and occurred, stated the facts concerning the same to said Finkbohner, and informed him of the fact in particular that the said litigation in which the said Finkbohner was interested as a party was by stipulation and agreement continued and held in abeyance until, and was to be governed by and depended upon, the final determination of that certain action pending in the same court by the same plaintiff against one J. L. Mowbray, No. 5,163, and like disposition to be made herein as by the terms of said stipulation provided, and that affiant now for the first time learned or had any intimation from any source that the said Finkbohner had given no authority to the said attorneys who appeared for him as attorney to so appear or to represent him in said action; that, although this said action had been pending for more than five years, said defendant, after being regularly and duly served with summons herein on January 13, 1894, made no appearance in said cause, except as made by and through the said attorneys, but has at all times up to ——— day of November, 1899, led plaintiff and this affiant to believe, and they have believed, that said defendant was duly and regularly represented by said attorneys, with full power and authority from him, said defendant, as to the same, and so believing and relying plaintiff and this affiant as attorney for said plaintiff have acted thereon, and entered no default against defendant for his alleged nonappearance, as they otherwise would have done." O. K. McMurray, an attorney at law, deposed that on the former hearing of the motion to dismiss this action he appeared for the attorneys associated with Mr. Loutitt and was present at the hearing, and that at the hearing defendant Finkbohner testified, among other things, "that he did know the above-entitled suit was pending and that said defendant Vizelich was fighting said case; that he further knew of the case because he found a copy of the summons and complaint left at his house over five years ago during his absence; that he did not think he received the same personally; but, if any one swears that he served him personally, he would not

say that it was not so, as it is so long ago." It was admitted that Finkbohner had formerly testified, among other things, denying that he ever had any conversation with Attorney Loutitt in which he was informed that any one had appeared for him or acted for him, and that he talked with said Loutitt but once about said action, and that was in November, 1899, and just before he had employed Webster as his attorney; and it was admitted that he further testified at that time substantially as stated by Attorney McMurray. Upon these facts the court denied the motion, and we think there was evidence sufficient to support the order. See opinion in same case on first appeal (141 Cal. 4, 74 Pac. 352), where on much the same facts the Supreme Court seems to have been similarly impressed, though not called upon to decide the point.

Appellant's counsel in their brief have, with much industry and clearness, stated the rules as laid down by the authorities governing the power and duty of the courts concerning the acts of attorneys assuming to represent clients without authority to do so. It is not necessary in this case to review the authorities. We had occasion recently to discuss the question to some extent in the case of *Daneri v. Gazzola*, 83 Pac. 455, where some of the rules are stated. In the present case it must be admitted that the appearance for Finkbohner and the stipulation to which he was made a party were without his previous authority. The only question before us concerns the effect of his conduct after he was served with summons and after he knew of the appearance and the stipulation. That the court had the power to determine whether he had knowledge or was charged with the means of knowledge that the stipulation had been entered into, and had discretion to relieve him from its effect, although he had such knowledge, we think the authorities cited by appellant fully establish. The evidence does not seem to call for extended comment. Appellant knew the action was pending against him as early as January 13, 1894, when summons was served. A demurrer had been filed in his behalf on January 22, and overruled on January 29, 1894. He took a deed to the property on April 11, 1896, with knowledge of the pendency of the action, and must be presumed to have known that his title was affected by this action. Attorney Loutitt testified on December 13, 1899, that he had frequent conversations prior thereto with appellant, and informed him particularly as to the stipulation. Appellant suggests as to this fact that this information may have been imparted after November 29, 1899, when appellant testified he first learned of the stipulation. But it must not be overlooked that the trial court may have disbelieved appellant, in view of all the facts disclosed, or determined that his memory was at fault. The stipulation was on file in the case April 28,

1897, and yet he took no action to have it set aside for 18 months. The court probably took into view the fact that he was in default all this time, and that, having knowledge of the action, he would have answered if he were not acquiescing in the stipulation. We think the evidence justified the court in concluding that appellant knew of the stipulation many months before he moved to set it aside, and was content to let it stand. We cannot say that the court abused its discretion in refusing to relieve appellant from the stipulation. Plaintiff had relied upon it in good faith, and had acted upon it in omitting to take the default of appellant, and in moving forward with this case and other cases in reliance upon it. Appellant's knowledge of the stipulation and apparent acquiescence exclude the idea of fraud or mistake. He does not attempt to show wherein he has suffered by the ruling of the court. His contention is that he never entered into the stipulation. He attempts no excuse for his neglect for over five years to answer after summons was served, and gives no reason for his not having moved promptly to set aside the stipulation, except want of knowledge, as to which the court found against him.

Error is claimed because the court failed to find on all the issues. The issues referred to are presented in appellant's answer and cross-complaint. In this pleading the same defense is set up as was involved in the motion to set aside the stipulation, and the matter was fully heard and was disposed of in denying the motion. We do not think the defense set up in this pleading could be entertained until after the stipulation was set aside; and, as this was refused, there was no necessity for findings on this pleading. In short, the stipulation standing, it was the duty of the court to enter judgment in accordance with its provisions. See opinion in second appeal. *Pacific Paving Co. v. Vizelech*, 82 Pac. 82.

The order denying motion for a new trial is affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

2 Cal. App. 314

WIESTNER et al. v. CALIFORNIA COKE & GAS CO.

(Court of Appeal, Second District, California. Dec. 1, 1905.)

SALES—ACTION FOR PRICE—FINDINGS.

In an action for the price of goods sold, the complaint alleged that plaintiff sold to defendant goods of the value of \$999.65, which, with interest, amounted to \$1,015.70, and that no part thereof had been paid, except the sum of \$300, leaving a balance of \$715.70. The findings were that plaintiff sold to defendant "goods, wares, and merchandise of the value of \$715.95," and that by reason of the defective character of the goods "defendant is entitled to an abatement in the sum of \$178.25, leaving a balance due to plaintiff of \$537.70." Held, that the finding as to the value of goods sold must

be construed as referring to the amount alleged to be due after the payment of the \$300.

Appeal from Superior Court, Los Angeles County; E. W. Britt, Judge pro tem.

Action by W. C. Wiestner and another against the California Coke & Gas Company to recover the price of goods sold and delivered. From a judgment for plaintiffs, defendant appeals. Affirmed.

Porter & Sutton, for appellant. A. D. Laughlin and Henry J. Stevens, for respondents.

SMITH, J. Appeal from a judgment for the plaintiffs. The only question involved is as to the construction of the pleadings and findings. The complaint alleges, in effect, that the plaintiffs sold and delivered to defendant goods of the value of \$999.65, on which there has accrued as interest the sum of \$16.06, making in all the sum of \$1,015.70, and that no part of the same has been paid, except the sum of \$300, leaving a balance of \$715.70. The answer denies the purchase of the goods as alleged of the value of \$999.65, or of any value in excess of \$300, which it is alleged defendant has paid; and it is denied, also, that there is a balance of \$715.70, or any other sum, due to the plaintiffs from the said defendant. Facts are also alleged showing damage in the sum of \$48 on account of defects in the goods sold, and the return of certain of the goods of the value of \$150. The findings are, in effect, that "within two years next preceding the commencement of this action the plaintiffs sold and delivered to the defendant, at the instance and request of the latter, and the defendant received of the plaintiffs, goods, wares, and merchandise of the value of \$715.95"; that by reason of the defective character of the goods sold defendant suffered damage in the sum of \$28.25; and that goods were returned to plaintiffs of the value alleged, \$150—and as conclusions of law "that defendant is entitled to an abatement of the sum of \$178.25 from the sum demanded by the plaintiffs in this action, leaving a balance due the plaintiffs of \$537.70," with legal interest from April 1, 1904, for which sum judgment was entered.

The only point urged by appellant is, in effect, that the payment of \$300 on plaintiffs' account is admitted, and that the finding of the court as to the amount due was in conflict with this admission and must be disregarded, and hence that the judgment should be reduced by the amount of \$300 and corresponding interest. But the findings of the court are to be considered, if susceptible of such construction, so as to be consistent with each other; and this will require us to understand the finding of the goods sold as referring to the amount alleged to be due after the payment of the \$300.

The judgment is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

2 Cal. App. 302

WALBRIDGE et al. v. COUSINS.

(Court of Appeal, Third District, California. Nov. 27, 1905.)

APPEAL — JURISDICTION — STATUTORY TIME LIMIT—NECESSITY FOR COMPLIANCE.

Under Code Civ. Proc. § 939, subd. 3, providing that an appeal may be taken from an order granting or refusing a new trial within 60 days after the order is made and entered, jurisdiction is conferred on the appellate court only by compliance with the statute.

[Ed. Note.—For cases in point, see vol. 2. Cent. Dig. Appeal and Error, § 1926.]

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by J. H. Walbridge and others against L. W. Cousins. From an order denying his motion for a new trial, defendant appeals. Appeal dismissed.

R. S. Taylor and J. H. Magaffey, for appellant. Jas. F. Farragher and Chas. J. Luttrell, for respondents.

CHIPMAN, P. J. In this case a notice of intention to move for a new trial was served and filed on May 8, 1903. The statement was settled August 16, 1904, and filed September 14, 1904, and on this last-named date the motion for a new trial was submitted to and denied by the court. On January 6, 1905, the notice of appeal from the order was served and filed. There is no appeal from the judgment.

Respondents make the point that this court is without jurisdiction to hear the appeal; citing subdivision 3, § 939, Code Civ. Proc. This section provides that an appeal may be taken: "3. From an order granting or refusing a new trial * * * within sixty days after the order * * * is made and entered in the minutes of the court or filed with the clerk." Appellant filed no reply brief, but at the argument claimed that the record would show a stipulation in effect, waiving the objection raised by respondent. It is not necessary to decide whether the requirements of the statute may be waived. We fail to discover anything in the record by way of stipulation or otherwise in effect waiving the objection. The right of appeal from the order as from a judgment depends upon the statute, and jurisdiction is conferred upon the appellate court by compliance with the statute. An appeal from an order denying a new trial must be taken within 60 days from the time the order is made and entered. *Turner v. Reynolds*, 81 Cal. 214, 22 Pac. 546. So held as to an order made after final judgment (*Doyle v. Republic Life Ins. Co.*, 125 Cal. 15, 57 Pac. 667); also as to an appeal from the judgment when taken too late (*Hunter v. Milam*, 133 Cal. 601, 65 Pac. 1079; *Michelson v. Fish* [Cal. App.] 81 Pac. 661).

The appeal is dismissed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

SMITH v. RAINEY et al.

(Supreme Court of Arizona. Jan. 9, 1906.)

1. MORTGAGE—EQUITABLE MORTGAGE—HOW CREATED—INTENT.

To create an equitable mortgage or lien upon property for the payment of a debt, an intention to create such must be manifest, as distinguished from an intention to apply to the payment of the debt the proceeds from the sale of the property.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 43.]

2. SAME.

An agreement construed, and held not to disclose an intention to create an equitable mortgage or lien upon property.

(Syllabus by the Court.)

Appeal from District Court, Maricopa County; before Chief Justice Edward Kent.

Action by Jesse Hoyt Smith against William J. Rainey and others. Judgment for defendants, and plaintiff appeals. Affirmed.

C. F. Ainsworth, for appellant. A. C. Baker and Walter Bennett, for appellees.

NAVE, J. Appellant, as plaintiff, brought suit to foreclose an alleged equitable mortgage lien upon certain property described in the complaint and alleged to be the property of William J. Rainey, in which property it was averred the defendants and appellees Frank Luke and John Luke claim to have some lien or interest. To the complaint the defendants Luke interposed a general demurrer. This demurrer was by the court sustained. The plaintiff elected to stand upon his complaint unamended, whereupon judgment was entered in favor of the defendants Luke.

In substance the complaint sets forth that in March, 1897, the plaintiff and the defendant Rainey entered into a certain agreement, set forth in full as an exhibit to the complaint and as a part thereof. In substance this agreement provided that whereas, the parties thereto had on the day of its execution purchased a certain tract of land in Maricopa county, Ariz., for the sum of \$18,000 in the proportion of an undivided two-thirds interest in the said Smith, and an undivided one-third interest in the said Rainey; and whereas, the said Smith had paid the entire purchase price, and the said Rainey had agreed to repay to the said Smith one-third thereof, with interest thereon as thereafter provided; and whereas, the said parties had joined in said purchase for the purpose of platting, grading, and otherwise improving said property, and, as so improved, selling and disposing of the same at a profit: Therefore the said parties agreed (1) that the improvement of the tract should begin forthwith; (2) that the improvements should consist of surveying and platting the tract into lots, grading streets, planting trees, etc.; (3) that the said Smith, in addition to the sum of \$18,000, was also from time to time to make all necessary advances of money for the improvements and

for the incidental expenses of the enterprise; (4) that all money advanced by the said Smith in said purchase, as well as all moneys advanced by him for any of the purposes aforesaid, should be considered as a loan by him, and be paid to him as rapidly as possible from the receipts of sales, or other income of said property, until the same should be fully paid with interest, before any division of profits should be made; (5) that if, five years from the date of the agreement, all the loans should not have been fully paid to the said Smith, with interest, the said Rainey thereby agreed that he would, on demand thereof, pay to the said Smith the one-third of all such loans then unpaid, including interest; (6) that the said Rainey should have management of the tract and of the improving and sale of the same; (7) that the said Rainey should keep and render accounts showing, among other things, "all the assets and liabilities of the partnership"; (8) that the said Rainey thereby agreed to accept the general management of the said tract, without other consideration or remuneration than his one-third share in the net profits of the business, as thereafter provided; (9) that after the repayment to the said Smith of the sum of \$18,000, and all other advances, with interest, the net profits of the business should be divided—two-thirds to Smith and one-third to Rainey—and the losses, if any, should be shared in the same ratio. It was further stipulated that the memorandum of agreement was made "for the purpose of stating explicitly the terms of the copartnership on which the said" Smith and Rainey had joined in the enterprise.

The complaint proceeds to state that pursuant to this agreement the plaintiff advanced in total the sum of \$65,000, including the purchase price, no part of which has been repaid to plaintiff; that all of the money so advanced was used in the purchase and improvement of the property, including the undivided one-third interest therein of the defendant Rainey; that the plaintiff had performed each act incumbent upon him under the agreement, but that the defendant Rainey refused, and still neglects and refuses, to perform any of his covenants and agreements; that none of the property described had been sold or disposed of, and no part of the money repaid to the plaintiff; that the defendant Lillian Rainey, wife of defendant William J. Rainey, and the defendants Luke, each claim to have some lien or interest in, on, or upon the interest of the defendant Rainey in the said property, which liens, if any there be, are each and all subject and subordinate to the lien of plaintiff. Therefore the plaintiff prayed that he be declared to have an equitable mortgage lien in and upon the interest of the said William J. Rainey in the said property, to the extent of one-third of the aggregate of the amounts advanced by plaintiff, and that this lien be declared prior and superior to any liens claimed by any of the other defendants, if

any they have, and that the said lien be foreclosed, and the interest of the said Rainey in the said property be sold as under execution.

The sole question upon this appeal is whether this complaint states facts sufficient to constitute a cause of action against the defendants Luke. The contention of the appellant is: (1) That the agreement set forth in the complaint "specifically points out and shows an intention to pledge the property purchased by plaintiff in his own name and that of the defendant Rainey for the purpose of securing plaintiff in the repayment of all advances made by him in the purchase and improvement of the said property," and that therefore the plaintiff has an equitable mortgage upon the interest of the said Rainey in the said property; and (2) that by the demurrer the averment of the complaint that the lien or interest of the defendants Luke is subject and subordinate to the lien of plaintiff is admitted.

In support of the first contention appellant cites, among other authorities, the decision of the Supreme Court of California in the case of *Daggett v. Rankin*, 31 Cal. 321, in which that court say: "The doctrine seems to be well established that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien on the property so intended to be mortgaged." Conceding this doctrine to be well established, we are unable to perceive that it can be applied to the facts in this case. We do not construe the agreement entered into between Smith and Rainey as disclosing an intention to appropriate or set apart the tract of land in question, or the interest therein of the defendant Rainey, as security for the advances of appellant. "The intention must be to create a lien upon the property, as distinguished from an agreement to apply the proceeds from the sale of it to the payment of the debt." *Jones on Liens*, § 32. The agreement in this case was that the proceeds of the sales of the lots into which the tract of land was to be subdivided should be applied, first, to the repayment of appellant's advances, and, second, to the payment of profits to the partners in the enterprise. Therefore, in our judgment, the complaint does not disclose that appellant has an equitable lien or mortgage upon Rainey's interest in the tract.

In view of this conclusion it is unnecessary to consider what is the effect of the demurrer with respect to the averment of the complaint that the lien, if any, of the defendants Luke, is subordinate to plaintiff's lien. It not appearing that the plaintiff in the cause has any interest, equitable or otherwise, in the property in question, he has no lien to which any lien or other interest of the

defendants Luke can be subordinate. The demurrer was properly sustained.

The judgment of the district court is affirmed.

SLOAN, DOAN, and CAMPBELL, JJ., concur.

TANNER v. TREASURY TUNNEL, MINING & REDUCTION CO.

(Supreme Court of Colorado. Jan. 8, 1906.)

1. EMINENT DOMAIN—PUBLIC USE—MINING TUNNEL.

A condemnation of a right of way for a tunnel, under Laws 1891, p. 98, § 3 (3 Mills' Ann. St. Rev. Supp. § 616), authorizing any corporation formed for the purpose of constructing a tunnel to acquire any necessary real estate under the eminent domain act, is a condemnation for a public use, where the tunnel is to be used for draining mines and for the transportation of waste and ore, for such proprietors as desire to avail themselves of the facilities offered.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 51-54.]

2. SAME—EFFECT OF LEGISLATIVE ACTION.

While the judgment of the Legislature in conferring the power of eminent domain for certain purposes is not conclusive on the courts on the question as to public use, it is entitled to great weight.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 165-168.]

In Banc. Error to District Court, Ouray County; Theron Stevens, Judge.

Petition by the Treasury Tunnel, Mining & Reduction Company to condemn a right of way. Judgment for petitioner, and Frank P. Tanner, substituted for B. H. Du Praw and others, brings error. Affirmed.

Defendant in error, as petitioner, instituted proceedings in the court below under the eminent domain act to condemn a right of way for tunnel purposes through the Corn Cob lode. To these proceedings the owners of the premises were made parties respondent. According to its articles of incorporation the petitioner is a corporation, organized under the laws of this state "to run, construct, work, operate, and maintain tunnels for mine development, drainage, prospecting, and other purposes; to demand, contract for, and receive royalties or other compensation for the use of such tunnel or tunnels, from any and all persons, associations, and corporations in any manner using same, or benefited thereby, in the drainage of properties operated by them; to excavate, drive, or otherwise construct cross-cuts and branches from any such tunnel for mining, prospecting, development, and other purposes." From the averments of the petition, as well as the testimony, it appears that the purpose of petitioner in constructing the tunnel, among others, is to furnish drainage for mines adjacent to its line; that its portal is in Ouray county, but, as projected, will extend into the county of San Miguel into a

locality highly mineralized, where there are mines being successfully operated; that this tunnel, when completed will cut the veins in these properties at a depth far below the present workings thereon; and that, if the owners of these properties desire to avail themselves of the facilities conferred by the tunnel, their mines can be drained thereby and waste and ore transported through such tunnel. It also appears that these mines are located at a high altitude, and that many of the inconveniences resulting from such location may be avoided by operations through the projected tunnel of petitioner. Judgment was rendered for the petitioner, and respondents bring the case here for review on error. In 1891 the General Assembly passed an act which in terms provided that any corporation formed for the purpose of constructing a road, ditch, reservoir, pipeline, bridge, ferry, tunnel, telegraph line, or railroad line, should have the authority to acquire any real estate necessary for its purposes in the manner provided by law, under the eminent domain act. Section 616, 3 Mills' Ann. St. Rev. Supp.; Laws 1891, p. 98, § 3.

Geo. Stidger, for plaintiff in error. Henry & Sigfrid, for defendant in error. Thos. Y. Bradshaw, amici curiae.

GABBERT, C. J. (after stating the facts). The authority to exercise the right of eminent domain for public uses is based upon the theory that property is granted the subject upon condition that it may be retaken to serve the necessities of the sovereign power. To this end agencies created by the state, the purpose of which is to serve the public, may exercise this right. *Denver Power & I. Co. v. D. & R. G. R. Co.*, 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383. The vital question is, whether or not the use of the property sought to be condemned will be public in its nature. As an aid in solving this question, we may consider the character of the business in which the petitioner proposes to engage through and by means of its tunnel. If this business is wholly for its benefit, then the use of the property sought to be appropriated would be private, while, on the other hand, if the business proposed to be carried on by petitioner through its tunnel is essentially for public benefit and advantage, then the use would be public. *De Camp v. Hibernia R. Co.*, 47 N. J. Law, 43; *Sholl v. German Coal Co.*, 118 Ill. 427, 10 N. E. 190, 59 Am. Rep. 379; 15 Cyc. 581. No definition, however, has as yet been formulated which would serve as an infallible test in determining whether a use of property sought to be appropriated under the power of eminent domain is public or private. No precise line is drawn between the uses which would be applicable in all cases. Doubtless this arises from the fact that the courts have recognized that the definition of "public use" must be such as to give it a degree of elastic-

ity capable of meeting new conditions and improvements, and the ever-increasing needs of society. *Olmstead v. Camp*, 33 Conn. 532, 551, 89 Am. Dec. 221. Consequently, we find, in examining the authorities, that, in determining whether or not a use is public, the physical conditions of the country, the needs of a community, the character of the benefit which a projected improvement may confer upon a locality, and the necessities for such improvement in the development of the resources of a state, are to be taken into consideration. *Oury v. Goodwin (Ariz.)* 28 Pac. 376; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 729, 23 Am. Dec. 756; *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085.

In this state we have conditions to meet and resources to develop, which, in their nature, require the employment of new and appropriate means. This has opened a field for the prosecution of new enterprises. The mineral resources of the state are of prime importance. Generally, they can only be reached by sinking shafts to great depth, or running tunnels of great length. It appears from the testimony that the tunnel which petitioner purposes to run will cut the mountain at a great depth; that it will intersect numerous veins of mineral; that it will reach mines now being operated; that through this tunnel these mines and others which may be developed along its line can be operated if the owners should so desire; that it will drain these properties and furnish ventilation, if connection is made therewith; in short, that the owners of mining properties along the line of this tunnel and adjacent thereto may, if they so desire, secure a distinct benefit and advantage in the operation of their mines by availing themselves of the facilities which may be afforded by the tunnel of the petitioner. The General Assembly has provided for the organization of companies for the purposes for which the petitioner was organized. It has provided that a corporation of this character may exercise the power of eminent domain in securing rights of way for its tunnel. It has evidently recognized that the business of a tunnel company may be for the benefit and advantage of the public, for we find that in designating what corporations may exercise the power of eminent domain, tunnel companies have been mentioned in connection with bridge, ferry, railroad, and other companies, whose business is unquestionably to serve the public. While this judgment is not conclusive upon the courts, it is entitled to careful consideration and great weight, as the judgment of a co-ordinate branch of the government of the necessities of the state for the development of its resources and the needs of the people in this respect. *Dayton M. Co. v. Seawell*, 11 Nev. 394.

Subject to the authority of the courts to determine certain questions, the General Assembly is the exclusive judge of the necessity or emergency justifying the exercise of the

power of eminent domain. *Sholl v. German Coal Co.*, supra. It has vested corporations organized for the purposes mentioned in the articles of incorporation of petitioner with the right to exercise this power. For the development of the great mining resources of this state, tunnels of the character contemplated by petitioner are not only expedient, but necessary. The necessity of vesting corporations of the character of petitioner with the right to exercise the power of eminent domain is apparent; for, without this power, enterprises of the character contemplated by the petitioner could be thwarted and the development of the mining resources of the state prevented by those owning property crossing the line of a projected tunnel. The number who may avail themselves of the benefits of the tunnel will be limited, but this is merely the result of natural conditions arising from the character and location of mining properties. The use and benefit of the tunnel will be in common, and may be enjoyed by all whose properties are so located with reference thereto that they may avail themselves, if they so desire, of the opportunities thus afforded for the development and operation of their properties. The business in which petitioner will engage in affording these facilities is essentially for the benefit and advantage of such owners. For these reasons, we are of the opinion that the use of the property sought to be condemned by the petitioner is public. *Gilmer v. Lime Point*, 18 Cal. 229, 251; *O'Reily v. Kankakee Valley D. Co.*, 32 Ind. 169, 185; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, 68; *Hartwell v. Armstrong*, 19 Barb. (N. Y.) 166.

The judgment of the district court is affirmed.

Affirmed.

MIDGLEY v. BERGERMAN et al.

(Supreme Court of Utah. Nov. 14, 1905.)

1. NEW TRIAL—MISCONDUCT OF JURY—AFFIDAVITS—SUFFICIENCY.

Rev. St. 1898, § 3292, subd. 2, makes it a ground for a new trial that the jury have been guilty of misconduct, in that one or more have been induced to assent to a verdict by resort to the determination by chance. An affidavit for a new trial made by a jurymen stated that a quotient verdict was rendered, and that the jurors agreed, before obtaining the result, that the amount so obtained should be the verdict. Counter affidavits stated that the jury did not agree to accept the quotient, but that they agreed upon such amount, because it met with the approval of each of the jurors. *Held*, that there was no showing to warrant a new trial.

2. SAME—BURDEN OF PROOF.

On a motion for a new trial, on the ground that the jury resorted to the determination of chance, the burden of proof is upon the party assailing the verdict.*

3. SAME—MISCONDUCT OF JURY—ESSENTIALS OF MISCONDUCT.

A new trial may not be had, on the ground that the jury resorted to the determination of

chance, unless it appear that the assent of one or more jurors was thereby obtained to the verdict.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 104.]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by Joshua A. Midgley against Jacob Bergerman and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

W. R. Hutchinson, for appellants. A. L. Hoppaugh and P. C. Evans, for respondent.

BARTCH, C. J. This action was brought by the plaintiff to recover damages for personal injuries which he alleges were inflicted upon him willfully and maliciously by the defendant Ford, acting under the direction and employ of the defendant Bergerman. It appears that, at the time of the injury, Bergerman was the proprietor and manager of Calder's Park, a certain pleasure resort; that he kept a saloon there; that the plaintiff and several companions went to the bar, and called for and drank beer; that thereupon others entered the saloon and also began drinking; that then a dispute arose and a disturbance ensued; that, to quell the disturbance and rid the saloon of the boisterous parties, the bartender called in the defendant Ford, who was a deputy sheriff in the employment of the manager, and pointed out the plaintiff to the officer as the man who made the disturbance; and that thereupon the officer ordered him out of the saloon, and, upon the plaintiff claiming he made no disturbance and refusing to go, struck him with a cane across the back of the head, causing the injury of which complaint is made. As to what took place during the drunken brawl and just before the blows were struck by the officer, the evidence is conflicting. On the part of the defense, there is evidence showing that, while trying to push the plaintiff out, the officer was assaulted and struck by one of the parties. Some testimony of the plaintiff is to the contrary. There is also a conflict in the evidence respecting the plaintiff's conduct during the disturbance, and at the time the officer ordered him to leave. Upon the submission of the case to the jury, a verdict was returned in favor of the plaintiff, and the court, after overruling a motion for a new trial, entered judgment on the verdict in the sum of \$525. The appellants now seek to reverse that judgment, but the record shows such a violation of the rules and practices of this court, in reference to the manner of presenting questions for review, that we cannot consider any of the alleged errors except the one relating to the misconduct of the jury.

It is insisted that the verdict of the jury was the result of a resort to the determination of chance, and, to support this contention, the appellants have filed an affidavit of one of the jurors. In that affidavit, B. Solomon, the affiant, states, in substance, that, upon the jury retiring to consider their ver-

*Pence v. Mining Co., 75 Pac. 934, 27 Utah, 373; Archibald v. Kollitz, 72 Pac. 935, 26 Utah, 226.

dict, each juror cast a "ballot for the amount which he considered to be correct from the evidence"; that then one of the jurors proposed "that they add up the several amounts," and divide the total by eight, the number of jurors, the quotient to be the verdict; that the proposition was accepted by all the jurors, and the sum so obtained written in the verdict, which was returned to the court; and that the "jurors agreed, before obtaining the result, that the amount obtained, from adding the separate amounts decided upon by each juror and dividing the total by eight, should be the verdict of the jury." This is the only affidavit upon which the appellants rely to show a vitiated verdict, and it will be noticed that there is nothing in it to show that there was no deliberation after the quotient was obtained, or that any one of the jurors was actually induced to assent to the amount so obtained as the amount of the verdict, or even that the affiant himself was induced to and did agree to the verdict because he considered himself bound by such arrangement. Not only does this affiant fail to show these things, but, on the contrary, six jurors, in a counter affidavit, state that the jury did not agree to accept the quotient as the amount of the verdict because induced to do so by the arrangement, but that they "accepted and agreed upon said amount solely and only because it met with the approval of each of said jurors, as a just and fair and a reasonable amount of recovery for the plaintiff; that none of said jurors were induced to assent to such verdict by resort to the determination of chance," or such addition and division; and that "there was no agreement on the part of said jurors, or any of them, by the terms of which they were to be bound in advance to the amount to be determined upon by addition and division, nor did the arrangement entered into in any respect affect or detract from the deliberations on the part of the jurors; that said jury were out and in discussion of said case about 1 hour, and discussed the amount reached as a quotient from adding and dividing the sums voted by each juror for about 10 minutes after the quotient had been reached." Clearly, when these affidavits are examined and considered they reveal no sufficient ground to justify this court in disturbing the judgment. In such a case, the burden of proof is upon him who assails a verdict, to show not only that there was a resort to the determination of chance, but also to show that the assent of one or more jurors was thereby obtained to the verdict.

This court, in *Pence v. Mining Co.*, 27 Utah, 378, 75 Pac. 934, commenting upon section 3292, Rev. St. 1898, of the statute relating, among other things, to misconduct of the jury by a resort to the determination of chance, said: "The 'determination of chance,' however, to have such effect, must have been the means of inducing one or more jurors to assent to the verdict. It follows that the

mere fact that the jury, in a given case, may, during their deliberations, have resorted to chance to obtain an average sum, will not vitiate their verdict, if, notwithstanding such sum, they thereafter continue to deliberate in good faith, and finally arrive at their verdict as a result of fair and honest deliberation, free of any inducement from the resort to chance. The burden of proof to show that the assent of one or more jurors was obtained to the verdict by the determination of chance, or that it was in fact a chance verdict, is upon him who assails the verdict." *Archibald v. Koltitz*, 26 Utah, 226, 72 Pac. 935; *Dorr v. Fenko*, 12 Pick. 521; *Bailey v. Beck*, 21 Kan. 462; *Hunt v. Elliott*, 77 Cal. 588, 20 Pac. 132. The decided preponderance of proof in this case is in favor of the validity of the verdict, and the presumption that the jury acted fairly and did their duty has not been overthrown. The contention of the appellant, therefore, that the jury were guilty of such misconduct as rendered their action void cannot prevail.

We find no reversible error in the record. The judgment is affirmed, with cost.

McCARTY and STRAUP, JJ., concur.

HARRINGTON v. BUTTE & BOSTON MIN. CO. et al.

(Supreme Court of Montana. Dec. 18, 1905.)

1. TRIAL — EXCLUSION OF EVIDENCE — REMOVAL OF OBJECTION — FAILURE TO RENEW OFFER.

In an action in which the administrator of the original defendant had been substituted, the refusal of the court to allow plaintiff to testify was not rendered erroneous by the subsequent introduction of the testimony given by the original defendant on a former trial, where at the time plaintiff's testimony was excluded it did not appear that defendant's testimony at the former trial had been preserved, and plaintiff did not renew his offer after such former testimony had been introduced.

2. BILLS AND NOTES — CHECKS — INDORSEMENT — HOLDER IN DUE COURSE — FACTS PUTTING ON INQUIRY.

Under Civ. Code, § 4035, providing that no defense can be maintained against the holder of a negotiable instrument in due course except that of payment, and section 4034, defining an indorsee in due course as one who in good faith in the ordinary course of business and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument, the fact that a purchaser of a check takes it under circumstances which would put a reasonably prudent man upon inquiry does not prevent him from being a holder in due course, unless the circumstances are such as to show bad faith.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 818-823.]

3. TRIAL — INSTRUCTIONS — INVASION OF PROVINCE OF JURY.

In an action by an indorsee of a check against the drawer, an instruction that, if there is anything in a negotiable instrument to cast suspicion upon its character, the holder will be considered to have taken it under cir-

cumstances which render him guilty of bad faith, was objectionable, as invading the province of the jury.

4. SAME—INCOMPLETE INSTRUCTION.

An instruction which submits to the jury certain premises, but fails to state what conclusions might be drawn from such premises, is erroneous.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

Action by Phil. J. Harrington against the Butte & Boston Mining Company and another. From a judgment for defendants, plaintiff appeals. Reversed.

J. E. Healy and Maury & Hogevoil, for appellant. C. M. Parr, for respondents.

HOLLOWAY, J. This is the third time this case has been before this court on appeal. *Harrington v. B. & B. Min. Co.*, 19 Mont. 411, 48 Pac. 758; *Id.*, 27 Mont. 1, 69 Pac. 102. The action is upon a check for \$2,500 issued by the Butte & Boston Mining Company to John A. Leggat, by Leggat indorsed generally and transferred to one Wearth, and by Wearth indorsed generally and transferred to this plaintiff, Harrington. The check was presented by Harrington to the First National Bank of Butte, upon which institution it was drawn, payment refused, and this action resulted. The defense pleaded is a want of consideration for the transfer of the check from Leggat to Wearth, and for the transfer from Wearth to Harrington. The cause was tried to the court sitting with a jury. A verdict for defendants was returned, and judgment entered thereon, from which judgment, and an order denying his motion for a new trial, the plaintiff appealed.

The record discloses that the check was received by Wearth from Leggat in settlement of a gambling debt, and that at the time he indorsed it Leggat was intoxicated, rendering his signature somewhat unnatural. Before the trial, which resulted in the judgment from which this appeal is taken, Leggat died, and his administrator was substituted. Among others, the court gave to the jury instructions Nos. 5 and 10, as follows: No. 5. "In this case you are further instructed that although you may believe from the evidence that the plaintiff actually paid for the check as testified to, and that he had no knowledge of the fact that the check was obtained from Leggat by Wearth without any consideration, still if you find from the evidence that the facts and circumstances surrounding the purchase of the check by plaintiff from Wearth, if you find he did purchase it, would have put a reasonably prudent man upon inquiry, and if the plaintiff failed to make such inquiry, such failure is equivalent to actual notice, and he cannot recover." No. 10. "If there is anything in a negotiable instrument to cast suspicion upon its character, the holder thereof, whether a holder for value, will be

considered to have taken it under circumstances which render him guilty of bad faith, provided you may take into consideration all of the circumstances under which the plaintiff came into the possession of the check in question in determining whether or not he purchased it in good faith, for value, and without notice of any fraud."

Upon the trial the plaintiff was introduced as a witness in his own behalf, and by him it was sought to show his transaction with Wearth by which he came into possession of the check. Objection was made that the testimony was incompetent under the provisions of section 3162, Code Civ. Proc., as amended by an act of the Fifth Legislative Assembly, approved February 19, 1897 (Sess. Laws 1897, p. 245). This objection was sustained and exception taken. Later in the course of the trial it developed that at a former trial of this cause Leggat had testified that his testimony had been preserved, and upon this trial proof of the testimony which he had given upon such former trial was introduced on behalf of the defendants. It is claimed that the trial court erred in excluding the testimony of the plaintiff, for the reason that Leggat's testimony taken at a former trial had been preserved. But it is sufficient to say that this fact did not appear to the trial court at the time Harrington was introduced as a witness, and that after it did appear the plaintiff did not renew his offer; so that, if there is the exception to the rule as claimed by the appellant, he did not bring himself within it. It is also said that the rule is not so extensive in its operations as to preclude the plaintiff from testifying to transactions had with a third person, even if the proof of such transactions tends to establish the plaintiff's claim against the estate of the deceased person. But in this, we think, counsel for appellant is in error. The language of section 3162, above, as amended, is: "The following persons cannot be witnesses: * * * (3) Parties or assignees of parties to an action or proceeding or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person."

The principal question is presented by a consideration of instructions Nos. 5 and 10 above. The doctrine announced in No. 5 is that, even though Harrington paid value for the check and had no actual knowledge of the fact that Wearth obtained it from Leggat without consideration, still, if the facts and circumstances attending the purchase of the check by Harrington from Wearth were such as to put a reasonably prudent man upon inquiry, and if Harrington failed to make such inquiry, such failure on his part was equivalent to actual notice by him of the want of consideration for the

transfer by Leggat to Wearth, and he could not recover. This never has been the law of this state, and is not now, and with the exception of a few states it has not been, the rule in this country for nearly three-quarters of a century. At an early date in the last century the rule announced in No. 5 above did prevail in England (*Gill v. Cubitt*, 3 B. & C. 466), and to some considerable extent in this country, but was repudiated by the English courts in 1836 (*Goodman v. Harvey*, 4 A. & E. 879), and by most of the courts of this country about the same time, and with few exceptions has not been given countenance by the courts of this country since. The overwhelming weight of authority is against it. But, in addition to this fact, that rule is entirely inconsistent with the provisions of our Civil Code upon the subject. When, in an action upon a negotiable bill or note, the defense of want of consideration in its making or transfer is interposed, it becomes a question whether the holder is an indorsee in due course, and, if he is, there are no defenses, except payment to him, which can be successfully maintained against his claim. Civ. Code, § 4035. Who, then, is an indorsee in due course? Section 4034 of the same Code answers this inquiry as follows: "An indorsee in due course is one who, in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer."

It appears from this record, first, that the check was indorsed by Wearth generally and transferred to Harrington; second, that the instrument is a negotiable instrument; third, that Harrington received it before its presumptive dishonor, and without knowledge of its actual dishonor; fourth, that he received it in the ordinary course of business; and, fifth, for the sake of this argument, we may say that Harrington paid value for it, although this is a disputed question of fact. In order, then, for Harrington to put himself beyond the pale of the defense pleaded, as an indorsee in due course, it was only necessary for him to show good faith; so that, instead of suspicious circumstances sufficient to put a reasonably prudent man upon inquiry being the test of plaintiff's right to recover, the test provided by our Code is good faith. If the suspicious circumstances are of sufficient cogency, they may warrant the conclusion of the jury that the holder acted in bad faith in procuring the paper; but the test, nevertheless, is good faith. If Harrington acted in good faith in his transaction with Wearth, assuming the other five premises announced above, then the defense interposed is not available against him. The rule is thus stated in 7 Cyc. 944: "The principle is now well established that neither a suspicion of defect of title, knowledge of circumstances

which would excite such suspicion in the mind of a prudent man or put him on inquiry, nor even gross negligence on the part of the taker will affect his right, unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith. In other words, the question is now one of good or bad faith, and not of diligence or negligence, except so far as the want of caution is material as bearing on the question of good faith, and suspicious or knowledge of facts which fall short of bad faith do not amount to notice." The authorities cited in support of the text are far too numerous to be reproduced here. The same doctrine is announced, and authorities at great length cited, in 1 Daniels on Negotiable Instruments (5th Ed.) §§ 770-775. It has been well said by the Supreme Court of Texas: "The ordinary rule of constructive notice which applies to the purchaser of property is not applicable in the case of negotiable instruments. As promotive of their circulation, a liberal view is taken, which makes the bona fides of the transaction the decisive test of the holder's right. He is entitled to recover upon it if he has come by it honestly." *Wilson et al. v. Denton et al.*, 82 Tex. 531, 18 S. W. 620, 27 Am. St. Rep. 908.

Instruction No. 10 above is erroneous for two reasons: First, it is a flagrant invasion of the province of the jury for the court to say that particular evidence proves a particular fact, as this instruction does; second, it is wrong in saying that suspicious circumstances alone will defeat recovery. The last half of the instruction, if standing alone, would correctly state the law; but, taken in connection with the first portion, the jury could draw but one conclusion, namely, if there were any suspicious circumstances attending the purchase of the check by Harrington, he was guilty of bad faith, and, as a result, could not recover. While evidence of suspicious circumstances or gross negligence on the part of Harrington, if any there was, was admissible upon the question of his good or bad faith, it remains for the jury to say whether such evidence in fact proves bad faith.

As this case must go back for a new trial, attention is directed to instruction No. 3 as given, which also submits to the jury the same erroneous theory of the law as instruction No. 5, but is further defective in submitting to the jury certain premises, but failing to inform the jury what conclusions might properly be drawn from the premises announced. Because of these errors, the judgment and the order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MILBURN, J., concurs.

BRANTLY, C. J., being disqualified, takes no part in the foregoing decision.

BOURKE v. BUTTE ELECTRIC & POWER CO. et al.

(Supreme Court of Montana. Nov. 27, 1905.)

1. PLEADING—ANSWER—NEGATIVE PREGNANT.

Where a complaint for injuries from defendants' electric wire charged that defendants on a certain day hung the wire over, above, and across a trestle at a certain mine, and the only denial was that defendants, except the B. Electric Co., hung the wire over, above, or across the trestle, and that any of the defendants hung the wire only three feet above the trestle, and alleged that "a certain wire hung by such company was hung over the trestle at a distance of 4½ feet," etc., the answer contained a negative pregnant, and did not raise an issue that the wire was placed in position before the construction of the trestle.

2. ELECTRICITY—INJURIES—TRESPASSERS—INSTRUCTIONS.

Defendants' electric light wire, by which the plaintiff was injured, was strung on and along a public street and over a tramway trestle leading to a mine, built at right angles with the wire, and plaintiff was injured by coming in contact with the wire while working on the trestle as an employé of the owner of the mine. *Held* that, in the absence of anything to justify the conclusion that either the owner of the wire or the owner of the trestle was a trespasser as to the other, an instruction imposing on defendants the duty of inspecting their lines of wire was not objectionable, on the ground that plaintiff was a trespasser as to whom defendants owed no duty of inspection.

3. SAME—CARE REQUIRED.

The owner or operator of an electric plant is bound to exercise reasonable care in selecting appliances and insulating wires, wherever people have a right to go and are liable to come in contact with them, and in maintaining a system of inspection by which any change in the physical condition of such apparatus which would tend to increase the danger to persons lawfully in the pursuit of their business or pleasure may be reasonably discovered.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Electricity, §§ 7, 9.]

4. SAME—INSTRUCTIONS.

In an action for injuries to plaintiff by coming in contact with defendants' electric light wire, alleged to have been negligently insulated, an instruction correctly stated the law which charged that all persons and corporations handling a force inherently dangerous to human safety must exercise a high degree of care so that persons shall not be hurt by the same, while they are not trespassing and are rightfully minding their own business, and that the care required is measured by and equal to the danger, etc.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Electricity, §§ 7-9.]

5. APPEAL—INSTRUCTIONS—PREJUDICE.

In an action for injuries to plaintiff by coming in contact with defendants' live electric wire, overhanging a trestle on which plaintiff was working, erected prior to the stringing of the wire, an instruction that there was no evidence that defendants had actual notice of the erection of the trestle, and that their wires were in close proximity thereto, and that the jury should only consider this in the event they believed that the wire was hung before the trestle was erected; otherwise, defendants were chargeable with knowledge of the existence of the trestle and the physical conditions surrounding it—was not prejudicial to defendant.

6. DAMAGES—INJURIES—EVIDENCE.

Under Civ. Code, § 4330, providing that the measure of damages in an action for injuries to the person is such an amount as will

compensate plaintiff for all the detriment proximately caused thereby, whether it could have been anticipated or not, evidence in action for injuries showing the wages plaintiff received more than a year prior to the date of the accident was admissible, as bearing on his earning capacity.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 490.]

7. TRIAL—INSTRUCTIONS—DAMAGES—NECESSITY OF REQUEST.

It was not error for the court, in an action for injuries, to omit to particularly charge the jury as to the plan or standard to be adopted in estimating damages, where no more specific instruction than that given was requested.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 628.]

8. DAMAGES—PERSONAL INJURIES—MEASURE OF RECOVERY.

In an action for personal injuries, an instruction that, if the jury found for plaintiff, in fixing his damages they might consider mental and physical suffering caused by the injury, wages which plaintiff might have earned from the date of the injury to the date of the trial, and, if the injuries were permanent, any loss to him by reason of the impairment of his capacity to earn money in the future, was proper.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 222, 233-241, 255-259.]

9. SAME—IMPAIRMENT OF EARNING CAPACITY.

In an action for personal injuries, plaintiff, if entitled to recover, should be allowed such an amount as would purchase an annuity equal to the difference between plaintiff's annual earnings before his injury and the amount, if any, which he might earn thereafter.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 237.]

10. SAME—EXCESSIVE DAMAGES.

Where, in an action for injuries, the evidence was such that the jury might well have found that plaintiff's injuries were permanent, and that, though he was 45 years of age, and had previously earned \$3.50 per day, he would not thereafter be able to earn money, a verdict in his favor of \$20,000 would not be set aside on appeal as excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 386.]

Appeal from District Court, Lewis and Clarke County; Henry C. Smith, Judge.

Action by Martin Bourke against the Butte Electric & Power Company and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

This action was commenced in Silver Bow county by the plaintiff, Bourke, to recover damages for personal injuries received by him by coming in contact with an electric light wire charged with electricity. The defendants originally were the Butte Electric & Power Company, the Butte Lighting & Power Company, the Butte General Electric Company, and George T. Aiken. Afterwards, on plaintiff's motion, the action was dismissed as to the Butte Lighting & Power Company and the Butte General Electric Company, and proceeded thereafter against the Butte Electric & Power Company and George T. Aiken.

The complaint alleges that the defendants

were engaged in the business of furnishing light by electricity to the citizens of Butte and Meaderville, in Silver Bow county. Paragraph 5 of the complaint is as follows: "That on or about the 1st day of May, 1902, near Meaderville, in the said county of Silver Bow, Mont., the said defendants did cause to be hanged, about three feet above and across a trestle at the East Colusa mine, a certain copper wire, and charged the same with, and continued at all times thereafter to keep the same charged with, a current of electricity of a voltage of about 2,500 volts, that being sufficient in power to kill men of ordinary vitality, and to do great bodily harm to all men, whenever they might touch the same; that the said wire, on the 10th day of May, 1902, and long prior thereto, was insufficiently, carelessly, and negligently insulated, and that the defendants were well aware of the said want of insulation, or could with reasonable diligence or care have been aware of such want of insulation." It is further alleged that the wire mentioned in paragraph 5 was hung by the defendants, or by them permitted to hang, over and across said trestle so low that persons working over the trestle were in imminent danger of coming in contact with the wire; and that the wire was so low that it had to be moved and lifted up by persons working on the trestle. It is further alleged that this trestle belonged to the Boston & Montana Company, and that on the 10th day of May, 1902, this plaintiff, while in the employ of that company, was there lawfully hauling waste in tram cars along and over this trestle. Paragraph 7 of the complaint is as follows: "That the defendants, when they hung the said wire over the said trestle, and only about three feet above the said trestle, and without insulation as aforesaid, well knew that this plaintiff, and many other men employed by the said mining company, were daily employed in walking over the said trestle and must in the course of such employment touch the said wire." It is further alleged that, in order for plaintiff to get his cars back and forth along the track on this trestle, it was necessary for him to lift up said wire every time he passed, and that the defendants knew that it was necessary for him to do so, and that plaintiff did not know that this wire was in any manner charged with an electric current. It is alleged that the placing of this wire over the trestle so low, and the placing of it there without proper insulation, constituted acts of gross negligence and malicious recklessness on the part of the defendant company. It is further alleged that on the 10th day of May, 1902, it was raining; that the trestle was wet, and that, as plaintiff was pursuing his business and passing back and forth with his car, in attempting to lift the wire to let his car go by he touched the wire with his left hand; that the wire was then charged with electricity; that a

current of electricity passed through him, caused him to hold on to the wire, burned all the flesh from the fingers and thumb of his hand, and otherwise caused him great pain and terrible anguish; that by reason of this injury he was confined to a hospital for 18 weeks under the care of a physician; that he suffered daily great bodily pain; that the injuries inflicted upon him are permanent; that before the accident he was a strong and healthy man, capable of earning, and did earn, \$3.50 a day; that by reason of this accident he will never be a strong man again; that he cannot open his left hand, because of the fact that the muscles on the inside thereof were burned off; that the muscles of his legs and arms have become shrunken; that he continues to suffer pains throughout his body; that he is informed and believes that he will never be relieved of these; that by reason of the burning he has been rendered so weak that he cannot eat anything but soft food; that at the time of the burning he was about 45 years of age; that since that time he has not been able to do any work or earn any money; and that he will never again be able to do any work, by reason of such injury. It is further alleged that the acts of the defendants, as set forth, were done maliciously and wantonly, and in criminal disregard of the rights and safety of all persons, and particularly of this plaintiff. Actual damages in the sum of \$30,000 are asked, and punitive damages in the sum of \$20,000 in addition thereto.

The answer denies that either or any of the defendants, except the Butte Electric & Power Company, was engaged in the business of furnishing light by electricity to the citizens of Butte and Meaderville, as charged in the complaint. There are specific denials that the wire mentioned in the complaint, strung over the trestle, was insufficiently or carelessly insulated, or that it was ever necessary for the plaintiff to lift the wire in hauling his car over the trestle, or that the plaintiff did not know that the wire was charged with an electric current. There is a denial of any knowledge or information sufficient to form a belief as to whether or not the plaintiff was injured, or the extent or character of his injuries. There is a further denial that, because of any act or thing done by the defendants, or either of them, the plaintiff was injured in any manner or at all. There is also a denial that any of the acts alleged in the complaint as having been performed by the defendants, or either of them, were done or performed maliciously or wantonly, or in criminal disregard, or any disregard, of the right of plaintiff or any person. The answer also contains allegations to the effect that over the trestle were strung two wires, one a primary wire, 6½ feet above the trestle, and a secondary wire, 4½ feet above the trestle; and it is alleged that the accident to the plaintiff was occasioned by the plaintiff taking hold of said primary wire

and said secondary wire at one and the same time. It is alleged that it was not necessary for the plaintiff to take hold of either of these wires, and that his taking hold of either of them, or both at the same time, were acts of negligence on his part, which contributed to the injury which he received. With relation to the principal allegations of the complaint in paragraph 5, set forth in full above, the denials in the answer are so pregnant with admissions that they are set forth at length, as follows: "Deny that on or about the 1st day of May, 1902, or at any other time, near Meaderville, in said county of Silver Bow, or elsewhere, any of said defendants above named, save and except the Butte Electric & Power Company, did cause to be hanged three feet, or any number of feet, above or across a certain trestle at the East Colusa mine, or elsewhere, a certain copper wire, or charged the same with, or continued at any time thereafter to keep the same charged with a current of electricity of a voltage of about 2,500 volts, or any number of volts, or at all, or that any wire hanged by said defendants, or by either of them, save and except the Butte Electric & Power Company, was sufficient in power to kill men of ordinary vitality, or to do gross or any bodily harm to all men, or any men, whenever they might touch the same, or otherwise, or at all. Deny that said defendants, or either of them, ever, at any time, strung or hanged said wire mentioned in said complaint, or any wire, or at all, over said or any trestle, only three feet, or about three feet, above said trestle; but in this connection and as a part of this denial, defendants allege that a certain wire strung by the Butte Electric & Power Company was so strung over and above said trestle a distance of 4½ feet from said trestle, and called a secondary wire." There is not any denial whatever of the allegations of paragraph 7 set forth above.

The cause was transferred to Lewis and Clarke county, where it was tried to the court sitting with a jury. The jury returned a verdict in favor of the plaintiff, and judgment was entered thereon. The appeals are from the judgment, and from an order denying defendants' motion for a new trial.

J. L. Wines, Forbis & Matteson, and M. J. Cavanaugh, for appellants. Robt. B. Smith, H. L. Maury, and John B. Clayberg, for respondent.

HOLLOWAY, J. (after stating the facts). 1. The cause was apparently tried upon the theory that there was an issue raised by the pleadings as to whether the wire which caused the injury to plaintiff was placed in position before the trestle upon which plaintiff was at work was erected. The most casual reading of the pleadings will show at once that there was not any issue upon this question at all. The complaint in paragraph 5 above, in plain and unmistakable

language, charges that the defendants, on or about the 1st day of May, 1902, hung this wire, charged with an electric current of 2,500 volts, over and above and across a trestle at the East Colusa mine. The denial of those allegations is that any of the defendants, except the Butte Electric & Power Company, hung the wire mentioned in the complaint over and above or across the trestle at the East Colusa mine; and that any of the defendants hung the wire mentioned in the complaint only three feet, or about three feet, above said trestle. The answer alleges that a certain wire hung by the Butte Electric & Power Company was so hung over and above said trestle, a distance of about 4½ feet from said trestle, and was called a secondary wire. These pregnant denials admit that the Butte Electric & Power Company strung the wire mentioned in the complaint, charged with an electric current of 2,500 volts, over the trestle at the East Colusa mine. The only denial is that such wire was only three feet, or about three feet, above the trestle. If the trestle was not there before the wire was placed in position, it is hardly necessary to say that the wire could not have been strung over and across the trestle, and therefore the answer unmistakably admits the existence of the trestle before the wire which caused plaintiff's injury was placed in position. The particular wire which caused the injury is definitely identified in the proof as a primary wire; so that the trial court would have been justified in stating to the jury that there was not any issue upon the question, but that the answer admits that this wire with which plaintiff came in contact, was placed in position after the trestle upon which he was working was erected. But the defendants offered proof tending to show that there were four wires stretched over this trestle; that two of them were primary and two secondary wires; that the primary wires were charged with an electric current of from 2,000 to 2,500 volts, while the secondary wires were charged with only about 104 volts, which was not sufficient to have caused the injury complained of.

Acting upon the assumption that there was an issue as to whether the wire or the trestle was first put in place, the court submitted to the jury certain instructions of which complaint is made. One of these instructions (No. 9) was asked by the defendants and given by the court with a material modification. By this instruction the jury was told that, if they found from the evidence that the wire which caused the injury to plaintiff was strung by the defendants before the trestle was erected, that the trestle was erected by a third person without the knowledge or consent of the defendants, and was not used by the defendants, and that plaintiff was at work on the trestle for some person other than the defendants, and that the defendants did not know that the trestle was be-

ing used, and if they further found that the wire which caused the injury was strung a sufficient height above the surface of the ground to render it impossible for persons at work or travelling in that vicinity to come in contact with it by ordinary means, then the act of plaintiff in coming in contact with the wire was contributory negligence on his part which would preclude his recovery. To this extent the instruction was asked by the defendants, but the court attached to it this modification: "Unless you find that the said defendants were guilty of negligence in not inspecting their property at such reasonable periods of time as would enable them to know and discover that said trestle had been erected under their said wires and was being used as a passageway by human beings, and that the erection of said trestle had brought the said wires so close to persons passing across said trestle as to be dangerous to the lives and safety of human beings." The court, by instruction No. 12, told the jury that, if they should find from the evidence that the wire which caused the injury was strung before the trestle was erected, then they were instructed that it is the duty of persons or corporations transmitting electric currents that are dangerous to human safety or life to inspect their properties at reasonable intervals with a view of ascertaining what, if any, physical changes have taken place which might create or increase danger to human life; and in this case, if the jury should find that the property was not inspected at reasonable intervals, and that a reasonable inspection would have disclosed the existence of the trestle and the physical conditions surrounding it at the time the plaintiff was injured, then, in that event, the defendants were charged with knowledge of the existence of the trestle.

Objection is made to instruction No. 9 as modified, and to No. 12, in that they impose upon the defendants the duty of inspecting their lines of wire, even if the trestle was erected after the wire which caused the injury was strung. Appellants contend that, if it was found that the trestle was erected after the wire was put in place, then, as to the defendants, the plaintiff was a naked trespasser, and, as to him, the defendants did not owe the duty of inspection, and in support of this cite *Egan v. Montana Central Ry. Co. et al.*, 24 Mont. 569, 63 Pac. 832; *Beinhorn v. Griswold*, 27 Mont. 79, 69 Pac. 557, 59 L. R. A. 771, 94 Am. St. Rep. 818; and *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 373. But the complaint alleges that the plaintiff was rightfully and lawfully in pursuit of his business at the time when, and place where, he was injured, and this is not denied. Neither is there anything in the pleadings or proof which would even tend to show that the owner of the trestle was, as to the owner of the wire, a trespasser. The wire was strung on and along a public street, and the trestle was built across the street at right angles

with the course of the line of wire. As said before, the answer specifically admits that the wire was strung after the trestle was erected; but, if it be said that all parties proceeded in the trial court upon the theory that there was an issue raised as to this fact, still there is not anything which would justify the conclusion that either the owner of the wire, or the owner of the trestle, was, as to the other, a trespasser. The law will not presume it, but, in the absence of any showing to the contrary, the presumption is that each alike was there lawfully. So that we may at once dismiss from our consideration any contention that the owner of the trestle was a trespasser; and this being so, the cases cited above from this state are not in point here. Defendants' liability to the plaintiff must therefore be determined by rules applicable to one injured by the alleged negligence of another, where the injured party was rightfully pursuing his business or pleasure at the time of his injury.

In 3 Current Law, 1182, the rule as to this liability is announced as follows: "While one furnishing electricity is not an insurer, yet as to the public he is obliged to use the utmost human care, vigilance, and foresight, reasonably consistent with the practical operation of his plant, to provide against all reasonably probable contingencies; the care required in any particular case being proportional to the danger. This includes the use of the best mechanical contrivances and inventions in practical use, perfect insulation at all places near which people have a right to go, and, it has been held, perfect insulation of all overhead wires strung through streets, the consideration of climatic conditions, and the maintenance of such a system of inspection as will insure reasonable promptness in the detection of defects." While this rule goes farther than it is necessary for us to go in this instance, we do adopt and approve it to the extent that it holds the owner or operator of an electric plant to a reasonable degree of care in erecting pole lines, selecting appliances, insulating the wires wherever people have a right to go and are liable to come in contact with them, and in maintaining a system of inspection by which any change which has occurred in the physical conditions surrounding the plant, poles, or lines of wire, which would tend to create or increase the danger to persons lawfully in pursuit of their business or pleasure, may be reasonably discovered. *Mitchell v. Charleston L. & P. Co.*, 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577. Other courts announce the rule in even stronger terms. For instance, in Colorado it is said: "Moreover, the court in other instructions correctly declared that the defendant was bound to exercise the highest skill, most consummate care and caution, and utmost diligence and foresight in the construction, maintenance, and timely inspection of its entire plant which was

attainable, consistent with the practical conduct of its business according to the best-known methods of the state of its art at and prior to the time of the disaster." *Denver Con. Electric Co. v. Lawrence*, 31 Colo. 301, 73 Pac. 39. And in Pennsylvania the rule respecting the duty of a gas company is stated as follows: "While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say in general terms that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken. This would require, in the case of a gas company, not only that its pipes and fittings should be of such material and workmanship, and laid in the ground with such skill and care, as to provide against the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of leaks that might occur from deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in business." *Koelsch v. Philadelphia Co.*, 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653.

It would hardly do to say that the defendant can only be required to exercise due diligence after it receives notice of any defect in its appliances or of any change in the physical conditions surrounding them, for this would be placing a premium upon negligent ignorance, as was said, in substance, by the Supreme Court of South Carolina in *Mitchell v. Charleston L. & P. Co.*, above. *District of Columbia v. Woodbury*, 136 U. S. 463, 10 Sup. Ct. 990, 34 L. Ed. 472. Under the rule which we have announced above, we think the court's instructions No. 9 as modified, and No. 12 as given, correctly state the law.

2. The court also gave an instruction, numbered 5, of which complaint is made. That instruction is as follows: "The court instructs the jury that all persons or corporations, who handle a force of great inherent danger to the lives and safety of others, are held by law to a high degree of care in handling the same, to the end that other persons shall not be hurt by the same, while such other persons are not trespassing and are rightfully minding their own business; in other words, the care required is measured by and equal to the danger. When any one handles a force of utmost danger, a very great care is required. What would be care in handling a force of little danger might not be care in handling a force of great danger, and might be negligence in handling such a force. As the danger increases, so the degree of care increases which is required of persons who are handling the force. The degree of care required is proportionate to the danger of the force, and, where a force of highest danger is handled, a very high degree of care is required in

handling the said force, to the end that no other person lawfully minding his own business and not trespassing may be hurt by the force." We think this instruction correctly states the law. In *Commonwealth Electric Co. v. Melville*, 210 Ill. 70, 70 N. E. 1052, it is said: "Electricity is a subtle and powerful agent. Ordinary care exercised by those who make a business of using it for profit, to prevent injury to others therefrom, requires much greater precaution in its use than where the element used is of a less dangerous character. As there is greater danger and hazard in the use of electricity, there must be a corresponding exercise of skill and attention for the purpose of avoiding injury to another, to constitute what the law terms 'ordinary care.' The care must be commensurate with the danger." In *Hoye v. Chicago, M. & St. P. Ry. Co.*, 46 Minn. 269, 48 N. W. 1117, the Minnesota court states the rule as follows: "Reasonable care is all that is required. But this must be proportionate to the risks to be apprehended and guarded against." This language is quoted with approval by the same court in the later case of *Gilbert v. Duluth Gen. E. Co.*, 100 N. W. 653.

The same rule in practically the same terms is announced by other courts and text-writers as follows: "It would have been safer and the better practice to instruct the jury—which ought hereafter to be observed—even in cases like the one before us, that the defendant was bound to exercise that reasonable care and caution which would be exercised by a reasonably prudent and cautious person under the same or similar circumstances. In addition to this, the jury should have been instructed that the care increases as the danger does, and that, where the business in question is attended with great peril to the public, the care to be exercised by the person conducting the business is commensurate with the increased danger." *Denver Con. Electric Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566. "An electric light company is bound as to the public to exercise the utmost degree of care in the construction, inspection, repair, and operation of its apparatus and appliances; or, disregarding distinctions as to degrees of care, the rule may be thus stated: To prevent an injury to the public, the law requires that usual and ordinary care should be used, which, in such a business as an electric light company operates, requires and demands a degree of care and diligence proportionate to the danger or mischief that is liable to ensue. The words 'usual and ordinary care' mean in such cases nothing more or less than that, if there be great danger and hazard in the business, there should be a corresponding degree of skill and attention required by the law." 10 Am. & Eng. Enc. Law, 872. "Electric companies are bound to use 'reasonable care in the construc-

tion and maintenance of their lines and apparatus—that is, such care as a reasonable man would use under the circumstances—and will be responsible for any conduct falling short of this standard.’ This care varies with the danger which will be incurred by negligence. In cases where the wires carry a strong and dangerous current of electricity, and the result of negligence might be exposure to death or most serious accidents, the highest degree of care is required.” *City Electric St. Ry. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262. “The measure or degree of care required of electrical companies is variously defined, but it is conceived that the consensus of opinion is that they must exercise that reasonable care, consistent with the practical operation of their business, which would be observed by reasonably prudent persons under like circumstances, increasing the care with any change in conditions likely to increase the danger, and having due regard to the existing state of science and of the art in question.” 15 Cyc. 472.

Many of the cases growing out of alleged negligence by companies handling electricity are reviewed in *Keasbey on Electric Wires*, §§ 242–255, and the doctrine announced is that embodied in instruction No. 5. After all is said, the instruction only announced the familiar rule in negligence cases: That the defendant is required to exercise reasonable care. But what is reasonable care in handling brick and mortar may amount to criminal negligence in handling nitroglycerin; so that the only rational rule is that announced by the trial court: That the care required is measured by and equal to the danger.

3. By instruction No. 10 the court told the jury that there was not any evidence which would warrant the jury in finding that the defendants had actual notice of the erection of the trestle, and that their wires had been brought in close proximity to it; but that the jury should only consider this in the event that they believed from the evidence that the wire which caused the injury was hung before the trestle was erected; and in the event they believed from the evidence that the wire was strung after the trestle was erected, then the defendants were chargeable with knowledge of the existence of the trestle and the physical conditions surrounding it. If there was any error in this instruction, it was error in the defendants’ favor.

4. Upon the trial the plaintiff offered testimony which tended to show that he had lived in Butte about 17 or 18 years; that he had worked in and about the mines and reduction works in Silver Bow, Deer Lodge, and Granite counties; that he had received from \$3 to \$4 per day, according to the character of work he did; that among others he had worked for one D. H. Dunshee for six or seven years; that in 1901 he was at work in the Pennsylvania mine and worked

there for about a year. He was then asked what wages he received there. This question was objected to on the ground that the investigation should be limited to an inquiry as to the wages he was receiving at the time the accident occurred, and that the testimony was irrelevant, incompetent, and immaterial. The objection was overruled, and error is assigned to this ruling of the court. We think the objection was properly overruled. It might have occurred that at the time of the injury the plaintiff was not receiving any wages at all, and had not been for some time prior thereto, and, while it would have been competent for this fact to have been made to appear to the jury, it can hardly be said that an injured party under such circumstances would not be entitled to recover anything. Section 4330 of the Civil Code establishes the measure of damages in cases of this kind, as follows: “For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.” In a leading English case upon this subject it is held that, where recovery was sought by a physician for injuries which occasioned loss of time and which impaired his capacity to earn money in the future, the jury might consider proof of the average aggregate of yearly fees received by the physician before his injury. *Phillips v. London, etc., R. R. Co.*, L. R. 5 Q. B. 78, 42 L. T. N. S. 6; *Patterson’s Railway Accident Law*, §§ 393–396. We do not think that the period of time covered by the inquiry in this instance was unreasonable.

5. In the specifications of errors in appellants’ brief, under the head “Insufficiency of Evidence to Justify the Verdict,” it is stated that the evidence is insufficient to justify a verdict for \$20,000, the amount returned by the jury; but counsel apparently attached little importance to this contention, as their brief does not contain any argument whatever upon the subject. *Kennon v. Gilmer*, 9 Mont. 108, 22 Pac. 448, and *Hamilton v. Great Falls St. Ry. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713, are cited, but to what purpose is not just apparent. In each of these cases the verdict was apparently arbitrarily scaled. *Fulsom v. Concord*, 46 Vt. 135, and *Houston & T. C. R. Co. v. Wille*, 53 Tex. 318, 37 Am. Rep. 756, are the only other cases cited, and these likewise, without any argument or comment whatever. In *Fulsom v. Concord* the trial court reminded the jury that an allowance for prospective damages is making payment in advance, and in fixing upon a sum for such damages this fact might be taken into consideration and the amount reduced to its present worth. On appeal the Supreme Court said of this: “As the effect of this suggestion would be to lessen the damages, if it had any effect, the defend-

ant cannot complain of it, and we find no legal error in it. In respect to the amount of prospective damages to be awarded, the jury are the exclusive judges." In *Houston & T. C. R. Co. v. Willie* the Supreme Court of Texas said that compensation for lessened ability to earn money should be made upon the principle that the amount allowed is such as will purchase an annuity equal to the difference between the injured party's annual earnings before his injury, and the amount, if any, he might earn thereafter.

But if these cases are cited in support of some contention which appellants may make that the jury was improperly instructed upon the method to be employed in determining the amount of damages for impairment of earning capacity in the future, it is sufficient to say that a more definite instruction than that given by the court was not asked by them. The court instructed the jury that, if they found for the plaintiff, then in fixing the amount of damages they might take into consideration, mental and physical pain and suffering caused by the injury, wages which plaintiff might have earned from the date of the injury to the date of the trial, and, finally, if they found that the injuries are permanent, they might take into consideration any loss to him by reason of the impairment of his capacity to earn money in the future. No complaint is made of this instruction, and none could well be made. We are, however, of the opinion that an instruction particularly informing the jury of the plan or standard to be adopted in estimating damages for impairment of capacity to earn money in the future should be given in all such cases; but, if defendants desired a more specific instruction than that given, they should have asked for it. We think the rule announced by the Texas court, above, is the correct one, and in fact the only safe guide in fixing such damages. The question in a case of that kind is, what amount will purchase an annuity equal to the difference between the annual wages or salary received by the plaintiff before and after the injury, where the injury is the proximate cause of the impairment of earning capacity? This rule is approved in *Baltimore & O. R. Co. v. Henthorne*, 73 Fed. 634, 19 C. C. A. 623; 4 *Sutherland on Damages* (3d Ed.) § 1249.

The law does not contemplate that the injured party shall be paid in advance a sum, the interest from which will equal such amount, and at his death leave the principal to his estate, but only that he shall not be made to lose because of his injury. From standard mortality tables and tables made use of by actuaries to determine the cost of a particular annuity, such damages may be ascertained and fixed with some degree of certainty. However, the elements of physical and mental pain and suffering are entirely uncertain, and no fixed standard can be established for ascertaining the damages oc-

casioned by them. The amount must, of necessity, rest in the sound discretion of the jury, and courts are ever reluctant to interfere with the verdict upon the ground that it is excessive or insufficient. The parties are entitled to a verdict from the jury, and courts ought not to substitute their judgments for those of juries, except in those exceptional cases where it manifestly appears that the jurors made a mistake in calculation, considered an item or items of damages which should not have been considered, or abused that sound discretion which by the law is vested in them. From the testimony given in this case the jury might properly have drawn the conclusion that the plaintiff's earning capacity was totally destroyed by this accident, and that his mental faculties as well were greatly impaired by reason of it. Had the jury been instructed as to the proper standard for estimating damages for impairment of capacity to earn money in the future, they might, by a reasonable, but not excessive, allowance for mental and physical pain and suffering, have arrived at the amount fixed by their verdict. In any event, the burden of showing error rests upon the appellants, and, in the absence of a clear showing, this court would not be justified in interfering upon the ground of excessive damages alone, particularly where, as in this instance, the evidence is such that the jury might well have drawn the conclusion that plaintiff's injuries are permanent. 13 Cyc. 130, and numerous cases cited.

We have considered the other assignments, but find no error. The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and MILBURN, J., concur.

STATE v. WELLS.

(Supreme Court of Montana. Nov. 27, 1905.)

1. LARCENY—EVIDENCE—ABETTOR.

Evidence held sufficient to establish a larceny and to present a question for the jury whether or not defendant was connected with it as an aider or abettor.

2. CRIMINAL LAW—EVIDENCE—DECLARATIONS OF CONSPIRATORS.

After the purpose of a conspiracy to commit a larceny had been accomplished, and the joint enterprise is completed, evidence of acts or declarations of one of the co-conspirators is hearsay and inadmissible as against another.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1002-1011.]

3. LARCENY—EVIDENCE.

Where, in a prosecution for larceny, other evidence had been admitted presenting a question for the jury as to defendant's guilty participation in the transaction, evidence that on the day succeeding that on which the offense was committed prosecutor had a conversation with one of the conspirators, and learned from him that prosecutor's watch, which had been stolen, was in a pawn shop, was not objectionable for immateriality and irrelevancy.

4. CRIMINAL LAW — APPEAL — HARMLESS ERROR.

Where, in a prosecution for larceny, it was undisputed that a larceny had been committed, and it was also established that A. had pawned prosecutor's watch, alleged to have been stolen at the time, the principal inquiry being whether defendant had guilty connection with the theft of it, evidence of a conversation between prosecutor and A., after the offense, from which prosecutor discovered that the watch was in a pawnshop, was not prejudicial to defendant.

5. WITNESSES—CROSS-EXAMINATION.

Where the testimony of a witness at an examining trial was identified by him, and a discrepancy between his evidence as it there appeared and his present testimony was called to his attention, and the witness denied that he had made the statement to which his attention was called, the right of cross-examination, conferred by Code Civ. Proc. §§ 3379, 3380, was fully exercised when the contradiction was made to appear, and it was not error to refuse to permit the witness to state whether the evidence claimed to have been given on the preliminary examination was true or false.

6. CRIMINAL LAW — REQUEST TO CHARGE — FORM.

It is not error for the court in a criminal case to refuse to give a request to charge in the exact form requested, where it is given in substance.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2014.]

Appeal from District Court, Choteau County; Jno. W. Tattan, Judge.

William D. Wells was convicted of grand larceny, and he appeals. Affirmed.

F. E. Stranahan, for appellant. Albert J. Galen, Atty. Gen., and W. H. Poorman, Asst. Atty. Gen., for the State.

BRANTLY, C. J. The defendant was by information charged jointly with his brother, Samuel E. Wells, and one Frank Allen, with the crime of grand larceny. He demanded and was granted a separate trial, and as a result thereof was convicted and sentenced to a term of four years in the state prison. From the judgment and an order denying him a new trial, he has appealed. The integrity of the judgment is assailed upon the grounds that the verdict is contrary to the evidence, that the court erred in admitting and excluding evidence, and that it prejudiced the defendant by refusing to submit a certain instruction requested.

1. The larceny charged is that the defendants feloniously took, stole, and carried away \$95 in money, of the value of \$95, and a nickel case Waltham watch, of the value of \$30, of the personal property of one J. H. Brady. The state's theory of the case is that on February 14, 1904, J. H. Brady and the accused were together, going from one saloon to another in the village of Havre, in Choteau county, and indulging in drink, and that the three defendants, discovering that Brady had the watch and a considerable sum of money upon his person, conceived a plan to steal them from him, and did so while he was stupefied by drink. There is a suggestion, also, that he was drugged during the course of the orgy. The evidence is entirely circum-

stantial. While not controverting the claim that the property was stolen by Allen, one of the accused, counsel for this defendant contends that the evidence wholly fails to connect him with the taking. This contention we do not think meritorious. While the evidence in this connection is not as convincing as it might be, the incriminatory circumstances proven made out a case for the jury. It appears that early on the evening in question Brady and the accused causally met at a saloon. They had had some previous acquaintance, but their relations had not been intimate. They there began to drink. Brady had on his person the watch in question and \$102 in bills, among which were three of the denomination of \$20, and the rest were of smaller denominations. The accused had no money. The drinking was all at the expense of Brady. That he had the property on his person became known to his associates by the fact that he carried the watch in sight, and during the course of the evening exhibited the roll of money. All of them are laboring men, but for the time being the accused had no employment, and were destitute; indeed, so destitute that for some days they had been dependent for drinks and meals upon the kindness of acquaintances in the village; the defendant and his brother in one or two instances using a borrowed meal ticket. The Wells brothers had been spending their nights in the saloons, and sleeping as best they could. During the evening Allen borrowed \$1.25 from Brady. This he spent for drink. They continued drinking until about 2 o'clock on the morning of the 15th, going from place to place. At this time the four left the last place they visited. Brady was much intoxicated. When they had gone a short distance, they were seen by the bartender, who seems to have watched them, out in the middle of the street; two of the accused having their arms about Brady, and the other standing near. Brady testifies that about this time he lost consciousness, and knew nothing until he woke at his room at the hotel, about 10 o'clock on the morning of the 15th. It appears from other evidence that he went to his hotel and room about 2 o'clock. When he woke and dressed, he found his money and watch gone. He went in search of his associates of the previous night and early morning. He first found Allen, and ascertained from him that the watch could be found at a pawnshop. It was found there, and shown by other evidence to have been pawned by Allen. Immediately after this conversation between Brady and Allen the latter went and found the Wells brothers. He obtained money from the defendant to redeem the watch. At the time he preferred his request for the money the defendant demurred, but, upon being urged by his brother, finally furnished \$2.50, the amount obtained on the watch by Allen. The conversation among the accused on this subject occurred in the rear of one of the saloons visited on

the previous evening and was conducted in whispers. Early on the morning of the 15th the defendant went to a saloon kept by one Hinote and deposited with him for safekeeping \$50 in bills. He had in his possession at that time three twenty-dollar bills, one of these he had changed, leaving the other two with a ten-dollar bill. During the morning he and his brother also paid some small bills theretofore contracted for drinks and small amounts in money borrowed at different saloons. The defendant himself was sworn and testified. His statements tended to contradict in a measure some of the facts detailed by the other witnesses. But his account of the night's doings is vague and contradictory of itself, as well as unreasonable in the light of some significant facts which are clearly established. For illustration: In explaining his possession of the bills next morning, he said that he had been saving the money for some time in order to pay his expenses to The Dalles, Or., where he intended to go to shear sheep as soon as the season opened. Though the opportunity was given him to tell the source from which he obtained the money, he failed to do so. He had recently been at Fort Benton, Chouteau county, and had been employed there a short time, but his earnings had been small, and he had left the place without paying for his current board bill, and had borrowed money enough to pay the expenses of himself and his brother to a village in an adjoining county. He explained that he had been keeping the money which was deposited at Hinote's saloon, upon his person, but had concluded that since he had begun to drink, he had better put it in a safe place, so that he would not "blow it in." At the same time he kept out \$10 for spending money.

Upon these facts we cannot say that the verdict is contrary to the evidence. There was knowledge on the part of the defendant and his associates of Brady's possession of the property. There was clear proof of their destitute condition at and for some time prior to the date of the crime. There was likewise the opportunity to commit the theft, and the defendant admitted his intimacy with his associates. There was also the fact, well established by the independent testimony of the pawnbroker, that Allen had pawned the watch early on the morning of the 15th, and that the defendant had furnished him with the money to redeem it. Coupled with these facts was the deposit by the defendant on the early morning of the 15th of the bills, the same in number and denomination as those in Brady's possession when last seen in his coat, and his inability to explain satisfactorily how he came by them. The evidence was sufficient not only to establish the larceny, but also sufficient to go to the jury upon the question whether or not the defendant was connected with it as an aider or abettor. Counsel compares the facts in

this case with those in the case of *State v. Whorton*, 25 Mont. 11, 63 Pac. 627, and insists that they are strikingly similar. A just comparison of the two cases, however, reveals a wide difference. The only incriminatory facts shown in that case were an opportunity to commit the theft, though not very convenient, because at all the times when the defendant might have had an opportunity other persons were present who were above suspicion, the possession by the defendant two or three days afterwards of coins of the same denomination as those which were claimed by the prosecuting witness as having been stolen from him, and some slight evidence tending to show that the defendant had stated previous to the larceny that he was without money.

2. Brady testified as a witness. He stated that on February 15th, when he discovered his loss, he went to seek the accused. He found Allen at a saloon, playing cards. The two retired together to a side room, and there had a conversation. The court, upon objection, excluded the details of the conversation, but permitted Brady to state that he learned from Allen that the watch was in a pawnshop. Allen gave no information as to how it came to be there. The contention is made that the admission of this evidence was error. The objection made was "upon the ground that it [the evidence] is immaterial and irrelevant, unless the getting of the watch to the pawnshop is connected with this defendant." It will be noticed that the objection was not made on the ground that the evidence offered was hearsay, and therefore incompetent. It is pregnant with the admission that the evidence was not only competent, but also material and relevant, provided other evidence introduced tended to connect the defendant with the larceny. As against the defendant, any act or declaration of Allen at that time was hearsay and incompetent, for the object of the conspiracy had been accomplished. The rule is elementary that after the purpose of the conspiracy has been accomplished, and the joint enterprise completed, evidence of acts or declarations of one of the co-conspirators is not admissible as against another. Such evidence is hearsay. But the evidence here offered was certainly relevant to the inquiry whether in fact a larceny had been committed. Without proof of this fact a conviction could not be had at all. The other circumstances proven were sufficient to go to the jury, as tending to show the defendant's guilty participation, and we think that the ruling upon the objection, as made, was correct. But, conceding, for the purpose of argument, that it was wrong, it was established by evidence, uncontroverted and unquestioned, that the larceny had been committed by some one. It was also established by independent evidence that Allen had pawned the watch. The principal inquiry was whether the defendant had guilty connec-

tion with the theft of it. The information imparted by Allen did not tend even remotely to aid this inquiry, and without the aid of other facts, established by independent proof, it did not even tend to inculpate Allen himself. The principal fact—the larceny—having been clearly and indubitably established by evidence other than that in question, and the information imparted to Brady not tending in any way to incriminate the defendant, we think the error, if error at all, was without prejudice.

3. The accused were arrested on February 15th. They were examined by a committing magistrate on the 16th. Brady was at that time examined as a witness. His testimony was reduced to writing and signed by him. There was a discrepancy between his statements at that time and those made at the trial as to the amount of money he had in the roll of bills and the amount thereof he had spent during the evening; the question being whether of the \$102 he claimed to have at the time he began to drink with the defendants he had spent \$5 or \$10. After he had identified his written statement, and the discrepancy had been called to his attention, he was asked by counsel for defendant: "Is the testimony which you have read from your testimony at the preliminary examination true or false?" The witness was not allowed to answer. Upon further examination he denied that he had made the statement therein to which his attention had been called. Incidentally he explained that he was not in condition to testify at the time of the examination, owing to the orgy beginning on the night of the 14th. The deposition was introduced in evidence. Complaint is made that the court erred in not permitting the witness to answer. We think there was no error. The purpose sought was to impeach the witness. The discrepancy between his statements on the different occasions was brought clearly to the attention of the jury. It was for the jury to determine whether the witness told the truth, taking into consideration all the circumstances and the explanation of the discrepancy offered by the witness. The right of cross-examination should not be restricted, but the purpose of the statute (Code Civ. Proc. §§ 3379, 3380) is served when the contradiction has been made to appear.

4. The court was requested to instruct the jury that the question whether the defendant was an accomplice with the others charged in the information, or either of them, was solely for them to determine. Complaint is made that this was not done. In this counsel is mistaken. It is true that the instruction was not submitted in the exact form requested by counsel, but it was in substance, and, taking the charge as a whole, it fairly and fully submitted all the issues in the case.

The judgment and order are affirmed.
Affirmed.

MILBURN and HOLLOWAY, JJ., concur.

(33 Mont. 261)

SHORT v. ESTEY et al.

(Supreme Court of Montana. Nov. 24, 1905.)

EQUITY — DIRECTING VERDICT — CONFLICTING EVIDENCE.

In an action to have a deed absolute in form declared one conveying the title to defendants in trust for plaintiff, a verdict may be directed, though the evidence be conflicting. The cause of action being one of purely equitable cognizance, and the verdict being but the finding of the court, it is necessary only that the evidence does not preponderate against the finding.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 812.]

Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

Action by Z. A. Short against John F. Estey and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Kirk & Clinton, for appellant. W. F. Davis, for respondents Estey. J. L. Wines, for respondents Umhang, Smith, and Capell.

BRANTLY, O. J. This action was brought to obtain a decree declaring the defendants trustees for the plaintiff of the legal title of an undivided one-sixth interest in the Ramsdell quartz lode claim situate in Butte, Silver Bow county, and directing a conveyance by them to him. An accounting is also demanded for the rent of the property during the time it has been occupied by the defendants. The complaint alleges, in substance: That on January 1, 1893, the plaintiff was the owner of said interest and certain buildings upon the claim, and was in possession of the claim under an arrangement with his co-owners. That on that date he executed a deed to the defendant John F. Estey, and delivered the possession to him, with the exception of one small cabin, which plaintiff retained. That, though the deed was absolute in form and for a consideration stated therein, its purpose was to convey the title in trust for plaintiff, and was so accepted by Estey, as is witnessed by the following writing, executed by him at the same time and delivered to plaintiff: "This is to certify that for the sum of five thousand dollars (\$5,000.00), for which I have given my note, I have bought all of Z. A. Short's interests in the Ramsdell mining claim, formerly known as the 'Maude S.,' together with three houses. I agree not to dispose of any of the property in any manner but to take good care of it all. I will deed him back all of the said property at any time that he wants it, if he pays me for the brick house that I build on the ground or what it is worth at the time he buys it. I will also promptly refund to Z. A. Short all rents that I am allowed to collect, the use of ground to be compensation for services. [Signed] John F. Estey." That thereafter said Estey entered into the possession of the premises, and collected all rents for the same, fully accounting to plaintiff therefor until February 1, 1895. That he thereafter failed to account further, but

converted the rents to his own use. That plaintiff, prior to the bringing of this action, demanded a reconveyance of the property and an accounting, offering at the same time to pay to plaintiff the price of the brick building referred to in the foregoing writing. That the other defendants claim some sort of separate interests in the premises, but that such interests, whatever they are, were obtained by them from Estey with full knowledge of plaintiff's rights, and are therefore subject and subordinate to them. The defendants Estey and wife admit that the property was conveyed to John F. Estey by the plaintiff, but allege that such conveyance was made to him in pursuance of an absolute sale to him by plaintiff for a valuable consideration, without condition or reservation, or any understanding or agreement on his part, that he was to reconvey at any time or account for the rents. They specifically deny the execution and delivery of the agreement set forth in the complaint, or any other agreement at any time of like import. Each of the other defendants filed a separate answer, in which he claims as a purchaser of an interest, either directly or by mesne conveyances, from Estey, and alleges that he purchased in good faith for value, without notice of plaintiff's equities, if any such there are. The plaintiff by replication denies all the affirmative allegations of the defendants. The cause was tried by the court sitting with a jury. When the evidence had all been submitted, the defendants requested the court to direct the jury to render a verdict in their favor. This motion was sustained, and the jury directed accordingly. Upon the verdict so rendered judgment was rendered and entered for the defendants for their costs. Plaintiff has appealed from the judgment and an order denying him a new trial.

The first assignment is that the court erred in directing a verdict. Counsel for appellant invokes the rule that no case should ever be withdrawn from the jury, unless the conclusion necessarily follows, as a matter of law, that no recovery could be had upon any inference which could reasonably be drawn from the evidence submitted. He points out that upon the issues presented by the pleadings there was a substantial conflict in the evidence, and insists that, such being the case, he was entitled as a matter of right to a finding thereon by the jury. This rule is applicable in all cases at law, for in such cases the weight of the evidence and the credibility of the witnesses are matters falling exclusively within the province of the jury. But this is not such a case. The cause of action stated in the complaint is one of purely equitable cognizance. There is no issue presented of such a character as would entitle any of the parties to a trial by jury, according to the usual course of law. The court, then, was not bound to call a jury; and if it had submitted the case for

findings, it would not have been bound by them. In such cases the findings may aid the conscience of the judge, but may not control his judgment. The findings and judgment are his. If, when the jury has made findings, the judge is not satisfied with them, he may disregard them and so find as to satisfy his own conscience. Such being the case, the court may direct a verdict, even though the evidence be conflicting, as was done in *Sanford v. Gates, Townsend & Co.*, 21 Mont. 277, 53 Pac. 749, where the questions involved were of equitable cognizance; for this direction to the jury is equivalent to a finding by the court in favor of the defendant. Whether the finding of the court in this case was erroneous depends, therefore, upon the evidence submitted, and whether it preponderates against the conclusion reached. *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Finlen v. Heinze et al.*, 32 Mont. 354, 80 Pac. 918. The court, in effect, found that the conveyance made to Estey was in pursuance of an absolute sale for value, without condition or reservation, and that the contract set out in the complaint was never executed and delivered as alleged by the plaintiff. Not only does the evidence not preponderate against this finding, but it amply justifies it. The plaintiff himself was the only witness who testified on his behalf as to the facts surrounding the execution of the deed. He stated that he had become incapacitated by overindulgence in drink, and, having confidence in the defendant John F. Estey, desired him to take a conveyance of his interest in the claim until such time as he could resume control of it himself, and that this defendant agreed to do so, and thereupon the deed and the agreement were executed. He further testified that the defendant assumed control of the property, and collected the rents and accounted for them for about two years, but that he then refused to account further. The evidence on the part of the defendants tends strongly to show that Estey bought the interest, giving as a consideration for it \$1,000 in money, part in cash and part on time, but afterwards paid, and also a deed to an undivided one-half interest in another claim situate in the same vicinity, which the defendant Estey then owned; that no other agreement was then or thereafter executed with reference to the matter; and that the plaintiff never, after the conveyance was executed and delivered, made any demand upon this defendant for a reconveyance or for any accounting, until about the time the action was brought—a period of about 10 years. It further tends to show that the defendant Estey and his wife collected the rents for the property, but never made any accounting at any time to plaintiff for any part thereof, or recognized that he had any interest in the property. The deed from the plaintiff to Estey was duly acknowledged and recorded. The agreement was neither ac-

knowledge nor recorded. The only evidence introduced tending to show that it was ever made was the testimony of plaintiff, supported by an alleged copy made in the handwriting of plaintiff; he claiming that the original had been lost. Under these circumstances the finding of the court may not be disturbed.

Our conclusion upon this branch of the case renders it unnecessary to construe the writing and determine whether in fact it amounts to a declaration of trust, for it is wholly immaterial what the character of the writing is, if, as the court found, defendant Estey never executed it. The same may be said of the question whether the plaintiff's cause of action is barred by the statute of limitations or laches.

The judgment and the order denying a new trial are affirmed.

Affirmed.

MILBURN and HOLLOWAY, JJ., concur.

(33 Mont. 206)

HENSLEY v. CITY OF BUTTE et al.

(Supreme Court of Montana. Nov. 17, 1905.)

MUNICIPAL CORPORATIONS — INJUNCTION —
RESTRAINING COLLECTION OF SPECIAL ASSESSMENT.

Injunction will lie to restrain collection of a special assessment for municipal improvement, the assessment being absolutely void because of the city council proceeding in contravention of *Sess. Laws 1897*, p. 219, § 31, providing that, where the owners of more than half the property to be assessed for the improvement object to the making thereof, the improvement shall not then, or within six months thereafter, be made.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

Action by Lavinia Hensley against the city of Butte and another. From an order refusing a temporary injunction, plaintiff appeals. Reversed.

James E. Murray and McBride & McBride, for appellant. L. P. Forestell, John F. Davies, and E. M. Lamba, for respondents.

HOLLOWAY, J. This action was commenced in the district court of Silver Bow county by the plaintiff, Lavinia Hensley, against the city of Butte and the city treasurer, to restrain them from selling certain real estate belonging to her for taxes levied for special improvement purposes. The complaint, among other things, alleges that the plaintiff owned the property in controversy; that on March 1, 1899, the city council of Butte passed, for publication, council resolution No. 231, creating special improvement district No. 3, defining its boundaries and including plaintiff's property therein, stating the purpose for which the district was created, and fixing March 8, 1899, as the time when, and the council room the place where, interested parties might appear

and object to the final adoption of the resolution; that at such last-named time and place this plaintiff and other owners, representing more than one-half of the area of the property to be assessed to defray the cost of such improvement, did appear before the city council, and did object to the final adoption of the resolution and to the making of such improvement; but, notwithstanding this objection, the city council assumed to pass finally such resolution, and thereby assumed to create such district, and afterwards, by resolution, assumed to levy and assess against plaintiff's property a tax of \$465.08, and, the same not having been paid, the city treasurer advertised her property for sale, and will, unless restrained by the court, proceed to sell the same. A temporary restraining order, and an order to show cause why an injunction pendente lite should not issue, were issued and served. The defendants answered, specifically denying that the plaintiff or any of the property owners appeared before the city council and objected to the final adoption of the resolution, or to the creation of the improvement district, admitting some of the allegations of the complaint, and denying others. Upon the hearing on the return of the order to show cause, the plaintiff offered evidence in support of the allegations of her complaint which were put in issue. An objection was made by the city attorney to the introduction of any evidence by the plaintiff, upon the ground that she has a plain, speedy, and adequate remedy at law, under sections 4024, 4025, and 4026 of the Political Code, and therefore is not entitled to relief in equity. This objection was sustained, the temporary restraining order vacated, and an injunction pendente lite refused. From the order so made, the plaintiff appeals.

There is but one question presented which requires consideration. The objection to the introduction of any evidence confessed, for the purposes of the objection, the truth of the allegations of the complaint, which were sufficiently pleaded. The allegation in the complaint is that the plaintiff and other owners, representing more than one-half the area of all the property which would be assessed to defray the cost of said improvement, did appear before the city council at the time and place mentioned in the notice, and "objected to the making of said improvements." We think this allegation sufficient, and, being so, and the truth of it being admitted for the purposes of the objection made, it is apparent that the city council had no authority to proceed to finally pass the resolution or to levy or attempt to collect the tax, and that such tax so levied was absolutely void under any circumstances. The city council assumed to proceed under the provisions of House Bill No. 204, approved March 8, 1897 (*Sess. Laws 1897*, p. 212), section 31 (page 219) of which, among

other things, provides: "If at such meeting, objections are made to the making of such improvement, by owners or agents representing more than one-half in area of all the property which would be assessed to defray the cost of said improvement, the improvements shall not be made at that time, and at no time during a period of six months thereafter." Assuming that the same rule of law is applicable to an assessment for special improvements as applies to a general tax, the query is presented: Was the plaintiff's remedy at law exclusive, or could she properly invoke equitable relief by injunction? This identical question was lately before this court in *Montana Ore Purchasing Company v. Maher*, 32 Mont. 480, 81 Pac. 13, and sections 4023, 4024, 4025, and 4026 of the Political Code were construed. This court there said: "A consideration of sections 4023 and 4026 leads us to believe that the phrase 'irregularly levied or demanded' was used by the Legislature advisedly, and as prescribing the limits wherein the statutory remedy is exclusive, as distinguished from those cases of illegal taxes, the collection of which may be restrained by injunction. In other words, if the action of the assessor or board of equalization was such that the tax complained of is manifestly void under any circumstances, injunction will lie to restrain its collection; but, if the error complained of is only an irregularity on the part of the assessor, the board of equalization, or the treasurer, which may be subject to explanation so as to cure the apparent defect, or, in other words, where the tax complained of is not necessarily void under all circumstances, then the remedy provided by sections 4024 and 4025, namely, payment under protest and an action to recover back, is exclusive, except in those unusual cases mentioned in section 4026." Applying that rule to the facts of this case, and it appearing that the assessment was void, plaintiff properly invoked the aid of equity, and the court erred in excluding testimony in support of the allegations of her complaint.

The order is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

BRANTLY, C. J., and MILBURN, J., concur.

(33 Mont. 250)

SCHARRENBROICH, Sheriff, v. LEWIS AND CLARKE COUNTY.

(Supreme Court of Montana. Nov. 24, 1905.)

SHERIFFS — COMPENSATION — STATUTORY PROVISIONS.

A sheriff transporting persons to an insane asylum or reform school under order of court, subsequent to March 3, 1905, is not entitled to 10 cents per mile traveled and 10 cents per mile additional for each person transported, according to the law in force at the time of his

election, but is entitled only to the expenses incurred in the transportation of such persons as provided by Act March 3, 1905 (Laws 1905, p. 180, c. 86), passed after his taking office, for the latter act is binding on him notwithstanding Const. art. 5, § 31, prohibiting the increasing or diminishing the salary of a public officer after his election; the Legislature by the former act not intending to permit the sheriff to make anything out of transporting prisoners.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sheriffs and Constables, § 87.]

Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

Action by Peter Scharrenbroich, sheriff, against Lewis and Clarke county. From a judgment for plaintiff, defendant appeals. Reversed.

Albert J. Galen, Atty. Gen., and E. M. Hall, Asst. Atty. Gen., for appellant. R. R. Purcell and W. T. Pigott, for respondent.

MILBURN, J. This case is on appeal from a judgment in favor of the plaintiff and respondent. The plaintiff was elected sheriff for the county of Lewis and Clarke in 1904, and is still the incumbent of that office. In the months of March, April, and May he, in obedience to lawful orders, transported three persons to the insane asylum, and one to the reform school, necessarily traveling 1,238 miles, for which distance the statute in force at the time of his election allowed him \$185.70 for mileage of himself and the persons in his charge. His actual expenses were \$90.65, leaving, as respondent claims, "\$95.05 as clear gain or profit to him for the services performed in traveling and dieting and conveying the persons to the asylum and school." His claims were disallowed in part; he being allowed the sum of \$90.65, the actual amount of his expenses. The court below, upon an agreed statement, found the amount claimed by the sheriff, and rendered judgment against the appellant, Lewis and Clarke county, for \$185.70. Hence this appeal.

The question to be settled is: Which law applies? The law in force at the time of the sheriff's election, which allowed him 10 cents per mile mileage, or Senate Bill No. 87 (Act March 3, 1905; Laws 1905, p. 180, c. 86) passed after his taking office and allowing actual expenses only? The discussion has gone over a wide field, taking into consideration numerous sections of the original Codes, which were passed as a whole in 1895 and amended at the same session in many particulars. There has been a wide range in the discussion as to what laws have been repealed by implication, expressly, and by substitution. It is interesting, but not important in this case, to trace the legislation affecting and relating to the income and expense account of the sheriff. It is conceded that the present statute, which allows only actual expenses to the sheriff, is valid and binding upon all officers elected after the date of its passage. It is also understood

that the act in force at the time of the election of the sheriff was valid. The point made by respondent is that the Constitution (section 31, article 5) prohibits the increasing or diminishing of the amount the sheriff shall receive for expenses during the term of office to which he is elected. The section is as follows: "Sec. 31. Except as otherwise provided in this Constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election or appointment: provided, that this shall not be construed to forbid the legislative assembly from fixing the salaries or emoluments of those officers first elected or appointed under this Constitution, where such salaries or emoluments are not fixed by this Constitution."

We think it impossible to reconcile all the different definitions and attempted definitions of the words "compensation" and "emolument," as used in the several sections of the statute and in the opinions of this court, unless we adopt what we believe has always been the intention of the Legislature, and the view of this court, that in respect of sheriffs the word "salary" means what it ordinarily means—a fixed compensation, made by law to be paid periodically for services, whether there be any services actually rendered or not. The word "emolument" is more comprehensive than "salary." But the Constitution says "salary or emolument." There are those who receive salaries, and there are other officers who receive certain emoluments which are not salaries. For instance: Section 4592 of the Political Code says: "The county surveyor, coroner, public administrator, justice of the peace, and constables may collect and receive for their own use, respectively, for official services, the fees and emoluments prescribed in this chapter. All other county officers receive salaries." This last sentence, saying that "all other county officers receive salaries," is pregnant with meaning, being unnecessarily put into that section, unless it is there placed from an abundance of caution, to let the people know that certain county officers receive salaries, and that the words "fees and emoluments" are not to include in their scope and meaning the word "salary," and that salaried officers are not to have "fees and emoluments" other than salaries from the state or county. In other words, that section might be well read thus: Whereas all other county officers receive salaries, therefore the county surveyor and others, who do not receive salaries, may receive and collect fees, etc., for their own use. The object of the Legislature was to have certain services performed for the people, and not to make money for a sheriff or to set him up in business. The old idea of paying an officer was to feed him and clothe him and take care of his family, while he was giving his services to the people. There never was any idea that holding public office was a

private business. The purpose of the people is to make its officers whole, not to enrich them. The salary is to pay the officer for his time and services. The mileage as originally fixed was a uniform rate fixed by the Legislature, with a view to make the sheriff whole for what he might lay out on account of the people. It was not the intention of the Legislature to give the sheriff 10 cents a mile to take a prisoner from Miles City to the penitentiary, in order that he might be privileged to figure out how cheaply he could carry him—perhaps to the great discomfort of the unfortunate convict—and how big a margin of profit or gain he could make out of the performance of his own duty to take the prisoner to the penitentiary in comfort and safety. It never was intended that the 10 cents per mile should be an inducement to the sheriff to take five persons separately and thereby get much more for himself than he would get if he should take them at one and the same time with one deputy to assist him. The same reasoning would apply to the feeding of prisoners in the county jail. If the statute allows 50 cents per day for feeding a prisoner, there is no understanding that the sheriff may make any gain or profit for his private use out of this stipend. The direction of the Legislature is to give that prisoner 50 cents worth of food every day, and not to feed him perhaps on bread and water at an expense of 5 cents, thus making 45 cents for the sheriff. The object of the law is to put food into the stomach of the prisoner, and not money into the pocket of the sheriff.

If John Doe should be lawfully elected to the office of sheriff of a certain county, but should be counted out and his opponent installed, and upon a contest at the end of a year he should gain the office and the other man be ousted, how about the salary and the mileage account? Certainly, the de facto sheriff would not get the salary, but the lawfully elected man would; but would the latter, who had not served during the first year, be entitled to 10 cents a mile for every prisoner transported to the penitentiary meantime, and 50 cents a day for every prisoner fed in the jail, or to the difference between what it actually cost and what was paid therefor by the county? We think not. If it were a part of the compensation fixed by law for the performance of certain services by the sheriff in the same way and manner as the salary is, then the sheriff who had been kept out of office for the year unlawfully would be entitled to the mileage as well as the salary. But is there any one who would venture to say that he could successfully sue in any court of justice to collect the mileage, or the difference between the actual cost of transportation of persons and the mileage, or the difference between the actual cost of feeding prisoners and the allowance of 50 cents per day?

We have not had any authority, except one,

called to our attention supporting any other views than those we have advanced above, and that case is *Apple v. County of Crawford*, 105 Pa. 300, 51 Am. Rep. 205. This case seems to depend largely upon the definition of the word "emolument," as found in the dictionaries. We cannot see wherein the dictionaries are opposed to the views hereinbefore set forth. We acknowledge that the word "emolument" includes the meaning of "gain," "profit," "compensation," etc. But the intention of the Legislature must be considered in determining what is meant, not only by "emoluments," but who shall receive them. In this case we do not consider that the Legislature ever intended that the sheriff should make a cent either in traveling on business or feeding prisoners, whether the law allows 10 cents a mile or "actual expenses." We think that the Legislature probably understood that the expenses averaged about 10 cents a mile, including guards, dieting, transportation, etc., and that in some cases sheriffs saved something honestly, and in other cases they lost. But whether loss or gain, it was for the Legislature to say how much they should have to meet expenses. Now, all sheriffs are treated alike, and there is not any opportunity for one to gain unjustly and the other to lose unjustly in the performance of his duty. The "salary" pays the sheriff for taking the person to prison. The "mileage" paid the expense incurred. The actual expense was paid by the "mileage," be it more or less. Now the actual expense, and not any more or less, is paid by the people.

For the reasons above stated, we do not believe that the Constitution of the state is violated by the legislation complained of, when applied to officers elected prior to its passage; and, believing that the court below erred, the judgment is reversed, and the court is directed to enter judgment for the defendant upon the statement of facts submitted.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

STATE ex rel. MATTHEWS v. TAYLOR,
Justice of the Peace.

(Supreme Court of Montana. Nov. 24, 1905.)

JUSTICES OF THE PEACE—JURISDICTION—SUBJECT-MATTER—ACTION FOR DECEIT.

Const. art. 8, § 21, establishes the jurisdiction of justices, but neither forbids nor gives jurisdiction of actions for deceit, and Code Civ. Proc. § 66, in relation to the jurisdiction of justices, gives them jurisdiction of actions arising on contract, for damages for injury to the person or to real property, for injuring personal property, and to recover possession of personal property. *Held*, that a justice has no jurisdiction of an action for damages for deceit in connection with a sale of property by defendant to plaintiff.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

Prohibition by the state, on the relation of William F. Matthews, to restrain C. Taylor, as justice of the peace, from proceeding to determine an action by Samuel Hastie against relator. From a judgment of the district court dismissing the proceeding and entering judgment for defendant, relator appeals. Reversed.

L. P. Fonestell, for appellant. J. M. Hinkle, for respondent.

BRANTLY, C. J. Prohibition. This proceeding was brought in the district court of Silver Bow county to restrain the defendant, a justice of the peace, from proceeding to try and determine a certain cause pending before him as such justice, entitled "Samuel Hastie, Plaintiff, v. William F. Matthews, Defendant," for that the said justice had no jurisdiction of the subject-matter thereof. Upon the hearing in the district court on the day fixed for the defendant to show cause under the alternative writ, the court dismissed the proceeding and entered judgment for defendant. This appeal is from the judgment.

The question submitted to this court is whether the justice's court has jurisdiction of the subject-matter of the action. The complaint filed in that court is voluminous, and vague and indefinite in its allegations; but, if it states a cause of action at all, upon any theory, it states one for deceit, of which the defendant was guilty in connection with the sale by him to plaintiff of an interest in a concentrator and machinery used therein and a certain tailings dump, by reason of which the plaintiff suffered damage. The civil jurisdiction of justice's courts, as was pointed out in *Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 696, is limited by the Constitution (sections 21, 22, art. 8) and by the provisions of the Code of Civil Procedure (section 66), enacted in pursuance thereof. In that case it was said: "Within the limitations prescribed by the Constitution, the Legislature has power to confer jurisdiction upon justice's courts in any class of cases; but these courts, being thus constituted courts of special and limited jurisdiction, are without power to hear and determine any case when such power is not, specifically or by clear implication, conferred by the statute defining their powers." We do not find in section 66, supra, any express or implied grant of jurisdiction to try and determine an action for deceit. While, so far as the provisions of the Constitution are concerned, the Legislature might have granted the jurisdiction in question, it has failed to do so. Whether this omission was intentional or through oversight, it is not necessary for this court to inquire. It is sufficient for present purposes to say that it has not done so. The wrong complained of by the plaintiff in the justice's court was done in connection with the com-

tract of sale of the property, but the subject-matter of the action is not the contract or the breach of it, but the wrong wrought by the deceit, by reason of which the plaintiff suffered damage. The action is not one ex contractu, but ex delicto, and is not enumerated among the actions ex delicto of which the justice's court has jurisdiction. That court was therefore without power to proceed.

No question is made in this court as to whether the defendant has pursued the proper remedy. This feature of the case we have not considered. The district court was in error in dismissing the application. The judgment is therefore reversed.

Reversed.

MILBURN and HOLLOWAY, JJ., concur.

CITY OF RED LODGE v. MARYOTT.

(Supreme Court of Montana. Dec. 4, 1905.)

MUNICIPAL CORPORATIONS—POLICE REGULATIONS—ANIMALS—RUNNING AT LARGE—MUNICIPAL ORDINANCES—APPLICATION.

A town ordinance required every person keeping certain domestic animals named "within the limits of the town" to keep them on his own premises, except when temporarily passing through the streets, etc. Section 2 provided that the poundkeeper should provide a pound for "impounding any domestic animals found running at large within the city limits." *Held*, that the "domestic animals" referred to in section 2 were those specified in section 1, and that the ordinance had no application to animals running at large on the common range outside the limits of the town which might stray within such limits.

Appeal from District Court, Carbon County; Frank Henry, Judge.

Action by the city of Red Lodge against John L. Maryott. From a judgment in favor of defendant on appeal from a justice's judgment in favor of plaintiff, defendant appeals. Affirmed.

Geo. W. Pierson, for appellant. O. F. Goddard, for respondent.

HOLLOWAY, J. In 1893 the town of Red Lodge enacted Ordinance No. 28, entitled "An ordinance concerning domestic animals running at large within town of Red Lodge," section 1 of which is as follows: "It shall be the duty of every person owning or keeping domestic animals, to wit, horses, mules, asses, cattle, sheep, goats, swine, within the limits of the town to provide for the keeping of the same within or upon his or her premises at all times, save when necessarily or temporarily passing through the streets, and then such animals must be attended by some one to take care of them and prevent their doing damage to person or property." Section 2 designates the town marshal as the poundkeeper and defines his duties as such, some of which are described as follows: "The town marshal shall be poundkeeper of

the town, and as such shall provide a pound of suitable character at the expense of the town for the impounding of any domestic animals found running at large within the limits of the town, or found trespassing or doing damage to the property of another. It shall be the duty of the poundkeeper to take such animals into custody, and to notify the owner thereof, and if he does not pay the fine and costs provided by section 4 of this ordinance, the marshal shall file a complaint against the owner." In 1903 this action was commenced in the police magistrate's court in the name of the city of Red Lodge against the respondent, John L. Maryott, to recover the sum of \$144, \$48.00 as fees for impounding 24 head of cattle, and \$96, costs of keeping the same within the city pound, and for the further sum of 50 cents per day for each head of cattle so impounded from the time of the commencement of the action until the trial of the same, and for an order that the impounded animals be sold to satisfy the judgment asked for. The complaint alleges the corporate existence of the city of Red Lodge; that about July 1, 1903, the defendant did keep and permit the animals in controversy to run at large within the city of Red Lodge without his premises, and without any person herding or in charge of the same, contrary to the form, force, and effect of Ordinance 28; that while defendant so permitted his cattle to run at large in violation of said ordinance the poundkeeper gathered and caused to be gathered the said cattle and placed them in the city pound and still confines them therein. The complaint further sets forth the amount of fees and costs incurred in impounding and caring for the animals. The defendant answered, admitting the corporate existence of the city of Red Lodge, the impounding of the cattle, and that defendant has not paid the city the amount claimed, or any amount whatever, and denying all the other allegations of the complaint. Upon the trial the court found the issues for plaintiff, and entered judgment against the defendant, from which he appealed to the district court. In the district court the cause was tried to the court sitting without a jury. The court found, first, that the defendant resides four miles from the corporate limits of Red Lodge; second, that the cattle in controversy were turned out in the spring of 1903 on the common range; fourth, that the cattle were found in the city of Red Lodge and a portion of them impounded by the city marshal, and a portion by Ralph Vaill, but this latter portion was taken possession of and retained by the city marshal; fifth, that the animals were not owned or kept within the limits of the city of Red Lodge, but strayed within the corporate limits of said city. As a conclusion of law, the court found that the city marshal had no authority to impound the animals, and ordered judgment for the defendant for his costs, from which judgment and an order

denying a motion for a new trial plaintiff appeals.

In this court the only question presented which requires any consideration is that involved in the construction of the provisions of sections 1 and 2 of Ordinance 28, as set forth above. It is conceded by respondent that the city of Red Lodge might properly pass this ordinance, or an ordinance, restraining animals running at large within the city, which would apply to the animals in question, and no contention is made here as to the procedure adopted by the city to carry out the provisions of this ordinance. The only contention of respondent is that this ordinance has no application to the animals in controversy. The evidence is sufficient to support the findings of the court, that the owner of the animals lives some three or four miles from the city limits; that he turned these animals out on the common range, and that they strayed within the city limits, but were not owned or kept therein. The question for determination, then, is, are the provisions of Ordinance 28 sufficiently broad to apply to all such domestic animals as are mentioned in the ordinance which may be found running at large within the city limits, whether owned or kept therein, or owned or kept without the city but which stray within the city limits? Section 1 of the ordinance makes it the duty of every person owning or keeping certain domestic animals (naming them) within the limits of the town to provide for keeping the same within or upon his own premises at all times, save when necessarily or temporarily passing through the streets, and then such animals must be attended by some one. This is not equivalent to saying that it shall be unlawful for any of the domestic animals named to run at large within the city limits. The duty of restraining such animals is only imposed upon persons who own or keep them within the city limits, and cannot be extended by implication to any one else. The language is too plain to require any construction beyond that clearly disclosed by its own terms. It has no application to animals running at large on the common range which may stray within the city limits.

But it is contended that under the provisions of section 2 of this ordinance the city may be justified in impounding these animals. That section provides that the poundkeeper shall provide a pound for impounding any domestic animals found running at large within the city limits. But, if this section is to be construed literally and without reference to section 1 of the ordinance, then dogs and cats, being domestic animals, fall within the provisions of the ordinance, and the poundkeeper is required to restrain them. But this ordinance must be construed as a whole, every portion of it given meaning, if possible, and neither the whole or any portion rendered ridiculous, unless that result is unavoidable. There is no conflict whatever

between the provisions of sections 1 and 2, and neither is broader in its terms than the other. Section 1 enumerates the particular domestic animals which are prohibited from running at large. Section 2 creates the office of poundkeeper and defines his duties; and, when the question is presented to him whether a particular domestic animal is permitted to run at large, he must determine the question by a reference to section 1, which defines the nuisance to be avoided. That the contention now made was not entertained by the city attorney when the action was commenced is apparent from the complaint, which was clearly drawn with reference to the provisions of section 1 of the ordinance. However, this becomes immaterial under our view of the case. As the court found that these cattle were not owned or kept within the city limits, and these findings are justified by the evidence, and this ordinance by its terms does not apply to cattle owned or kept without the city and which may stray within the city limits, the court's conclusion was correct, and the judgment and order are affirmed.

The other questions presented do not require any consideration.

Affirmed.

BRANTLY, C. J., and MILBURN, J., concur.

In re TUOHY'S ESTATE.

SHIELDS et al. v. PAUWELYN.

(Supreme Court of Montana, Nov. 6, 1905. On Rehearing, Dec. 4, 1905.)

1. SALES OF DECEDENT'S LAND—PROCEEDINGS ON APPLICATION—JURY—DEMAND.

Code Civ. Proc. § 2923, requires issues of fact in probate proceedings to be tried in conformity with article 2, c. 2, of the title. Section 2924 provides that, if a jury is demanded in writing by either party, the court must settle and frame the issues to be tried and submit the same to the jury. Section 2340, which is found in the article and chapter referred to, provides that, upon the presentation of issues of fact in a will contest, such issues must, on request of either party in writing, filed three days prior to the date set for hearing, be tried by a jury, but that, if no jury is demanded, the court must try and determine the issues joined. *Held* that, in order to entitle objectors to a sale of lands to pay debts of a decedent to a jury trial, the issues must first be made up, and a written demand must then be made and filed three days prior to the day set for the hearing; and the fact that the objections filed by the objectors close with a demand for trial by jury does not require the judge to grant such a trial, where the demand is not called to his attention until the hearing begins.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 154, 159-164.]

2. COURTS—DISTRICT COURT—JURISDICTION IN PROBATE.

The district court, sitting as a court of probate, has only such powers as are expressly conferred upon it by statute and such as are necessarily implied to carry out those expressly conferred.

3. EXECUTORS AND ADMINISTRATORS—SALES OF LANDS—PROCEEDINGS—ISSUES DETERMINABLE.

Under Code Civ. Proc. § 2671, requiring a petition for the sale of land to pay a decedent's debts to set forth the amount of personal property in the hands of the administrator, the debts outstanding, the amount due on family allowances, the debts and expenses of administration, a general description of all the real property of which decedent died seized or in which he had any interest, and the names of legatees, devisees, and heirs, the court cannot, on an application for the sale of real estate to pay debts, try issues of title to the real estate to be held, or of adverse possession of such real estate, as between executor and devisees.

4. DESCENT AND DISTRIBUTION—LIABILITIES OF DEVISEES—DEBTS OF TESTATOR—APPORTIONMENT.

Under Civ. Code, § 1822, requiring the property of testator to be resorted to for the payment of debts "in the following order: (1) The property which is expressly appropriated by the will for the payment of the debts; (2) property not disposed of by will; (3) property which is devised or bequeathed to a residuary legatee; (4) property which is not specifically devised or bequeathed; and (5) all other property ratably"—and Code Civ. Proc. § 2678, requiring the other real estate belonging to testator to be sold before resorting to real estate which has been devised and not charged with the payment of debts—property belonging to the first four enumerated classes must be sold before resorting to property specifically devised; but, if it is insufficient, property specifically devised must then be resorted to ratably to pay testator's debts, regardless of the nature of the devise, whether made for a valuable consideration or for charitable purposes, and notwithstanding equities existing in favor of certain devisees which might entitle them to a conveyance of the land devised to them.

5. EXECUTORS AND ADMINISTRATORS—SALES OF REAL ESTATE—NATURE OF PROCEEDINGS—LIMITATIONS.

An application, under Code Civ. Proc. § 2671, to sell real estate for the payment of debts of a decedent, is not, in view of Civ. Code, §§ 1821-1823, 1826, 1850, et seq., and Code Civ. Proc. §§ 2559, 2603, 2608, 2609, 2791, and 2793, which give the estate of a decedent, both real and personal, to the executor for the payment of debts, and for distribution, and require creditors to present their claims within a certain time or be barred, and specify the time within which actions on rejected claims may be brought, an action to recover real estate or the possession thereof; nor is it an action arising out of the title thereto or the rents and profits thereof, within the meaning of Comp. St. 1887, div. 1, §§ 29, 30, Pol. Code 1895, § 9, and Code Civ. Proc. §§ 483, 484, 3456, prescribing the time within which actions to recover real estate or the possession thereof, and actions arising out of title to real estate or the rents and profits thereof, may be brought.

6. SAME—ALLOWANCE OF CLAIMS—EFFECT—OPERATION OF LIMITATIONS.

Where claims against a decedent's estate have been presented and allowed, and are not contestable for the reason that they were not presented within the time limited by the notice to present claims, as required by Code Civ. Proc. § 2603, or that they were barred at the time of presentation by some particular statute applicable thereto, none of the statutory limitations run as against them.

7. ESTOPPEL—PARTICIPATION IN JUDICIAL PROCEEDINGS—ASSUMPTION OF INCONSISTENT POSITION.

Where claims were presented to an executor soon after letters were issued to him, and, most of them being rejected, litigation arose, in

which the principal ones were declared groundless, and the executor, about a year after the termination of the litigation, applied for an order authorizing the sale of lands to pay the debts which were declared valid, devisees who, desiring that the property of the estate should not be sold, encouraged the executor to lease the land, in order to raise money to pay the debts and avoid a sale of such land, and took part in proceedings instituted to enable such leases to be made, were estopped to assert that the debts found to be due from the estate should not be paid, because of laches of the executor in making his application for the sale of land to pay such debts.

On Rehearing.

8. EXECUTORS AND ADMINISTRATORS—SALES OF LAND—APPLICATIONS—FINDINGS.

On an application to sell lands for the payment of a decedent's debts, a finding made by the court outside of the purview of the application, as on the issue of title to the lands, is erroneous.

9. SAME—APPEAL—HARMLESS ERROR—IMMATERIAL FINDINGS.

The act of the court in making an immaterial finding, wholly outside the purview of an application pending before it for the sale of a decedent's lands to pay debts, is not prejudicial to the parties to the application.

10. APPEAL—BRIEFS—SPECIFICATION OF ERRORS—NECESSITY.

The Supreme Court will not consider errors not assigned in appellant's brief.

11. SAME—REHEARING—GROUNDS.

The fact that the Supreme Court did not, on the original hearing, consider and decide a question not assigned in the brief and not properly before it, is not ground for rehearing.

Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

In the matter of the estate of James Tuohy, deceased. Petition by Cyril Pauwelyn, as executor, to sell lands for the payment of debts. From an order granting the petition, Daniel Shields and another, devisees, appeal. Affirmed.

W. Y. Pemberton, H. L. Maury, and J. B. Clayberg, for appellants. John J. McHatton and John G. Brown, for respondent.

BRANTLY, C. J. Appeal from an order of the district court of Silver Bow county directing a sale of real estate belonging to the estate of James Tuohy, deceased.

James Tuohy died on or about October 2, 1893, in Silver Bow county. His estate consisted of a small amount of personal property and certain real estate, chiefly undeveloped mining claims. He left a will which, after disposing of most of the estate by special bequests, closes with this clause: "I hereby appoint Cyril Pauwelyn, of Butte, sole heir and executor of this my last will and testament, without bonds." Cyril Pauwelyn, having qualified as executor under an order of the district court, entered upon the discharge of his duties, and has continued therein. Soon after his appointment, litigation arose involving the validity of claims against the estate to a large amount, sufficient, if established, together with the undisputed claims, to consume the entire estate. The last of this litigation was finally disposed of about

March 25, 1903; the principal claim having been declared invalid. On March 22, 1894, the executor filed his petition for an order to sell a portion of the real estate, alleging facts showing a necessity therefor. For some reason, doubtless because of the pending litigation and uncertainty as to the amount of funds necessary to pay claims, this petition was abandoned. Thereafter some of the mining claims were leased, with the expectation that a sufficient amount would be realized from royalties upon ores extracted therefrom to pay the debts, and that a sale would not be necessary.

The petition upon which the order now before us was made was filed on April 21, 1904. It appears therefrom that the personal property has been exhausted in the payment of expenses of administration, the principal part of which have been counsel fees and other disbursements in connection with the litigation referred to above. The debts chargeable against the estate, as set forth therein, amount to \$10,572.15. The charges for administration and other expenses already accrued and unpaid amount to \$4,845.28. The executor states that he is unable to estimate the amount of charges and expenses yet to accrue, "owing to the uncertainty of the time it will require to close up and settle said estate; the amount or amounts that may be realized from the sale or sales of property belonging to the said estate, so as to enable your petitioner to determine the amount of his commissions, and the pendency in this court of an action in which said estate is interested, * * * entitled Cyril Pauwelyn, Executor, etc., Plaintiff, v. Charles A. Elvers, Defendant." The nature of this claim does not appear. The value of the property belonging to the estate is estimated to be \$47,350. The court is asked to grant an order authorizing the executor to sell all of the real property belonging to the estate, alleging that the entire amount derived from the sale thereof will be necessary in order to pay the claims approved and allowed, besides expenses, commissions, etc.

It appears that three parcels of the real estate are not mentioned in the will, namely, an undivided one-half interest in the Malone lode claim, and the Belmont and Amy claims. Specific bequests are made of all the rest of it; Daniel Shields being mentioned as devisee of an undivided one-fourth interest in the Tuolumne lode claim, and Thomas McLaughlin as devisee of a lot and house thereon, in the city of Butte. Appellants Shields and McLaughlin appeared and objected to the granting of the order of sale. Shields' objections are, in substance, first, that for more than 10 years prior to the filing of the petition he had been in open, notorious, adverse, exclusive, uninterrupted, and continuous possession of the one-fourth interest in the Tuolumne lode claim belonging to the estate, and that no ancestor, nor predecessor, nor the executor had in 10 years prior to the

filing of the petition been seized of it or any part thereof, and that the executor's cause of action is barred by the provisions of sections 29, 30, div. 1, of the Code of Civil Procedure of the Compiled Statutes of 1887, and by section 9 of the Political Code, and sections 483, 484, and 3456 of the Code of Civil Procedure of 1895; second, that the interest in this claim was devised to him by deceased for a valuable consideration, that much other property was in the said will devised to charities without consideration, that such other property is sufficient in value to pay all debts and other claims, together with the expenses of administration, and that for this reason the property devised to him should not be sold until after all the property so devised should be exhausted; and, third, that certain property had not been devised at all, and that it should first be resorted to to pay claims. McLaughlin objected on the two grounds last mentioned. The executor replied to these objections. Upon the issues thus joined a hearing was had by the court sitting without a jury. Thereupon the court made its findings of fact and conclusions of law, and entered an order directing a sale.

The court found that the debts, costs, and expenses of administration already accrued against the estate amount to \$14,417.45, with interest; that there was no money belonging to the estate to pay the same; that the real estate was not yielding any revenue; and that the sale of all of it was necessary to pay the debts. The court further found that there had been no unreasonable delay on the part of the executor in making application for the order of sale; that the property mentioned in the petition belongs to the estate; that none of it has been delivered to the heirs or devisees by the executor; and that the same is in the control of the executor, and under the direction of the court. As conclusions of law, the court declares that the objections of Shields and McLaughlin were without merit; that the executor was entitled to have an order of sale as prayed for; that the property be sold by the executor in the manner and order provided for by the statute, and that he exercise his judgment and option as to which portion, or interest, or parcel of the property specifically devised should be first offered for sale and sold; and that in making said sale he do not offer for sale, or sell, any more of the property than may be necessary to pay said claims, with interest, and the debts, costs, and expenses which may hereafter accrue.

Upon these facts and conclusions of law, the court entered its order directing the executor to sell so much of the real estate as may be necessary to pay the debts, claims, and expenses of the estate, and the costs and expenses of administration accrued, or that may hereafter accrue, either in one parcel or in subdivisions, as the executor should judge most beneficial to the estate, and in the

order prescribed by the statute and the foregoing findings and conclusions; and that, when he shall have sold sufficient for the purposes aforesaid, he shall not sell or offer for sale any more. From this order, so far as it directs the sale of the interest devised to them respectively, Shields and McLaughlin have prosecuted this appeal.

1. Contention is made that the order cannot be sustained because the court denied the appellants a trial by jury upon the issues presented by their objections. Without pausing now to inquire whether any material issues are presented by the objections, but assuming this to be so, and assuming, further, that, upon every like application wherein material issues of fact arise, the right of trial by jury exists, there is no merit in the contention. The Code of Civil Procedure provides:

"Sec. 2923. All issues of fact in probate proceedings must be tried in conformity with the requirements of article 11, chapter 11, of this title, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. * * *"

"Sec. 2924. If no jury is demanded, the court or judge must try the issues joined. If on written demand a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court or judge, on due notice to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. * * *"

The provisions of article 2, c. 2, tit. 12, to which section 2923 refers, relate to contests arising over the probate of wills. Section 2340 of article 2, c. 2, of this title provides, among other things, that, upon the presentation of any one or more of the issues of fact enumerated therein, they must, "on request of either party in writing, filed three days prior to the day set for the hearing, be tried by a jury. If no jury is demanded, the court or judge must try and determine the issues joined. * * *". Under this section it is clearly the duty of the court or judge to try the issues joined without a jury, unless one is demanded in the manner and within the time prescribed therein. Its requirements presuppose issues joined before the demand for a trial by jury is made. The policy of the law is that proceedings of this nature should progress as speedily as they may, to the end that the affairs of the estate may be closed up, and the parties in interest discharged from the supervision of the court. The presiding judge is not supposed to know what issues, if any, are to be made, until the pleadings are filed, and not then until attention is called to them. If in any case no issue of fact is presented, the presence of a jury is unnecessary. The section, therefore, not only requires the issues to be made up before the demand is made, but, also, that

the demand be made a sufficient length of time before the hearing to secure the attendance of a jury. Sections 2923 and 2924, supra, are general in their application, while section 2340 refers only to contests over the probate of wills; but the provisions of the latter must be read into the former and be observed, whenever the parties desire an issue of fact to be tried by a jury. In this case the objections of Shields were filed on July 18, 1904, and those of McLaughlin on July 23. The replies of the executor were filed not later than July 25. The hearing was begun on September 14, 1904. No written demand for trial by jury was ever filed. It is true that the objections filed by the appellants close with a demand for a trial by jury; but, so far as the record shows, these demands were never called to the attention of the court or judge until the hearing began. Under this condition of affairs, a trial by jury is properly denied, no matter what the issues are.

2. The next contention made is that the order is erroneous, in that it directs a sale of all the real estate, including that devised to appellants, whereas, it appears from the objections that these devises were respectively made for a valuable consideration, and therefore that the court could not direct a sale of property so devised until after a disposition of all the other property belonging to the estate. We think this contention is without merit for two reasons:

First. The application for the order in this case was made under section 2671 of the Code of Civil Procedure, which lays down the procedure necessary to obtain an order for the sale of real estate. The section provides what the verified petition filed in support of the application shall contain. It must set forth the amount of personal property that has come into the hands of the administrator, and how much, if any, remains undisposed of; the debts outstanding against the decedent, so far as they can be ascertained or estimated; the amount due upon family allowances, or what will be due after the same have been in force for one year; the debts, expenses, and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a general description of all the real property of which decedent died seized, or in which he had any interest, or in which the estate had acquired any interest, and the condition and value thereof; and the names of the legatees and devisees, if any, and of the heirs of the deceased, so far as known to the petitioner. Upon these necessary allegations it is not possible for an issue as to the title of real estate to arise. Nowhere else in this title do we find any provision upon which the court may enter into an investigation of questions of title. It is well settled by the decisions of this court that the district court, sitting as a court of probate, has only such powers as are expressly conferred upon it by statute, and such as are

necessarily implied in order to carry out those expressly conferred, and that, in the exercise of its jurisdiction, it is limited by the provisions of the statute. *State ex rel. Shields v. Second Judicial District Court*, 24 Mont. 1, 60 Pac. 489. It cannot be presumed, in the absence of an express declaration to that effect, that the Legislature intended that the court, when sitting in probate proceedings, should exercise the extensive powers necessary to such investigations and determine the rights involved. While exercising jurisdiction in these matters, its proceedings are all more or less summary, and not suited to the adjustment of equities and the adjudication of rights dependent upon them.

In the second place, section 1822 of the Civil Code provides: "The property of a testator, except as otherwise specially provided for in this Code and the Code of Civil Procedure, must be resorted to for the payment of debts, in the following order: (1) The property which is expressly appropriated by the will for the payment of the debts. (2) Property not disposed of by will. (3) Property which is devised or bequeathed to a residuary legatee. (4) Property which is not specifically devised or bequeathed; and (5) All other property ratably. * * *" It will be seen from an examination of this section that no distinction is made between specific devises for charitable purposes and those made upon consideration. They are placed upon the same footing. If the property mentioned in the first four classes designated by the statute is not sufficient, specific devises, no matter for what purpose, are to be resorted to ratably; for such devises clearly fall in the fifth class in the enumeration. The appellants have no right to have the property devised to them, exempted from sale for the payment of debts, or the sale of it postponed until other property specifically devised has been resorted to for that purpose, for the reason that the devises to them were made for valuable consideration, no matter what that consideration may have been, even though it might be conceded, for sake of argument, that the district court, when sitting in probate, has jurisdiction under the statute to investigate and determine questions of title upon an application for the sale of real estate.

By the terms of the will, as appears from the record, all the property belonging to the estate, except the interest in the Malone lode and the Amy and Belmont claims, was disposed of by specific devises to the appellants and others. On the theory, assumed by the appellants to be correct (and we think it correct, though the will is not now before us for construction), that by the last clause of the will the executor is made residuary legatee, these interests go to him. They, therefore, fall in the third class in the enumeration, and must be resorted to and exhausted before the property devised to appellants is burdened with any part of the debts.

Section 2678, Code Civ. Proc. When, however, the property falling in the first four classes has been exhausted, no distinction may be made among specific devises, but all must bear the burden ratably. In view of these express provisions of the statute, the cases cited by counsel for appellants, in which the courts of other jurisdictions have applied the rule contended for, are not in point. In any event, in this state the court, upon a hearing of an application for the sale of real estate, has no power to proceed, except in conformity with the statute. If the devise to either of the appellants was made under such circumstances as would warrant a decree requiring the executor to convey to him, the questions involved and a decree thereon can be had only in a court of equity in an action brought for that purpose. The order made in terms directs the executor to proceed to sell in the order prescribed by the statute, and, presumably, he will do so and first exhaust the property not specifically devised.

3. Evidence was offered by the appellants tending to show that they had been in the possession of the property devised to them respectively, holding the same adversely to the executor, for more than 10 years prior to the filing of the petition. This was, on objection, excluded by the court as immaterial. The ruling is assigned as error. The contention is made that an application for the sale of real estate is in the nature of an action to enforce a lien upon the lands of the decedent; that title to the estate vests at once in the heirs or devisees, subject only to the payment of debts; and that, such being the case, the right to maintain the application is barred by the provisions of the statute (Comp. St. 1887, div. 1, §§ 29, 30; Pol. Code 1895, § 9; Code Civ. Proc. §§ 483, 484, 3456) prescribing the time within which actions may be brought to recover real estate or the possession thereof, and actions arising out of the title to real estate or the rents and profits thereof, unless the application is made before the limitation has run.

While an application to sell real estate does partake somewhat of the nature of an action (*Broadwater v. Richards*, 4 Mont. 80, 2 Pac. 544, 546), it is in no sense of the term an action to recover real estate or the possession of it. Nor is it an action arising out of the title thereto, or the rents and profits thereof. Under our system the whole of the estate, both real and personal, goes into the possession of the executor or administrator, first for the payment of debts, and then for distribution under the will or the laws of succession. Civ. Code, §§ 1821-1823, 1826, 1850, et seq.; Code Civ. Proc. § 2559. Claims of creditors must be presented for allowance within the time prescribed by law, after notice has been published (Code Civ. Proc. § 2603), or they are forever barred, whether they are due, not due, or contingent. If a claim is barred by lapse of time at the date of pres-

entation, it may not be allowed. Section 2609. If rejected, action must be brought against the administrator in the proper court within three months thereafter, or it is barred. Section 2608. Upon the coming in of the account, the heirs or devisees may contest and have rejected any claim allowed in violation of these provisions. Sections 2793, 2791; *In re Moullierat's Estate*, 14 Mont. 245, 36 Pac. 185. And, since the petition for the sale must set forth the debts of the estate (section 2671), it would seem that the appropriate limitation may then be invoked in order to defeat a particular claim, and therefore the sale *pro tanto*. But when claims have been presented and allowed, and are not contestable, for the reason that they have not been presented in time, under section 2603, *supra*, or that they are barred at the time of the presentation by the particular statute applicable, none of the statutory limitations run as against them. *In re Arguello*, 85 Cal. 151, 24 Pac. 641; *In re Estate of Schroeder*, 46 Cal. 305. Furthermore, the question of adverse possession, as between the executor and a devisee, may not be tried by the court upon an application for the sale of real estate. As has been said already, any question as to the title of property belonging to the estate must be settled in the appropriate action brought in the district court as a court of general jurisdiction. *In re Estate of Burton*, 63 Cal. 36; *In re Estate of Groome*, 94 Cal. 69, 29 Pac. 487; *Stewart v. Lohr* (Wash.) 25 Pac. 457, 22 Am. St. Rep. 150.

4. Contention is made that the court, in the exercise of its sound discretion, should have denied the application on the ground of the palpably unreasonable delay of the executor in presenting it. Whether or not gross negligence or palpable laches on the part of the executor or administrator is sufficient reason for denying an order of sale in a given case, we do not deem it necessary to discuss or decide. There is abundant authority in support of the affirmative of the proposition. *Estate of Crosby*, 55 Cal. 574; *Mooers v. White et al.*, 6 Johns. Ch. 360; *Wolf et al. v. Ogden*, 66 Ill. 224; *McCrary v. Tasker et al.*, 41 Iowa, 255; *Rickard v. Williams et al.*, 7 Wheat. 59, 5 L. Ed. 398; *Ex parte Allen*, 15 Mass. 58; 2 Woerner on the American Law of Administration, § 465. The policy of the statute requires the administration to be conducted speedily to a close. This fact also lends support to the rule contended for by the appellants. Here, however, the parties, assuming that such a defense could be invoked, tried the question of laches, and the court decided that under all the circumstances there had been no unreasonable delay. We think the conclusion reached by the court justified upon the facts presented.

Soon after letters were issued to the executor, claims were presented to the amount of

more than \$30,000. Most of them were rejected. Litigation arose over them. Finally, about one year prior to the making of the application, the principal claims were declared groundless. In the meantime the appellants, desiring that the property belonging to the estate, and particularly that devised to them, should not be sold, encouraged the executor to lease certain of the claims, in order to raise money to pay the debts and thus avoid a sale. Indeed, they urged him to make leases, and took part in the proceedings instituted to secure orders of court at various times authorizing such leases to be made. The claims which were undisputed were small in amount in comparison with those presented and rejected out of which litigation arose. Under these circumstances we think it would be unjust to the creditors to permit these appellants to assert that the debts finally found to be due from the estate should not be paid.

These remarks dispose of all the questions requiring special notice.

While the findings and conclusions of the court cover matters not properly within scope of the application, and the order is somewhat indefinite in its terms, we think the court did not commit any prejudicial error, and that the order should be affirmed.

HOLLOWAY, J., concurs. MILBURN, J., being disqualified takes no part in this decision.

On Rehearing.

BRANTLY, C. J. Appellants have filed a petition for a rehearing of this cause, alleging two grounds therefor: (1) That the district court found that the property claimed by the appellants belongs to the estate, that this finding is recited in the opinion of this court, and that, though this court held that the district court upon application to sell real estate has no power to determine questions of title, as between the executor representing the estate and the heir or devisee, yet, this finding having been recited and the order of sale affirmed, it follows that this court has in effect adjudicated the question of title, so that, in a controversy over the title in a court of competent jurisdiction, the order may be pleaded as *res judicata* and thus conclude the rights of appellants; (2) that this court, by affirming the order as made, has held that the district court was not in error in directing the sale of the property the title to which is in dispute, whereas that court should have deferred the sale until the question of title might be adjudicated in an action brought, or to be brought, for that purpose.

1. Though the finding referred to is recited in the statement of facts preceding the opinion of this court, it is clear from even a casual reading of the opinion that the judgment can have no such effect as counsel anticipate. If the question of title could not be inquired into and determined by the district court, it must follow that any finding upon that sub-

ject by that court was wholly outside of the purview of the application and immaterial. The concluding paragraph of the opinion applies to this finding, though special mention is not made of it. It was error for the court to make a finding upon a matter falling entirely outside of the purview of the application; yet it was error without prejudice, and appellants cannot complain.

2. The second ground of the petition proceeds upon the assumption that one purpose of the objections made by appellants in the district court was to secure a delay of the sale, in order to protect the property from sacrifice until the question of title could be determined by a court of competent jurisdiction, whereas they were intended to prevent the sale altogether. No such theory was entertained by appellants in that court, nor is error assigned in the briefs of counsel in this court upon the refusal of the district court to stay proceedings until the question of title may be determined. The notion that such a stay should have been granted was, so far as the record shows, conceived after the cause was removed to this court. Under the rule, repeatedly declared, this court will not consider errors not assigned in the brief. While we did not, and do not, decide that the district court might not, in its discretion, have postponed the sale of the property in dispute until the question of title could be determined, whether the court did in fact err in failing to do so was not before us on the former hearing, nor is the fact that this court did not consider and decide this question ground for rehearing.

The petition is denied.

Denied.

HOLLOWAY, J., concurs.

SMITH et al. v. PERHAM.

(Supreme Court of Montana. Dec. 11, 1905.)

1. SALES—EXPRESS OR IMPLIED.

A person may recover for goods delivered on showing a delivery thereof to and an acceptance thereof by the intended buyer, and a promise, express or implied, on the part of the buyer to pay for them; but it does not devolve on one seeking to collect for goods delivered the necessity of proving a request for the delivery thereof.

2. SAME — RECOVERY OF PURCHASE PRICE — PROOF—SUFFICIENCY.

One seeking a recovery for goods delivered to another must prove an express contract, or a request, express or implied, on the part of the latter for the goods, or the delivery of the goods to the latter and a promise, express or implied, on his part to pay therefor.

3. SAME — ACTION FOR PRICE — COMPLAINT — SUFFICIENCY.

A complaint in an action for goods sold, which alleges that during a time specified plaintiff furnished and delivered to defendant certain goods of a specified value, that defendant received the same and used them for his own use, and that he has not paid therefor, states no cause of action; its allegations not being inconsistent with a gift.

4. APPEAL — PREJUDICIAL ERROR — PRESUMPTIONS.

An erroneous instruction is presumed to be prejudicial.

5. TRIAL—INSTRUCTIONS—CORRECTION.

Where an instruction erroneously stated the law, and another instruction was correct, the court could not say that the error was cured; for it could not determine whether the jury followed the erroneous one or the correct one.

6. SALES—RECOVERY OF PRICE.

The delivery of goods by one person to another is not sufficient to create a liability for their value, but the delivery to and acceptance by the intended buyer must have occurred under such circumstances that the law will imply a promise to pay for them.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

Action by H. J. Smith and another, doing business as partners under the firm name of Smith & Urner, against William T. Perham. From a judgment for plaintiffs, defendant appeals. Reversed.

J. Bruce Kremer and McBride & McBride, for appellant. Robt. B. Smith and Maury & Hogevoil, for respondents.

HOLLOWAY, J. Omitting the formal parts and the allegations of mere conclusions of law, the complaint in this action alleges: "That during the month of September, 1901, the said plaintiffs furnished and delivered to the defendant, and the defendant received from the plaintiffs, stucco and plaster of paris, of the reasonable value of three hundred twenty-eight (\$328.00) dollars, which the defendant used for his own uses and for his own benefit. That the defendant has not paid the plaintiffs therefor, or any portion thereof." The answer denies specifically these allegations of the complaint. The cause was tried to the court sitting with a jury. Among others, the court gave instruction No. 2, as follows: "The court instructs you that the only question to be determined in this case is whether or not the defendant received from the plaintiff the material which the plaintiff claims to have furnished to the defendant. If the defendant received such material from the plaintiff, and accepted it, then it is your duty to find for the plaintiff the reasonable value thereof, not exceeding the sum sued for"—and refused to give an instruction asked by the defendant, the material portion of which is as follows: "That, before any charge can be made or any money collected for goods furnished or delivered, it devolves upon the plaintiff to prove a request by the defendant for the furnishing and delivery of such goods and material." The jury returned a verdict in favor of the plaintiffs, and judgment was entered thereon. From this judgment, and from an order denying him a new trial, the defendant appealed. Heretofore the appeal from the judgment was dismissed. 32 Mont. 603, 83 Pac. 1118.

Error is predicated upon the giving of instruction No. 2 above, and the refusal of

the court to give the instruction asked by the defendant, herein set forth. Error is also assigned to the giving of instruction No. 1, and to the rulings of the court in excluding certain documentary evidence offered by defendant upon the trial of the cause. While instruction No. 1 is inartistically drawn, we do not think it is open to the criticisms made upon it. The objection to it is hypercritical. Neither do we think that the court committed error in excluding the proffered testimony. The instruction asked by the defendant and refused by the court does not correctly state the law. Under the theory of that instruction, before a person can ever recover for goods delivered by him, he must prove a request therefor by the party to whom they are delivered. This is not necessarily true. He may recover if he shows a delivery to, and acceptance of the goods by, the intended purchaser, and a promise, expressed or implied, on the part of such purchaser to pay for them. For the reason that the instruction was limited altogether too much in its scope, the court did not commit error in refusing to give it.

The principal contention is made with reference to instruction No. 2, given by the court and set forth above. That instruction told the jury that there was but one question to be determined, namely: Did the defendant receive from the plaintiffs the materials in controversy? If so, plaintiffs were entitled to recover therefor the reasonable value of such goods. The court evidently proceeded upon the theory that the complaint states a cause of action, and conformed the instruction to the theory of the case announced in the complaint. If it is only necessary for plaintiffs to deliver goods to defendant, or to deliver them and for the defendant to receive the same, in order to establish a liability on the part of the defendant to pay for the goods, then the instruction was properly given. But is this sufficient? It is elementary that before a plaintiff can prevail he must put the defendant in the wrong. There is not anything set forth in the complaint inconsistent with the idea that the goods in controversy were intended as a gift. In every instance of a gift there is a delivery by the donor, and an acceptance of the gift and its use for the donee's benefit. Or, again, goods may be sold to one person, and at his request delivered to, and accepted and used by, another, and the person accepting and using them will not be liable for their value to the seller. In order to charge the defendant, the complaint must set forth an express contract, or a request, expressed or implied, on the part of the defendant for the goods, or the delivery of the goods by the plaintiff and a promise, expressed or implied, on the part of the defendant to pay therefor.

In the brief of respondents, who were plaintiffs below, appears this statement: "There is no question between counsel for appellant

and myself as to what constitutes an express or an implied contract. In the case at bar the contract is express." If the contract sued upon was an express contract, the complaint wholly fails to plead it. But this feature alone would not necessarily be fatal, if an implied contract was set forth. But the complaint does not state a cause of action, either upon an express or implied contract. *Conrad Nat. Bank v. Great Northern Ry. Co.*, 24 Mont. 178, 61 Pac. 1. The instruction was erroneous, and prejudice will be presumed. It does not improve matters to say that other instructions were given which correctly state the law; for it cannot be determined whether the jury followed instruction No. 2 or not. The mere delivery of goods by one person to another is not of itself sufficient to create a liability for their value. The delivery to and an acceptance by the intended purchaser must have occurred under such circumstances that the law will imply a promise to pay for them. One may not make himself the creditor of another by officiously delivering to such other person goods of whatever character. As this cause must be remanded for a new trial, attention is called to the insufficiency of the complaint to state a cause of action.

Because of error in giving instruction No. 2 above, the order denying a new trial is reversed, and the cause remanded, with direction to grant a new trial.

Reversed and remanded.

BRANTLY, C. J., and MILBURN, J. concur.

BANK OF ONTARIO v. HOSKINS et al.
(Supreme Court of Montana. Dec. 11, 1905.)

BILLS AND NOTES — CONSIDERATION — FORBEARANCE TO SUE.

Where M., not being liable on the debt of O., represented by O's. note to plaintiff, signed it several days after O. executed and delivered it, only on condition that she should not be sued till enough money to pay it had been realized by O. from his contract, and not then unless O. failed to pay it, there was no consideration for her signing; this being a mere forbearance to sue her, against whom plaintiff had no claim.

Appeal from District Court, Flathead County; D. F. Smith, Judge.

Action by the Bank of Ontario against Omar Hoskins and another. From the judgment for plaintiff, defendant Maggie Hoskins appeals. Reversed.

Foot & Pomeroy and W. H. Poorman, for appellant. Thomas D. Long and Frank L. Gray, for respondent.

HOLLOWAY, J. The complaint in this action contains two causes of action. As to the second no defense is made or attempted. The first cause of action is upon a promissory note for \$1,000, dated March 4, 1903, and due 30 days after date. It is admitted

that this note was executed and delivered by Omar Hoskins on the date which the note bears. It is alleged that the defendant Maggie Hoskins did not sign this note until long after its execution and delivery by her co-defendant, Omar Hoskins; that she signed it then at the instance and request of plaintiff, but only upon the terms and conditions set forth in her answer. She alleges that at the time of the execution and delivery of the note by Omar Hoskins, and for a year prior thereto, he had a contract for the construction of an irrigating canal in Malheur county, Or., and that it became necessary for him to borrow money, represented by this note, from the plaintiff bank for the purpose of carrying on his work; that this note was given for the money so borrowed by him, and for no other consideration; that the money was used by him in his work on the canal; that the defendant Maggie Hoskins had no interest whatever in the contract, and did not receive any of the money; that on March 19, 1903, at the instance and request of plaintiff, defendant Maggie Hoskins "signed said note upon the expressed understanding and agreement with said plaintiff that said plaintiff would not sue said defendant Maggie Hoskins thereon until the amount thereof was realized by said Omar Hoskins upon said contract for the construction of said irrigating canal; and that, in the event said defendant Omar Hoskins did not pay said note from the amount so realized upon said contract, said defendant Maggie Hoskins should pay the same, and that suit thereon might then be maintained against said defendant Maggie Hoskins." It is then alleged that she signed the note only upon the condition stated in her answer. To this answer a general demurrer was interposed and sustained; and, the defendants refusing to plead further, judgment was entered in favor of the plaintiff, from which judgment the defendant Maggie Hoskins appealed.

Only one question is presented here: Do the facts pleaded in the answer disclose a want of consideration for the contract which defendant Maggie Hoskins entered into when she signed the note sued upon? As she signed the note long after its execution and delivery by Omar Hoskins, the consideration for his agreement was, as to her at the date she signed it, no consideration at all. Her answer discloses that at the date she signed the note she was not liable upon the debt of Omar Hoskins represented by the note, and that she signed it 15 days after the execution and delivery by him, only on condition that she should not be sued until money sufficient to pay the note had been realized by Omar Hoskins from his contract for the construction of the canal, and not then unless Omar Hoskins did not pay it. As the note by its terms became due 30 days after date, the only effect of this agreement was to postpone the bringing of any

action on the note against the defendant Maggie Hoskins until the happening of the contingencies mentioned. As a general proposition it is said that forbearance to sue is a sufficient consideration to sustain a contract based thereon; for it operates as an advantage to the person to whom the favor is extended, or as a detriment to the party extending it, or both. But, in order that forbearance to sue may constitute a valid consideration for a contract, the party forbearing must have, as against the party to whom the favor is granted, a bona fide claim which might give rise to an action to enforce it. Of course, a contract may be made between two persons for the benefit of a third; and, if the agreement pleaded in this case had been that the plaintiff would not sue Omar Hoskins until he should realize upon his contract, this forbearance would have been a sufficient consideration for the contract made by the defendant Maggie Hoskins. But that is not the agreement pleaded. The forbearance in this instance only extended to Maggie Hoskins, and as against her the plaintiff had no claim whatever. Therefore she could not derive any benefit from the bank's forbearance to sue her, and the bank did not suffer any inconvenience or detriment in forbearing to sue, when it could not do so in any event. As the bank had no claim upon which it could maintain an action against the defendant Maggie Hoskins, its forbearance to sue her was not any consideration for her signing the note. The question is too well settled to require further notice. The authorities in support of our position may be found cited in 9 Cyc. 341, 342.

The answer sufficiently pleaded a want of consideration, which is a perfect defense, if proved. The court erred in sustaining the demurrer to this answer; and the judgment is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

BRANTLY, C. J., and MILBURN, J., concur.

McCONNELL v. STATE BOARD OF EQUALIZATION.

(Supreme Court of Idaho. Dec. 30, 1905.)

1. TAXATION—BOARD OF EQUALIZATION—ASSESSMENT OF TELEGRAPHS.

Under the provisions of the revenue law, approved March 22, 1901 (Sess. Law 1901, p. 257), the state board of equalization is authorized to fix for taxation the valuation of railroad, telephone, and telegraph lines, and property belonging thereto.

2. CERTIORARI—SCOPE OF REMEDY—CONSTITUTIONALITY OF STATUTE.

Under the provisions of sections 4962, 4968, Rev. St., this court is not authorized by certiorari to pass upon the constitutionality of an act upon the application or petition of a private person to protect his private property rights.

3. SAME.

Under the provisions of said section 4968 the review upon said writ cannot extend further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority given such tribunal, board, or officer by the law. If such were done, it would amount primarily to an inquiry as to the authority of the Legislature to enact such law, and not the authority of a tribunal, board, or officer to act under a statute which has all the appearance and semblance of a valid law.

4. SAME.

This court cannot inquire into the constitutionality of the revenue law of this state upon a writ of review on the application of a private citizen in a matter involving his private rights.

5. SAME—BOARD OF EQUALIZATION—CERTIORARI.

Under a writ of review, errors and mistakes of judgment of a board as to the value of property that it is authorized to assess cannot be reviewed; neither can such writ be invoked for the purpose of reviewing the facts upon which the inferior tribunal, board or officer acted, except for the purpose of ascertaining the fact of jurisdiction.

6. SAME—INSUFFICIENT VALUATION.

The provisions of such writ are limited to a review of questions of law involved in the matter, and the court must confine its inquiry to the question as to whether or not the action complained of was beyond and in excess of the jurisdiction conferred on the tribunal, board, or officer. On such writ this court cannot review the question of fact as to whether said board in its judgment or opinion has valued the railway, telephone, and telegraph lines at less than their cash value.

(Syllabus by the Court.)

Original application for a writ of review by William J. McConnell against the state board of equalization. Writ denied.

Ralph P. Quarles, for plaintiff. J. J. Guheen, Atty. Gen., Edwin Snow, F. S. Wettach, and Geo. M. Parsons, for defendants.

SULLIVAN, J. This is an application for a writ of review to the state board of equalization requiring them to certify to this court for review all of their proceedings had and done at their August, 1905, meeting, which was held "for the purpose of equalizing taxation and assessments of the property for taxation throughout the state, and in the various counties thereof." It is alleged in the petition that, in addition to performing the duties devolving upon said board by law, in violation of the provisions of article 7 of the Constitution of the state of Idaho, and especially of section 6 of said article, it usurped and assumed the power to impose municipal taxes for county and school district purposes upon the various railway lines within the state and within each and all of the counties thereof, and in so doing said state board of equalization was acting without its jurisdiction, and acting in a judicial capacity and performing judicial functions which are not vested in it by the Constitution of the state. The petitioner further states that he is advised and believes, and therefore avers, that the power to impose taxes necessarily includes and carries with it the power

to fix the valuation of the property to be subjected to such taxation, and that the act of the Legislature of the state of Idaho relating to revenue and taxation, approved March 22, 1901 (Laws 1901, p. 233), and sections 74 to 83 (pages 257-261), inclusive, in so far as they attempt to authorize said board of equalization to assess or fix the valuation of railways and other property, real and personal, in the different counties of the state for the purposes of municipal taxation, is unconstitutional and void. Then the petitioner proceeds to set forth some of the acts done by said board at said meeting, and also sets forth a schedule showing the assessment of the railway lines in this state for that year, and avers that he is advised and verily believes that said acts of said board are of no effect and made without authority or power and are void. The petitioner thus attacks not only the acts of the board as being void, but also said act of the Legislature as being unconstitutional, and further states "that should it be held that said act of March 22, 1901, is not void, but valid and of binding force, which affiant does not admit, but, on the contrary, denies that then the said order and the whole thereof is void and of no effect for the reasons following, to wit: The said board wrongfully, unlawfully, and without jurisdiction so to do, failed and refused to fix the full cash value of and upon the said railways lines and each and every of them as required by the provisions of the statute in such cases made and provided, but, on the contrary, placed the valuation thereof at not to exceed one-eighth of the fair cash value of the same." The petitioner then avers that he is informed and believes that the value of the railway lines in the aggregate are \$91,000,000, and that the defendant board fixed the same at less than one-eighth of that amount, and then proceeds to give his opinion of the value of the said railway lines and of their marketable and commercial value, and proceeds to state the valuation placed upon cows, horses, and sheep by the county assessors of the various counties and other property, and avers that the value placed thereon approximated nearer the actual cash value of the same than the value placed upon the railway lines by said board of equalization, and petitioner further alleges that the defendant board in like manner assumed and usurped the power to assess telegraph and telephone lines throughout the different counties of the state without jurisdiction. The petitioner further avers that there is no appeal from the action of the said board of equalization, and that the petitioner has no other adequate remedy, speedy or otherwise, to correct the errors alleged to have been committed by said board. Petitioner demands that a writ of review be issued to said board, requiring them to certify all their proceedings in regard to said matters set forth in the petition; that the same may be reviewed by this court, and that the order fixing the valuation of the railway

lines in the state be annulled and that said assessment of the railway, telegraph, and telephone lines be held to be without the jurisdiction of said board, and that should this court hold that said act of March 22, 1901, is valid; that this court then hold and adjudge said order of the defendant board void for want of jurisdiction, in that it assesses for taxation the said railway lines at one-eighth of their actual cash value.

To this petition the state board of equalization appeared and demurred: (1) On the ground that said petition does not state facts sufficient to authorize the issuance of the writ of review; (2) that the petition is ambiguous, unintelligible, and uncertain, and that it is ambiguous in asking primarily for a determination of the constitutionality of the act giving said board its authority and declaring the acts void, and then alleging excess or want of jurisdiction in a board having, according to the petition, no legal existence or authority to do the acts complained of; (3) that it is inconsistent in alleging the authority of the said board and then denying it, and that it is uncertain in declaring but one of the several consistent allegations will be relied upon; (4) that it fails to set out the facts that would authorize the issuance of the writ, and that the affidavit of the party making the oath to said petition is insufficient to show that he is entitled to the writ, and that said petition is insufficient in form, as well as in substance.

The plaintiff presents two propositions in this case: (1) That sections 74 to 83, inclusive, of the revenue act of March 22, 1901 (Sess. Laws 1901, pp. 257-261), in so far as the same attempt to authorize the state board of equalization to fix the valuation of railroad and telegraph lines and property belonging thereto, are unconstitutional and void; and (2) that, if the said sections are constitutional and valid, then the board has exceeded its jurisdiction in assessing the property of railway and telegraph lines in this state, for the reason that said board has failed to assess the same at its full cash value, but, on the contrary, has placed a valuation thereon at not to exceed one-eighth of the fair cash value of the same. Upon the threshold of our consideration of the first proposition we are confronted with this question: Can the court upon a writ of certiorari sued out by a private party for the protection of his private property rights inquire into and pass upon the constitutionality of an act of the Legislature? It has been heretofore determined by this court in *Adleman v. Pierce*, 6 Idaho, 294, 55 Pac. 658, that the jurisdiction of the court on writs of review is limited by the statute to the cases therein designated, and cannot inquire into the action of the court, tribunal, or board whose action is being reviewed in any respect beyond the scope prescribed by the statute. The court, speaking through Justice Quarles, there said: "The question

of jurisdiction is to be determined by the terms of the statute. The authority cited to us from the common law, and from those states whose statutes are different from ours, have no application here, and are entitled to no weight in determining the question before us. The Legislature, having defined the cases in which the writ will lie, have excluded all others.

This brings us to the question: In performing the act complained of (i. e., the letting of the said contract) was the common counsel of Boise City exercising a judicial function? We are compelled to answer this in the negative. None of the acts complained of were judicial acts. The Legislature, in passing the act amending the charter of Boise City, was exercising a legislative, and not a judicial, function." So the Legislature in passing said revenue act was exercising a legislative, and not a judicial, function. Section 4962, Rev. St. 1887, defines the conditions on which the writ will issue, and is as follows: "A writ of review may be granted by any court except a probate or justice's court, when an inferior tribunal, board or officer exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy." Section 4968 provides that "the review upon this writ cannot be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer." The statute of Nevada defending the writ of certiorari and the powers and authority of the court thereunder is the same as the provisions of our statute. Sections 3458 and 3464 of the Revised Statutes of Nevada 1885 correspond to sections 4962 and 4968 of our statute above quoted. In considering the right and power of the court to examine into the constitutionality of an act of the Legislature upon a writ of certiorari, the Supreme Court of Nevada in *State v. Osburn*, 51 Pac. 837, 24 Nev. 187, held that "under Gen. St. 1885, §§ 3458, 3464, providing that a writ of certiorari will be granted where an inferior tribunal exercising judicial functions has exceeded its jurisdiction, and there is no appeal nor any adequate remedy, but restricting the review to a determination as to whether the inferior tribunal has regularly pursued its authority, the court has no power to inquire into the constitutionality of the act of incorporation of a town, under a writ of certiorari, to review the action of its city council in ordering bonds to be issued in accordance with the provisions of said act of incorporation." The reasons announced in that case for the conclusion reached under their statute seem to us sound and logical. It will be observed that the statute prohibits the court upon such writs extending its inquiry further than to as-

certain whether or not the inferior tribunal, board, or officer has "regularly pursued the authority of such tribunal, board or officer." If the tribunal, board, or officer assuming to exercise the authority complained of can produce a statute of the state by the terms of which such authority is granted, it would seem that under the limitation prescribed by section 4968 the inquiry would at once cease. If, on the other hand, the court should extend the inquiry to the point of determining whether or not the Legislature had the power to enact such a statute, the court would be placing itself in the position of not only reviewing judicial or quasi judicial action, but legislative action. In such case it would amount to an inquiry primarily as to the "authority" of the Legislature to enact such a law, and not the authority of the tribunal, board, or officer to act under the statute which has all the appearance and semblance of a valid law. The writ of certiorari has been frequently issued and considered by this court, but our attention has not been called to any case wherein this court has ever at the instance of a plaintiff inquired into the constitutionality of an act of the Legislature on a writ of review. There are many cases to be found wherein the defendant, tribunal, board, or officer has, in justification of its action which is sought to be reviewed, been permitted to raise the question as to the constitutionality of some act of the Legislature, and in such cases the courts have considered the validity of the statute. In such cases, however, the constitutional question has been inquired into on account of its constituting an alleged defense to the action which is sought to be reviewed. In *Wright v. Kelley*, 4 Idaho, 624, 43 Pac. 565, this court held that "the constitutionality of an act of the Legislature cannot be determined collaterally by the court in an application for a writ of mandate by a private party to enforce a private right." It should be observed that the court held to this doctrine with reference to the scope of inquiry it would make on application for a writ of mandate without being so limited by a specific statute. But upon writs of review the court is specifically limited by section 4968, supra, which section has no parallel in the statutes prescribing the powers and duties of the court in issuance of any of the other extraordinary writs authorized. It has been repeatedly held by this court, as well as most other courts, that the writ of review will issue on the application of a private citizen and taxpayer beneficially interested in the order or proceeding sought to be reviewed. *Dunn v. Sharp*, 4 Idaho, 98, 35 Pac. 842. Our examination of this matter convinces us that we would not be justified in inquiring into the constitutionality of said revenue act upon a writ of review sued out by a citizen and taxpayer in a matter involving his private

rights. *Quinchard v. Board* (Cal. Sup.) 45 Pac. 856; *Central Pac. R. R. Co. v. Placer Co.*, 43 Cal. 366.

The second question presented, namely, that the board exceeded its jurisdiction, in that it has assessed the railroad and telegraph property of the state at less than its full cash value, is a question of fact, and not of law. The writ of review is not a remedy for correcting errors and mistakes of judgment, neither can it be invoked for the purpose of reviewing the facts upon which the inferior tribunal, board, or officer acted, except for the purpose of ascertaining the one fact of jurisdiction. Its province is limited entirely to a review of the questions of law involved in the matter. The court should in such cases always confine its inquiries to the question as to whether or not the action complained of was beyond and in excess of the jurisdiction conferred on the tribunal, board, or officer. *Sweeny v. Mayhew*, 6 Idaho, 455, 56 Pac. 85; *Smith v. Portland*, 25 Or. 297, 35 Pac. 665.

The writ is denied. Costs are awarded to the defendant.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

D. HOLZMAN & CO. et al. v. HENNEBERRY.

(Supreme Court of Idaho. Nov. 20, 1905.)

1. JUDGMENT — DEFAULT — SETTING ASIDE — SHOWING OF MERITS.

Affidavits on motion to set aside a default judgment under the provisions of section 4229, Rev. St. 1887, must show that the default occurred through mistake, inadvertence, surprise, or excusable neglect, and that the defendant has a meritorious defense to the action.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 272-293, 312.]

2. APPEAL—DISCRETIONARY ORDER.

An application to set aside and vacate a default judgment is addressed to the sound legal discretion of the court to which the application is made, and unless it appears that such discretion has been abused the order will not be disturbed on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3823.]

3. SAME.

This discretion must be directed and exercised within the well-established rules of law, and when the essential elements necessary to set it in action are wanting its improper exercise will be corrected on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3823.]

4. JUDGMENT — DEFAULT — SETTING ASIDE — GROUNDS.

Showing made in this case reviewed, and held insufficient to authorize the setting aside a default judgment.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; Ralph T. Morgan, Judge.

Action by D. Holzman & Co. and others against William Henneberry. From an or-

der vacating a default judgment, plaintiffs appeal. Reversed.

Chas. L. Heltman, for appellants. Stewart S. Denning, for respondent.

AILSHIE, J. This is an appeal from an order vacating and setting aside a default judgment. Plaintiffs filed their complaint on the 20th day of January, 1904. On the same date summons and writ of attachment duly issued. The summons was served on the defendant in Kootenai county on the 22d day of January, and on the same day the writ of attachment was levied on certain personal property, and also on 160 acres of land, belonging to the defendant. Thereafter, and within the 10 days allowed for answering, Edwin McBee, Esq., served upon counsel for plaintiffs a demurrer to the complaint, but this demurrer does not seem to have ever been filed. On February 1st the defendant executed what seems to be a bill of sale or trust deed to one William Rhinehart, conveying to Rhinehart certain personal property belonging to the defendant, and described in the bill of sale, and directing and authorizing Rhinehart, as trustee, to sell and dispose of all the property therein described, and apply the proceeds toward the payment of certain of his creditors, whose names and the amounts due each were set out in the bill of sale or trust deed. Among the claims enumerated in the bill of sale to Rhinehart was the claim of the plaintiffs in this action. The defendant authorized the trustee to pay the claim of the plaintiffs in this action and also their costs and an attorney's fee. On February 18, 1904, it appears that the attorneys for the respective parties in open court agreed to the entry of judgment as prayed for in the complaint, and thereupon judgment was duly and regularly entered against the defendant. The order made at that time by the district judge directing the entry of judgment is as follows: "At this time, by agreement of counsel for plaintiffs and defendant, it was ordered by the court that judgment for the plaintiffs be entered herein in accordance with the prayer to plaintiffs' complaint." It also appears that about the time the bill of sale was executed in favor of Rhinehart as trustee plaintiffs' attorney stipulated with Mr. McBee, as attorney for defendant, that the personal property under attachment might be released from the operation of the attachment; that property being included in the bill of sale. On May 5th a writ of execution issued, directed to the sheriff of the county, for the collection of the judgment, and the writ was thereafter returned as having been executed by selling 160 acres of real estate belonging to the defendant which had previously been attached. Thereafter, and on August 20th, the defendant, through his counsel, served notice upon plaintiffs that he would make a motion to vacate and set aside the judgment, and thereafter the motion was made, supported by numerous affidavits upon

the ground that the judgment had been taken against defendant through his "inadvertence, surprise, and excusable neglect."

The affidavits are numerous and lengthy in support of and in opposition to this motion, but the substance of defendant's showing is that, while he admits the indebtedness, he claims that it was his understanding when he executed the bill of sale to Rhinehart, as trustee, that the plaintiffs would take no further steps in their suit against him, but would look to Rhinehart, as trustee, to make the amount of plaintiffs' claim out of the trust property. He also denies that Mr. McBee was ever his attorney or authorized to appear for him in this action. He also charges that the trustee has been reckless and extravagant in the management and disposition of the trust property, and that he has made excessive charges for his services and expenses in connection therewith. He alleges that he allowed the case to pass without further consideration or attention on his part under the understanding and belief that no further action would be taken against him, and that, had he understood that the plaintiffs intended to further proceed to judgment and execution, he would have appeared and contested the matter. He does not show, however, that he ever had any defense to the action on its merits or to any part of the action. In fact, he does not pretend to show any grounds of defense that he ever had against this action on its merits. The plaintiffs, in opposition to defendant's showing, filed affidavits to the effect that the bill of sale to Rhinehart was made at the defendant's own instance, and that Rhinehart was named as trustee by the defendant, and that the plaintiffs never made any promises whatever to the defendant, except that they would release the personal property from the operation of their attachment, which they did. Plaintiffs also show quite conclusively, to our minds, that Mr. McBee was the authorized attorney for defendant in the original action, and had authority to do the acts and things which he appears to have done. We might also observe that the defendant in his affidavit swears that he never was served with summons. The sheriff's return, however, shows that he was served, and, if it should be admitted that the service of the summons could be attacked in this manner, still we are satisfied that the plaintiffs established beyond all doubt that the defendant was served with summons. After a hearing on this motion, the judge made his order vacating and setting aside the judgment. It is a well-established principle that the granting or refusing an order of this kind rests in the sound legal discretion of the court to which the application is made, and that, unless it appears that such discretion has been abused, the order will not be disturbed upon appeal. *Bailey v. Taaffe*, 29 Cal. 422; *Note* in 58 Am. Dec. 392 to 398; *Holland Bank v. Lleuallen*, 6 Idaho, 127, 53 Pac. 398. This discretion must

be directed and exercised within the well-established rules of law; and, when the essential elements necessary to set it in action are wanting, its improper exercise will be corrected on appeal. *Bailey v. Taaffe*, supra; 17 Ency. of Law (2d Ed.) 844-846.

In this case no affidavit of merits was presented, and it conclusively appears that no defense to the action on its merits existed. On the other hand, no "inadvertence, surprise, or excusable neglect" is shown. Defendant knew the action was pending, knew he owed the debt, and must have known that summons had been served on him, and that Mr. McBee had appeared in the case for him. He did not appear personally, and had no other attorney appear to represent him. It has been generally held under a statute similar to section 4229, Rev. St. 1887, that a defendant making application to open a default judgment must not only show that the judgment has been entered against him through his "mistake, inadvertence, surprise, or excusable neglect," but must also show sufficient facts from which it appears that he has a good defense. This court in *Holland Bank v. Lienallen*, 6 Idaho, 127, 53 Pac. 398, in considering the showing necessary to be made under this statute, said: "Correct practice and the rule in this state to be followed is that, in addition to showing one of the grounds mentioned in section 4229 of the Revised Statutes of 1887, the defendant must, in his affidavit of merits, state the facts upon which his defense is based, must set forth the substance of his defense, so that the court may judge for itself whether the alleged defense is frivolous or meritorious. No such showing was made in this case. We are not willing to sanction a rule of practice which substitutes for the judgment of the trial court as to whether the defendant has a meritorious defense or not the opinion of some attorney whose opinion is based upon ex parte statements of an interested party not made under oath." To the same effect, see cases above cited. There was no showing made in the case at bar which would bring the defendant within the rule announced in *Bank v. Lienallen*, supra. And the defendant, in addition to failing entirely to furnish any affidavit of merits, has, in our opinion, failed to show any "inadvertence, surprise, or excusable neglect" for not originally defending in the case, if he had any defense thereto. If the statements contained in the affidavits furnished by defendant are all true, it is possible that he has a cause of action against the trustee named in his bill of sale or trust deed. If the trustee has neglected and disregarded the trust, or has squandered the estate or made unreasonable and unjust charges, that will become a subject for settlement in a proper proceeding between the defendant and the trustee; and, of course, if any other parties have conspired with or assisted the trustee in a conversion or unlawful appropriation of the trust funds, such

persons will undoubtedly be proper defendants in an adjustment of these matters. Such questions, however, do not constitute a ground for vacating and setting aside the judgment in this case.

For the foregoing reasons, the judgment and order appealed from will be reversed, and the cause remanded. Costs awarded to appellant.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

(11 Idaho, 474)

NAMPA & M. IRR. DIST. v. BROSE et al.

(Supreme Court of Idaho. Nov. 25, 1905.)

1. STATUTES—TITLE—SUFFICIENCY.

The title to an act, entitled "An act relating to irrigation districts and to provide for the organization thereof, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes and for other and similar purposes" (Laws 1903, p. 150), held not repugnant to the provisions of section 16, art. 3, of the state Constitution.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 141, 142.]

2. WATERS AND WATER COURSES—IRRIGATION — ORGANIZATION OF DISTRICT — STATUTE — CONSTITUTIONALITY.

Said act is not repugnant to any of the provisions of our state Constitution.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 305.]

3. SAME—LEGALITY OF PROCEEDING.

Under the provisions of said act, held, that the Nampa & Meridian irrigation district is a legally organized and existing irrigation district under the provisions of said act.

4. SAME — BONDS — ISSUANCE — JUDICIAL APPROVAL.

Under the provisions of said act, the board of directors of an irrigation district may commence a proceeding like the one at bar, in and by which the proceedings of the board and of said district providing for and authorizing the issue and sale of the bonds of said district may be judicially examined, approved, and confirmed, whether said bonds or any of them have been sold at the time of the commencement of such proceedings or not.

5. SAME—PROCEEDING—REGULARITY.

Held, that all of the provisions of said act concerning the submission of the question of bonding said district for the sum of \$583,505 to the legal voters of said district have been substantially complied with, and that said bonds have been legally voted, and, when issued, will be valid bonds against said district.

6. SAME—QUESTIONS REVIEWABLE.

Under the provisions of said act the court is empowered and given jurisdiction upon the hearing of such proceedings to examine and determine the legality and validity of, and approve and confirm, each and all of the proceedings for the organization of such district under the provisions of said act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of such bonds and the order for the sale thereof.

7. SAME—NOTICE OF HEARING.

Notice of the hearing for confirmation may be by posting and publication as provided in said act.

8. SAME—EXTENT OF DISTRICT—TOWNS AND VILLAGES.

When the lots and lands within a town or village will be benefited by irrigation under the system proposed for such district, such towns and villages may be included within an irrigation district.

9. SAME — EXPENSES — APPORTIONMENT — WAIVER OF BENEFITS.

While said act contemplates a general plan for the purchase or construction of the necessary irrigation canals and works for the purpose for which such irrigation district is organized, a landowner within said district may, with the consent of the district, waive his right to water from such district, where it appears that no one residing within the district is injured or prejudiced thereby. In such a case, no part of the bond issue can be apportioned to the land whose owner has agreed with the district to waive all claims against it for water.

10. SAME—JUDICIAL REVIEW OF PROCEEDINGS — HARMLESS ERRORS.

In such proceedings, the court must disregard any error, irregularity, or omission which does not affect the substantial rights of the parties to such proceedings.

11. SAME — FINDINGS — EVIDENCE — SUFFICIENCY.

Held, the findings of the court are fully sustained by the evidence.

(Syllabus by the Court.)

Appeal from District Court, Ada County; Geo. H. Stewart, Judge.

Proceedings by the Nampa & Meridian Irrigation District against R. C. Brose and others to determine the validity of certain bonds issued by the district. From a judgment declaring such bonds valid, defendant Brose appeals. Affirmed.

Hawley, Puckett & Hawley, for appellant. Hugh E. McElroy and Wood & Wilson, for respondent. Richards & Haga, for Reclamation Service & Water Users' Association.

SULLIVAN, J. This is a proceeding instituted in pursuance of an act approved March 9, 1903 (Sess. Laws 1903, p. 150), for the purpose of obtaining judicial confirmation of the organization of the Nampa & Meridian irrigation district, located in Ada and Canyon counties, and the confirmation of all of the proceedings of the board of directors, whereby the voters of said irrigation district on the 26th day of August, 1905, by their votes authorized said board of directors to issue and sell the bonds of said district to the amount of \$583,505 for the purchase and enlargement of what is known as the "Ridenbaugh Canal System" in said counties. Default was entered against all of the parties interested as defendants, except the appellant, R. C. Brose, who appeared and demurred generally to the petition, which demurrer was overruled by the court, and, no answer being filed, default was entered accordingly. Thereupon proofs satisfactory to the court were made and judgment was entered as prayed for. This appeal is from the judgment.

The district irrigation law under which this proceeding is instituted is entitled "An act relating to irrigation districts, and to

provide for the organization thereof, and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes, and for other and similar purposes." Said act, so far as the questions in this case are concerned, is substantially the same as what is known in the state of California as the "Wright District Irrigation Law," with the acts amendatory and confirmatory thereof. It is contended by counsel for the appellant that the title to the district irrigation act under consideration, embraces more than one subject and matters properly connected therewith, and for that reason is repugnant to section 16 of article 3 of the state Constitution. It is sufficient to say that the title above quoted does not embrace but one subject and matters properly connected therewith. In referring to the title of the irrigation law of this state approved March 6, 1899 (Laws 1899, p. 408), which is substantially the same as the title now under consideration, this court said in *Pioneer Irrigation District v. Bradley*, 8 Idaho, 310, 68 Pac. 295, 101 Am. St. Rep. 201, that, however numerous the provisions of an act may be, if they can by fair intentment be considered as falling within the subject-matter legislated upon in such act, or necessary as ends and means to the attainment of such object, the act will not be in conflict with said constitutional provisions. Said act has but one general subject, object, or purpose, and all of the provisions of said act are germane to the general objects and purposes of the act. Said title does not embrace more than one subject and matters properly connected therewith.

The constitutionality of said act is raised. So far as that is concerned, this court held in *Pioneer Irrigation District v. Bradley*, 8 Idaho, 311, 68 Pac. 295, 101 Am. St. Rep. 201, that the district irrigation law then in force was constitutional, and the act under consideration is a re-enactment of that law, with slight alterations and amendments. The district irrigation law under consideration is substantially the same as the Wright law of California, with its amendments, and the act known as the "Confirmation Act," approved March 16, 1889 (St. 1889, p. 212, c. 178). In fact, the irrigation act under consideration was adopted from California, and prior to its adoption by this state the Supreme Court of California had repeatedly held that law to be constitutional. The Wright law has been attacked from nearly every possible point of view, and the Supreme Court of that state has without deviation held it constitutional. See *Kinney on Irrigation*, § 390. We hold that the district irrigation law of this state is not repugnant to any of the provisions of our state Constitution.

The act under consideration provides, inter alia, for the organization of irrigation districts, and for the adoption and carrying out

of plans for the irrigation of the land embraced within such districts. The first section of the act provides that, "whenever fifty or a majority of the holders of title, or evidences of title, to lands susceptible of one mode of irrigation from a common source and by the same system of works, desire to provide for the irrigation of the same, they may propose the organization of an irrigation district under the provisions of this act, and, when so organized such district shall have the powers conferred or that may be hereafter conferred by law, upon such irrigation districts." Said section further provides that such persons must hold title, or evidence of title, to at least one-fourth part of the total area of land in the proposed district which will be assessable for the purposes of the district under the operation of said act, and makes the equalized county assessment roll next preceding the presentation of a petition for the organization of such district, sufficient evidence of title for the purposes of said act. The second section provides that a petition shall be presented to the board of county commissioners, signed by the required number of holders of title, or evidence of title, of such proposed district, which petition shall set forth and particularly describe the proposed boundaries of the district, and shall pray that the same shall be organized under the provisions of said act, and shall state the time at which the same shall be presented to said board, and also that a map of the proposed district, showing certain things particularly mentioned in said section, shall accompany the petition. Said section also provides that on the presentation of such petition said board shall set a time for hearing the same, which time shall not be less than 30 nor more than 60 days from the date of such presentation, and that notice of the time of such meeting shall be published by said board at least 15 days before the time of such hearing in a newspaper published within the county in which such district is proposed to be organized, and that, if any portion of the district be within another county or counties, such notice shall be published in a newspaper published within each of said counties. Said section also provides the duties of the state engineer therein, and also provides that said board shall, after such hearing, if the requirements of said law have been complied with, divide such irrigation district in three divisions, and also provides for the election of one director in each of said districts; and it is further provided that said board of county commissioners shall then give notice of an election to be held in such proposed district for the purpose of determining whether or not the same shall be organized under the provisions of said act. Section 3 (page 154) relates to the conduct of such election, and also provides for the election of the district officers at such

elections and the duties of such officers. The question of the validity of the organization of said district is presented. Upon a review of the whole case, and of the acts and things done in the organization of said district, and of all steps necessary to be taken under the provisions of said act for the organization of an irrigation district, we conclude that each and every provision of said act has been substantially complied with in the organization of said district, and that it is a legally organized and existing district under the provisions of said act.

We will next consider several sections of said act bearing on the issuance of district bonds. Section 11 (page 160) of the act under consideration provides for proper surveys "to determine the cost of the works necessary for the irrigation of the lands of the district," and also provides that "the board of directors shall examine critically each tract or subdivision of land in said district, with a view of determining the benefits which will accrue to each of such tracts or subdivisions from the construction or purchase of such irrigation works, and that the cost of such work shall be apportioned or distributed over such tracts or subdivisions of land, in proportion of the benefits accruing thereto, and the amounts so apportioned or distributed to each of said tracts or subdivisions shall be and remain the basis for fixing the annual assessment levy against such tracts or subdivisions in carrying out the purpose of said act." The section further provides "that the proceedings of said board of directors in making such apportionment of costs, and the said list of such apportionment, shall be included with other features of the organization of such district which are subject to judicial examination and confirmation, as provided in sections 16, 17, 18, 19, and 20 of this act." Section 15 (page 163) authorizes said board "to formulate a general plan for the construction of the new canal system, or the acquisition of existing canal systems," and when those plans are fully formulated and the cost of construction or acquisition has been determined the directors are authorized to submit the question of bonding the district to the legal voters thereof for the purpose of securing necessary funds for the construction of such proposed work or the purchasing of such systems. Said section also authorizes the district to enter into a contract with the United States for the construction of the necessary works under the provisions of what is generally known as the "Reclamation Act of Congress," and the rules and regulations thereunder, and further provides that the district may issue bonds for a portion of the indebtedness authorized by such bond election, and enter into an obligation or contract with the United States to the extent of the remainder of such amount. After all jurisdictional steps have been taken and the bonds of the

district have been voted, it is provided by the first proviso of section 15 and sections 16, 17, 18, 19, and 20 as follows:

First proviso of section 15: "The board of directors of said irrigation district shall commence a special proceeding, in and by which the proceedings of said board and of said district providing for and authorizing the issue and sale of bonds of said district, whether said bonds or any of them have or have not been sold, may be judicially examined, approved and confirmed."

Section 16: "The board of directors of the irrigation district shall file in the district court of the county in which the lands of the district or some portion thereof are situated, a petition, praying in effect that the proceedings aforesaid may be examined, and approved and confirmed by the court. The petition shall state the facts showing the proceedings had for the sale and issue of said bonds, and shall state generally that the irrigation district was duly organized, and that the first board of directors was duly elected; but the petition need not state the facts showing such organization of the district or the election of the first board of directors."

Section 17: "The court or judge shall fix the time for hearing of said petition, and shall order the clerk of the court to give and publish a notice of the filing of said petition. The notice shall be given and published in the same manner, and for the same length of time that the notice of a special election provided for by said act, to determine whether the bonds of said district shall be issued, is required to be given and published. The notice shall state the time and place fixed for the hearing of the petition, and the prayer of the petition, and that any person interested in the organization of said district, or in the proceedings for the issue or sale of said bonds, may, on or before the day fixed for the hearing of said petition, demur to or answer said petition. The petition may be referred to and described in said notice of the petition of the board of directors of ——— Irrigation District (giving its name) praying that the proceedings for the issue and sale of the bonds of said district may be examined, approved, and confirmed by said court."

Section 18: "Any person interested in said district, or in the issue or sale of said bonds, may demur to or answer said petition. The provisions of the Code of Civil Procedure, respecting the demurrer and the answer to a verified complaint shall be applicable to a demurrer and answer to said petition. The person so demurring to or answering said petition shall be the defendants to said special proceedings, and the board of directors shall be plaintiff. Every material statement of the petition not specifically controverted by answer must, for the purpose of said special proceedings, be taken as true; and each person failing to answer the petition shall be deemed to admit as true all the material statements of the petition. The

rules of pleading and practice provided by the Code of Civil Procedure, which are not inconsistent with the provisions of this act, are applicable to the special proceedings herein provided for. A motion for a new trial must be made upon the minutes of the court. The order granting a new trial must specify the issues to be re-examined on such new trial, and the findings of the court upon the other issues shall not be affected by such order granting a new trial."

Section 19: "Upon the hearing of such special proceeding, the court shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm each and all of the proceedings for the organization of said district under the provisions of said act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order for the sale and the sale thereof. The court inquiring into the regularity, legality or correctness of said proceedings, must disregard any error, irregularity or omission, which does not affect the substantial rights of the parties to said special proceedings; and it may approve and confirm such proceedings in part, and disapprove or declare illegal or invalid, other and subsequent parts of the proceedings. The court shall find and determine whether the notice of the filing of said petition has been duly given and published for the time and in the manner in this act prescribed. The cost of the special proceedings may be allowed and apportioned between all the parties, in the discretion of the court."

Section 20: "An appeal from an order granting or refusing a new trial, or from the judgments, must be taken by the party aggrieved within thirty days after the entry of said order or said judgment."

Section 21 authorizes the board, after final judgment is entered in the proceeding authorized by the above-quoted sections, to "sell bonds from time to time in such quantities as may be necessary and most advantageous to raise money for the construction of said canal and works, the acquisition of said property and rights, and otherwise to fully carry out the objects and purposes of this act." That section also directs that the necessary notice must be given before the sale of any of said bonds, and provides what said notice shall contain, and that it shall be given by publication thereof at least 30 days in three newspapers published in the state of Idaho, etc. Said section also provides that the board may reject all bids, and, in case no bids are received at the time stated in the advertisement, it shall not again be necessary to advertise the sale of such bonds, but that they may be sold at any time until canceled, provided that they shall in no event be sold for less than the face value and accrued interest.

We find that all of the provisions of said

act, as conditions precedent to the submission of the question of bonding the district for the sum of \$583,505 to the legal voters thereof, have been complied with, and that, in the submission of the question of bonding said district to the legal voters thereof for the said sum of \$583,505, all of the provisions of said act in regard thereto have been substantially complied with, and that said bonds have been legally voted, and, when issued, will be valid bonds against said district.

The California confirmation act of 1889 was passed on and held valid in *Modesto Irrigation District v. Tregoe*, 88 Cal. 334, 26 Pac. 237. The court there said: "As the validity of the bonds when issued depends upon the regularity of the proceedings of the board, and upon the ratification of the proposition by a majority of the electors, it is matter of common knowledge that investors have been unwilling to take them at their proper value when all of the facts affecting their validity remain the subject of question and dispute. To meet this inconvenience, for the security of investors, and to enable irrigation districts to dispose of their bonds on advantageous terms, the supplemental act under which this proceeding was instituted was passed. It provides that the board of directors of any irrigation district may commence a special proceeding in and by which the proceedings of said board and the said district providing for and authorizing the issue and sale of the bonds of said district, whether said bonds, or any of them, have or have not been sold, may be judicially examined, approved, and confirmed." This decision contains an exhaustive examination and consideration of the questions involved under the original district irrigation act, practically all of which provisions have been incorporated in the Idaho statute. See, also, *Turlock Irrigation District v. Williams*, 76 Cal. 360, 18 Pac. 379; *Central Irrigation District v. De Lappe*, 79 Cal. 351, 21 Pac. 825; *Crall v. Poso Irrigation District*, 87 Cal. 140, 26 Pac. 797. In those decisions the Supreme Court of California has decided several of the questions presented in the case at bar.

The notice of hearing in this matter was served by posting and publication, as provided by the provisions of section 17 of said act, and it is contended by counsel for appellant that such constructive service is not sufficient, but that personal service on all defendants must be made. Our irrigation law in that regard is the same as the Wright law of California, and the Supreme Court of that state, in *Crall v. Board*, 87 Cal. 140, 26 Pac. 797, holds that such proceeding as that at bar is a proceeding in rem, and is special in its nature, for the purpose of determining the status of the district and its power to issue valid bonds. The court said: "In such proceedings, constructive service of process by publication and posting as prescribed by the Wright act is sufficient to give the court

jurisdiction of the subject matter and of the parties, and its judgment is valid and binding as against them and all the world upon all questions involved in the case until reversed on appeal or set aside by some direct proceeding instituted for that purpose." The service of the notice of hearing in this proceeding was sufficient to give the court jurisdiction.

It was suggested on the argument of this case that the act under consideration did not contemplate including towns or villages within an irrigation district. We cannot agree with that contention. If the lands within the towns or villages within such district will be benefited by irrigation under the system proposed, there is no ground upon which a court can say that an order including such lands in such district is void. This question is ably discussed in *Board of Directors v. Tregoe*, 88 Cal. 351, 26 Pac. 237.

It is contended by counsel for appellant that the judgment of the lower court cannot be sustained, because this proceeding was commenced before any bonds had been issued. There is nothing in that contention, for the reason that section 15 of said act provides that such proceedings may be commenced, whether such bonds, or any of them, have or have not been issued or sold. It was the evident purpose and intent of the Legislature that the validity of such bonds should be determined before they were actually issued, as it is well known that purchasers of bonds hesitate about purchasing them until after their validity and legality have been fully determined; and the bonds, no doubt, would bring a better price when it is known that there is no question in regard to their legality or validity. The Legislature knew that fact, and wisely provided that this proceeding could be brought before the issue and sale of the bonds, and their validity adjudicated. Under the provisions of section 19 of said act, the court is empowered, and is given jurisdiction upon the hearing of this proceeding, to examine and determine the legality and validity of, and approve and confirm, each and all of the proceedings for the organization of such district under the provisions of said act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of such bonds and order for the sale, and the sale thereof, and in inquiring into the regularity, legality, or correctness of such proceedings the court is directed to disregard any error, irregularity, or omission which does not affect the substantial rights of the parties to such proceedings; and it is further provided therein that the court shall find and determine whether the notice for the filing of the said petition has been duly given and published for the time and in the manner in said act prescribed. It is contended in this case that the court acquired no jurisdiction in the matter, because the notice of filing said petition had

not been duly given and published in the manner provided; but on an examination of the record before us we find that the law in regard thereto has been substantially complied with, and that the court had full and complete jurisdiction to determine all of the matters as to whether the notice of filing said petition had been duly given and published, and to determine each and all matters that the court is authorized to pass upon in this proceeding. We also find that the notice of filing said petition has been duly given and published for the time and in the manner prescribed in said act, and that the court had full and complete jurisdiction in said matter. The court acquired full and complete jurisdiction in this matter by due service of the process authorized by said act. We further find that the notice of the bond election was given as required by the provisions of said act.

It is contended by counsel for the appellant that the judgment herein adjudges that the bonding plan set forth in the findings of the trial court and submitted at the bond election by the irrigation district is a "general plan for the construction and acquisition of the necessary irrigation canals and works for carrying out the purposes for which said irrigation district was organized." Since it appears from the allegations of the petition and the findings of the court that the same was not a general plan, and only provided for the acquisition of the irrigation works for a part of the land of the district, it is contended that the district is not permitted to propose or adopt a plan that does not include all the land in the district. It appears that certain of the landowners in said irrigation district have executed contracts of waiver to the district. It appears that those who have executed such contracts are anticipating that they will procure water from government irrigation works proposed to be established, and it is further shown that none of the parties owning land within such district, and for whom no provisions have been made to secure water from the proposed district works, will be injured by way of taxation, since the law provides that the costs shall be apportioned to the tracts of land according to the benefits received, and it appears from the petition itself that no costs have been apportioned to the lands included in the contracts of waiver. It also appears that the district has acted strictly in pursuance of the request of the owner of the land, where the plans do not provide water for any particular tract. As the allegations of the petition are taken to be true in this case, and the purpose of the law is to secure water for the lands of the district according to some feasible method and to charge the benefit to those receiving the same, that object will be accomplished, although the district itself furnishes only a part of the water. No one appeared in said proceedings and complained of the plan

adopted, or challenged the allegations of the petitioners. But let us assume that some one who is injured had appeared at the hearing and raised the question, and it was admitted that such person had requested such district by contract of waiver to exclude his land from the general irrigation scheme proposed, and therein agreed to look to the government for his water, and had requested the district to make no provision for him, he certainly could not complain, as the district merely complied with his request. His request had been granted, and the district had not apportioned any part of the costs to his land, for the reason that he is not to receive any benefit for the money expended on behalf of the district. On the other hand, the landowner who looks to the district for water and to whom the costs have been apportioned cannot complain, for the simple reason that he is getting all the benefits resulting from the plans of the district, and is paying for just what he gets, and nothing more. He has no ground for insisting that any other man whose land receives no benefits shall be taxed for his benefit. He cannot be heard to say that some other person must secure water through the district plan, whether he chooses to or not. In the case of *Board of Directors v. Tregoe*, supra, the Supreme Court of California considers this same question. The California law differs from our statute in that it provides a method for the exclusion of lands from the district after the district has been organized. That district voted a bond issue, and subsequently, and before the bonds were sold, about 28,000 acres of land were excluded from the district; and the court there said: "The identity of the district was not destroyed by the exclusion of a part of its lands. Those who remained in the district will receive all the benefits of the expenditure of the proceeds of the bonds. They will not be compelled to pay anything for the benefits of others." In the case at bar, the lands of the district to which the proceeds of these bonds had been apportioned will receive all the benefits of such proceeds. They will not be compelled to pay anything for the benefit of those lands that contract with the government for a water supply and have signed a contract of waiver.

While it seems that the primary purpose of the irrigation law was to organize in one district only such lands as can properly share in the same system of works, we think, under the liberal construction that courts are commanded to place upon this law, that the owners of lands properly included in such district may waive their rights to obtain water from the general district plan and obtain water from another source and by means of a different plan, where it is clearly shown that no one residing within the district is in any manner injured or prejudiced thereby. It is provided in said act that the court in this proceeding

must disregard any error, irregularity, or omission which does not affect the substantial rights of the parties. The California act contains substantially the same provisions, and in *Central Irrigation District v. De Lappe*, 79 Cal. 351, 21 Pac. 825, the court holds that the rule that proceedings to divest a person of his property in invitum are to be strictly construed does not apply to proceedings for the formation of irrigation districts. Such provisions are to be liberally construed to carry out the purposes of the law. No part of the bond issue in this case can be apportioned to the land whose owner has agreed with the district, to waive all claims against the district for water and look to the general government therefor. Without the consent of the landowner he cannot be left out of the general plan adopted for procuring water for the district; but with his consent and the consent of the district he may be left out. The trial court found that the notice of filing said petition had been duly given and published for the time and in the manner prescribed in said act. We find, on an examination of the record, that the court was fully justified in making that finding.

From the record it clearly appears that each and every finding made by the trial court is fully supported by the record and must be sustained, and the judgment must be affirmed; and it is so ordered. Costs are awarded to respondent.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

FOUNTAIN v. LEWISTON NAT. BANK et al. (THOMPSON, Intervener).

(Supreme Court of Idaho. Nov. 25, 1905.)

1. TRUSTS — CONSTRUCTIVE TRUSTS — FIDUCIARY RELATIONS—EVIDENCE—SUFFICIENCY.

Where the plaintiff sought to establish a trust and fiduciary relation as having existed between her ancestor and one of the defendants, and the evidence shows that the dealings and business transactions which took place between the parties were at arm's length and in the ordinary course of dealing in business transactions of the character involved, and no special, peculiar, or extraordinary degree of trust or confidence appears to have been reposed by the one party in the other, and a fair market price has been paid, and the transaction has been made in the open and with the full knowledge of the nature thereof and all the facts surrounding the same, and the transaction appears upon its face to have been equitable and just, the finding of the court that no trust or fiduciary relation existed between the parties cannot be disturbed on appeal.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 108-111.]

2. ADVERSE POSSESSION — ENTRY—DEFECTIVE CONVEYANCE.

Where M. owed to the bank the principal and interest on an overdue mortgage previously executed, and on October 18, 1889, executed to the bank a warranty deed of conveyance of the premises covered by the mortgage for the stipulated consideration of the amount of principal

and interest then due, and on the same date took a written agreement and contract from the bank, giving M. the option until June 18, 1890, to repurchase the premises for the amount of principal and interest named as the consideration for the deed, and thereafter and on March 28, 1890, in consideration of the further sum of more than \$1,700, executed what purported to be a release of the agreement and contract for purchase of date October 18, 1889, and all the parties to these several transactions understood and believed that the conveyance and purported release amounted to a transfer of both the legal and equitable title from M. to the bank, and thereupon the bank and its successors in interest, with full knowledge and consent of M., entered into the sole, exclusive, and open possession of the premises, and continued such possession uninterrupted, and with the knowledge and consent of, and without objection from M., held, that the possession by the bank and its successors was adverse and hostile to any and all claim of title or possession by M. and her heirs, and that such adverse possession did, upon the lapse of the statutory period of five years, constitute a complete bar to an action by M.'s heirs to redeem the property.

3. SAME.

Where the full purchase price agreed upon was at the time paid, and the purchaser took possession under written instruments, which both the vendor and vendee at the time thought sufficient to pass both the legal and equitable title to the premises, the possession so taken and maintained will be held to have been adverse to the vendor, although it should thereafter appear that the writings under which the possession was taken did not amount to the transfer of title, but was in law only a mortgage.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 451-454.]

4. SAME—INTENT.

In such case, even though it should be conceded that the entry was not made under an absolute title, it is clear that it was done under color of title and without any purpose of ever restoring possession to the vendor, and is therefore sufficient to initiate an adverse possession.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 451-454.]

5. LIMITATION OF ACTIONS — ACTION TO REDEEM.

Under the facts of this case, held, that the defendants have maintained an adverse possession for about 10 years prior to the commencement of the plaintiff's action, and that the same constituted a bar to the prosecution of plaintiff's action, under the provisions of sections 4036 and 4037, Rev. St. 1887.

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

Action by Mary A. Fountain against the Lewiston National Bank and others, in which G. W. Thompson intervened. From an order for the intervener and defendants, plaintiff appeals. Affirmed.

The record brings to this court the second amended complaint of the plaintiff, and the cause of action therein stated is one to have a deed absolute on its face declared a mortgage, and praying for a decree permitting the plaintiff to redeem the lands and premises covered by such conveyance. The tract of land conveyed is 160 acres, which was at that time adjoining the city of Lewiston, and is now included within the corporate limits thereof. A detailed history of the

facts to be considered in the determination of this appeal is set out in the court's findings. Findings numbered 8 and 9 are as follows:

"(8) That on the 27th day of July, 1888, the said Mary McQueen executed and delivered to William F. Kettenbach, Sr., a mortgage, bearing date on that day, wherein and whereby she mortgaged to said William F. Kettenbach, Sr., the real property described in the said second amended complaint in this action, to secure the payment of the principal sum of \$1,250 and interest; that said mortgage was recorded July 28, 1888, in the recorder's office of Nez Perce county, state of Idaho, in Volume 55 of Mortgages, at page 103; that the indebtedness which said mortgage secured was evidenced by a promissory note of said Mary McQueen, payable to said William F. Kettenbach, Sr., or order, and the said promissory note was thereafter, by the said William F. Kettenbach, Sr., for value, assigned and delivered to the defendant the Lewiston National Bank, and the said bank was the owner and holder of said promissory note and said mortgage, on the 18th day of October, 1889, and no part of the same had then been paid.

"(9) That on the 18th day of October, 1889, the said Mary McQueen executed and delivered to said bank a warranty deed, wherein and whereby she conveyed and warranted to said Lewiston National Bank the real property described in the said complaint in this action. That the said deed was made in consideration of the sum of \$1,468.75, that being the amount due on that date upon said promissory note secured by mortgage as aforesaid, and for the consideration that the bank would execute with the said Mary McQueen a written agreement, hereinafter mentioned, for reconveyance of said property to said Mary McQueen. That the said deed was acknowledged by said Mary McQueen, and her acknowledgment thereto certified, so as to entitle the same to be recorded, and the same was recorded October 18, 1889, in the recorder's office of Nez Perce county, in Book 54 of Deeds, at page 535. That on the execution and delivery of said deed by the said Mary McQueen to the said bank the said bank received the same in full satisfaction and discharge of the indebtedness theretofore owing by the said Mary McQueen to the said bank, and said bank thereupon surrendered and delivered the said note of the said Mary McQueen to her, and took no other note in the place thereof, and caused an entry to be made in its registry of said note that the same had been paid, and caused said real estate incumbered by the said mortgage to be registered in its books as real estate, and stated therein that the same was acquired October 18, 1889. That on the said 18th day of October, 1889, the said Lewiston National Bank executed with the said Mary McQueen a certain instrument in writing, wherein and whereby the said bank promised and agreed

to convey the said real estate to the said Mary McQueen on the payment, by June 18, 1890, by her, of \$1,468.75, with interest thereon from October 18, 1889, until paid at the rate of 1½ per cent. per month, and all taxes and assessments of whatsoever nature which were or might become due upon the said real estate, and that she, while not in default of such payment, might have possession of the lands, and she, the said Mary McQueen, in and by said written agreement, promised and agreed to pay the said sum and interest on the 18th day of June, 1890, and the taxes and assessments as aforesaid, and the said last-mentioned instrument was duly acknowledged by the parties thereto, and their acknowledgments were duly certified thereon, so as to entitle the same to be recorded, and it was thereafter delivered to the said Mary McQueen, and was thereupon, at her request, filed for record and recorded in the recorder's office of Nez Perce county, state of Idaho, on the 18th day of October, 1889. That it was the agreed and expressed purpose of the parties to the said last-mentioned deed and contract to place the title to the real estate therein described in the said bank in such a way as to save the necessity of a foreclosure suit for the purpose of vesting the title in said bank, in case Mary McQueen should not make the payments stipulated in said contract; that the consideration expressed in said deed, coupled with the privilege given by the said bank to the said Mary McQueen in the said contract, represented at that date the reasonable value of the real estate therein described. That thereafter, and on the 14th day of March, 1890, the said Mary McQueen executed what is commonly known as a 'Bond for a Deed,' wherein and whereby she obligated herself unto said William F. Kettenbach, Sr., to make, execute, and deliver unto him a good and sufficient conveyance, with the usual covenants of warranty, of the land described in the said mortgage and said warranty deed dated October 18, 1889, in consideration of the sum of \$3,300. At the time of the execution of said bond for deed it was agreed and understood by the parties that the consideration of \$3,300 therein named consisted of the amount specified in the bond for deed aforesaid, dated October 18, 1889, with interest thereon until the time of the payment of said \$3,300, less taxes on the property described in said bond for deed which the bank had paid since the 18th of October, 1889, and the balance of said \$3,300, whatever it should be, to be paid in cash, and that the said Mary McQueen should execute and deliver her deed as called for in said bond for deed dated March 14, 1890, on payment to her in cash of the balance of the sum of \$3,300 over and above the amount named in said bond for deed dated October 18, 1889, with interest, and less the taxes which the bank had paid. That said bond for deed, dated March 14, 1890, was secured in the interest of the

Lewiston National Bank for the purpose of procuring a release of Mary McQueen's right to purchase the said land under the bond for deed dated March 18, 1889. That said William F. Kettenbach, Sr., indorsed on the back of said bond for deed, dated March 14, 1890, the following instructions to Frank W. Kettenbach, to wit: "The bank has a deed; just canceled the old bond; that will make it all right." That on or about the 14th day of March, 1890, and prior to the conveyance hereinafter mentioned, from the Lewiston National Bank to C. J. Smith, the said bank agreed to sell and convey the real estate described in said deed of October 18, 1889, and other real estate, to William F. Kettenbach, Sr., for a consideration which was to equal the amount that the said lands had cost the said bank. That thereafter, and prior to the time the said Lewiston National Bank conveyed the said lands to the said William F. Kettenbach, Sr., pursuant to the said agreement of purchase last mentioned, the said William F. Kettenbach, Sr., made sale of the said lands and other lands to the defendant C. J. Smith, and the transactions were closed at the request of William F. Kettenbach, Sr., by a conveyance from the said Lewiston National Bank direct to the said C. J. Smith, without any conveyance having been made by the said bank to the said William F. Kettenbach, Sr. That said conveyance to said defendant C. J. Smith by the Lewiston National Bank bore date of March 24, 1890, and was executed by the said bank by said William F. Kettenbach, Sr., its cashier, at Portland, in the state of Oregon, and was forwarded by the said William F. Kettenbach, Sr., to the Lewiston National Bank at Lewiston, Idaho, where the same was delivered by the said bank by filing the same for record in the recorder's office of Nez Perce county, state of Idaho, on April 3d, 1890, when the same was duly recorded in said recorder's office in a volume kept therein for the recording of deeds. That on the 29th day of March and the 1st day of April, 1890, the said Mary McQueen was released by said bank from all liability, if any, to it, and was paid, dated March 14, 1890, the difference between the principal sum named in said bond for deed pursuant to said bond for a deed, dated October 18, 1889, and interest thereon at 1¼ per cent. per month from that date until the dates of such payment, less the taxes the bank had paid on said lands and the sum of \$3,300, which difference amounted to about the sum of \$1,712.05, which was paid to her in cash, and in consideration thereof she delivered to the said Lewiston National Bank the said bond for deed dated October 18, 1889, with the following indorsement written and signed thereon by her, and sworn to by her before the probate judge of said Nez Perce county, to wit:

"For value received, I hereby release the within obligation, and direct that the county

recorder of Nez Perce county release the same on the records. Mary McQueen.

"Territory of Idaho, County of Nez Perce—ss: Mary McQueen, being first duly sworn, deposes and says that she is a party to the within agreement, and that the above release was made for the purpose therein mentioned. Mary McQueen.

"Subscribed and sworn to before me this 28th day of March, 1890. W. M. Rice, Probate Judge."

"That thereupon the said bond for deed last mentioned, together with the indorsement of release and verification thereof, as aforesaid, was filed for record in the recorder's office of Nez Perce county, state of Idaho, on the 29th day of March, 1890, and the said indorsement of release and affidavit were recorded in Book B of Miscellaneous Records in said office, at page 15, on the margin of the original record of said contract. That said Mary McQueen received and was paid the full consideration called for in said bond for deed dated March 14, 1890, and the consideration so received by her for the real estate therein described represented the full value of the said lands at that time, and the full market value thereof. That it was the intention of the said Mary McQueen, at the time she indorsed said release on said bond for deed of October 18, 1889, and swore to the same before the probate judge as aforesaid, and delivered the same, to cause the absolute title to the real estate described in said bond for deed to be vested in the Lewiston National Bank, free and clear of any title, claim, interest, or demand on her party, and the said bank and the said William F. Kettenbach, Sr., believed that such was the effect of the transaction, and the said Mary McQueen believed she had caused the said lands to be conveyed absolutely to the said bank. That during the month of March, 1890, said William F. Kettenbach, Sr., was the cashier of said bank, and the defendant Frank W. Kettenbach was the assistant cashier of said bank, and in the transactions concerning the said lands the said Frank W. Kettenbach represented the said bank and the said William F. Kettenbach, Sr. That said deed to C. J. Smith was a warranty deed, and was made to him in terms absolute upon its face, but in fact to be held by him in trust for the use and benefit of himself and William F. Kettenbach, Sr., Jonathan Bourne, Jr., S. L. Darrin, C. E. S. Wood, K. A. G. McKinzie, and others who had contributed to the payment of the purchase price of said lands, which was paid as the consideration of the deed that was made to said C. J. Smith. That the defendant Frank W. Kettenbach and C. J. Smith were not, nor were either of them, members of the association or syndicate, or one of the persons for whose use said C. J. Smith held the title to said lands when he acquired the same in 1890."

The court further finds: "That very soon after the 29th day of March, 1890, and pursuant to the purchase of said lands made

from the said Mary McQueen, and payment therefor made her as aforesaid, the said C. J. Smith, with her knowledge and consent, took possession of said lands and the said C. J. Smith has thence hitherto held the sole, notorious, actual, adverse, exclusive, peaceable, and hostile possession of said lands, and paid all taxes of every nature which have been levied or assessed thereon, before the delinquency thereof, and changed the nature of the improvements on said lands, removed fences surrounding the same therefrom and placed other structures thereon, and since on or about November, 1896, leased the said lands to J. D. C. Thiessen, who occupied and possessed the same under such lease from time to time, until the commencement of this action, with the knowledge and acquiescence of the said Mary McQueen at all times until her death, and the knowledge and acquiescence of the plaintiff in this action. That the said J. D. C. Thiessen at all of the said times used said lands for pasturage, keeping thereon many thousand head of sheep, shearing them and feeding them, and erecting thereon corrals, feeding troughs, sheds for the keeping of feed, and in which were stored many tons of wool and feed at different seasons of the year. * * * The court also finds that the total sum paid to Mary McQueen for this tract of land was the full and fair value of the property at the time of the transaction.

The appellant, Mary A. Fountain, is the sole surviving heir of Mary McQueen. Judgment was rendered and entered in favor of the defendants and against the plaintiff. Plaintiff appealed from the judgment, and from an order denying her motion for a new trial. Affirmed.

Bender & Lingenfelter, for appellant. James E. Babb, for respondent bank and others. Ben F. Tweedy and F. D. Culver, for respondent Thompson.

AILSHIE, J. (after making the foregoing statement). After an extended and laborious examination of the record, 350 pages of briefs, and scores of authorities, we are convinced that, however the other questions raised might be resolved, still the appellant could not recover, on account of the bar of the statute of limitations. It is quite clearly established that William F. Kettenbach, Sr., did not at any time during this transaction occupy or assume a fiduciary relation toward Mary McQueen. The dealings and business transactions which took place between them were at arm's length in the ordinary course of dealing in business transactions of the character involved, and no special, peculiar, or extraordinary degree of trust or confidence appears to have been reposed in Kettenbach by Mary McQueen. She was a woman of ripe years, large experience, wide observation, and more than average business capacity and intelligence. All of her contracts and agreements with Kettenbach and the

bank were reduced to writing and placed of record, and it clearly appears that she was dealt with fairly, and was at the time satisfied with the outcome of the transaction. The evidence abundantly supports the court's finding that no trust or fiduciary relation existed between Kettenbach and Mary McQueen. In such a case the finding of the trial court would not be disturbed unless it amounted to a substantial departure from the facts clearly established by the evidence. *Morrow v. Matthew* (Idaho) 79 Pac. 201; *Stuart v. Hauser* (Idaho majority and dissenting opinions) 72 Pac. 719; *Mayhew v. Burke*, 3 Idaho, 333, 29 Pac. 106; *Deeds v. Stephens* (Idaho) 79 Pac. 79. Counsel for appellant cite and quote from *Smitz v. Leopold* (Minn.) 53 N. W. 719, *King v. Remington* (Minn.) 29 N. W. 352, *Kirby v. Lakeshore R. R.*, 120 U. S. 136, 7 Sup. Ct. 430, 30 L. Ed. 569, and *Lant v. Manley*, 75 Fed. 635, 21 C. C. A. 457, in support of the contention that a trust and fiduciary relation existed between Kettenbach and Mary McQueen. We think these authorities correctly state the principle of law, but, as we read the record before us, the facts of this case do not bring it within the principle announced by these authorities.

Passing now to a consideration of the bar of the statute, we find that the lands over which this litigation is pending were unoccupied, semiarid lands adjoining the city of Lewiston. The lands were in this condition on March 28, 1890, when Mary McQueen indorsed her release on the agreement of October 18, 1889. By the agreement of October 18, 1889, it was provided "that the party of the second part [Mary McQueen] is to have immediate possession of the said premises." This seems to have been a recognition at the time and among the parties thereto of the bank's right of possession in the absence of this stipulation. No further specific acts of control or ownership, other than payments of taxes, appear to have been exercised by either party until 1893. In the latter year C. J. Smith, the purchaser from Kettenbach and the bank, let this land along with a large tract of adjoining lands to J. D. C. Thiessen. Thiessen used and occupied the land, from that time till the trial of the cause, for a sheep camp and grazing purposes. He occupied and used the land during the winter and spring months each year, and kept large quantities of wool and feed for his sheep stored there. Mary McQueen, and also the plaintiff, lived near the land and had actual notice that it was being occupied and used, and not only this, but Thiessen caused all other stock to be excluded from and kept off of the premises. This occupation and possession continued for 10 years undisturbed, unquestioned, uninterrupted, and exclusive. The appellant does not controvert the fact that respondents were, during this period of time, in possession of the premises. Appellant does argue

with great earnestness that the possession was not adverse, but was, on the other hand, subordinate to and agreeable with the title and possession of Mary McQueen. It is contended that respondents could not claim title through and by virtue of the transactions with and transfer from the grantor, and at the same time hold possession thereunder adversely to the title and interest of such grantor. Upon this contention the whole question rests.

In support of the contention that respondent's possession was agreeable and pursuant to the title and possession of Mary McQueen, counsel cite: *Farish v. Coon*, 40 Cal. 33; *Kerns v. McKean* (Cal.) 4 Pac. 404; *Kerns v. Dean* (Cal.) 19 Pac. 817; *Southern Cal. Ry. Co. v. Slauson* (Cal.) 68 Pac. 106; *Davis v. Davanney*, 7 Idaho, 742, 65 Pac. 500; *Kirk v. Smith*, 9 Wheat. 288, 6 L. Ed. 81; *Alexander v. Wheeler*, 69 Ala. 341; *Allen v. Smith*, 6 Blackf. 528; *Armstrong v. Risteau's Lessee*, 5 Md. 279, 59 Am. Dec. 115; *Clarke v. McClure*, 10 Grat. 310; *Potts v. Coleman*, 67 Ala. 223; and 4 *Rose's Notes* on U. S. Reports, p. 505. In *Farish v. Coon* the party claiming under adverse possession had located school land warrants on tide lands which belonged to the state of California. Under the statute, however, school land warrants could only be located on land belonging to the United States, and it was held that a location on any other lands was null and void as against the true owner, and that it was impossible for the locator to acquire adverse possession, for the reason that he would be under the necessity of inflating and maintaining such possession by an act or acts of trespass. It was also held in that case that such a location did not amount to a color of title. In *Kerns v. McKean* "by the terms of a written contract for the sale of land A. [from whom plaintiff claimed] was authorized, on default in the payment of principal or interest by B. [under whom defendant claimed], to declare the contract forfeited and ended, by depositing a written notice to that effect in the county recorder's office, and immediately thereupon he should be at liberty and have the right to re-enter into free and full possession of the premises, and be restored to his former estate therein; and, said default occurring, A. did file the notice as allowed by the agreement," and it was held that A. thereby became entitled to the right of possession of the land and the recovery thereof, and that B., while holding under such executory contract, was not in adverse possession of the premises. *Kerns v. Dean* involves the same state of facts passed upon in *Kerns v. McKean*, and the court again said: "Defendant having entered into possession under contract with the vendor, his holding cannot be adverse, unless its hostility has been manifested by unequivocal acts brought expressly, or by legal

implication, to the vendor's knowledge." In *Southern California R. Co. v. Slauson* both the facts and conclusion of the court are sufficiently stated in the third paragraph of the syllabus to give the view of the court upon the possession or adverse possession as there discussed. It is said: "A railroad company and a landowner agreed that, if the former would lay its tracks over the land and put in a station, the owner would make a deed of the right of way; and thereafter the road was built and operated, but no station was built, nor did trains stop on the land. Held that, the railroad having gone into possession under permission and in consonance with the owner's title, which it was not to have until the performance of conditions which had not been performed, the possession of the railroad was not adverse to the owner." In *Davis v. Davanney* the claim of adverse possession was predicated upon a possession of some six years, held under a contract to purchase the premises, which consisted of a dam and irrigation ditch and land lying under the ditch. This court held in that case that a title by adverse possession or prescription could not be obtained by permissive use and occupation.

An examination of the other cases cited by appellant discloses that the same principle runs through those cases that has been uniformly maintained in the cases just reviewed. The principle upheld in all these cases—and I take it to be a well-established principle of law—is that wherever the claimant enters into possession under an agreement or contract, whereby in any event, or upon the happening of any contingency, he may be under the duty or necessity of restoring possession to the grantor or true owner of the premises, then and in that case his possession is the possession of his grantor or the true owner, and cannot be considered as adverse to the possession of him under and from whom he received his possession. The citation from *Rose's Notes* is an extract from *Zeller's Lessee v. Eckert*, 4 How. 289, 11 L. Ed. 979, where it is said: "When one enters in privity with the owner, the statute does not begin to run until there is a clear, positive, open disavowal of his title brought home to his knowledge." This is undoubtedly a correct statement of the law, but there seems to have been more or less confusion among the courts as to just when a person enters or holds privity with a grantor or adversely to him. It is clear, however, upon principle, that one who purchases a tract of land and pays the purchase price and enters into the possession thereof, believing he has title whether he receives a good deed of conveyance, an imperfect one, or no deed at all, nevertheless enters into a possession adversely to the vendor and all the rest of the world; and, while the entry is made with the permission of the owner, it is from that moment adverse to him, and an adverse and

hostile possession is the real intent of the party to such a contract. A phase of this character of entry and possession is considered in *Merryman v. Bourne*, 76 U. S. 592, 19 L. Ed. 683; *Bybee v. Oregon & Cal. R. Co.* 139 U. S. 663, 11 Sup. Ct. 641, 35 L. Ed. 309; *O. S. L. R. Co. v. Quigley* (Idaho) 80 Pac. 401.

The case at bar differs somewhat in its facts and circumstances from any of the cases cited. Here, whatever a court might hold as to the legal effect of the deed and agreement of October 18, 1889, and the release of March 28, 1890, the fact remains that from and after the latter date all the parties to these transactions understood and believed that both the legal and equitable title to this property had passed from the grantor, Mary McQueen, to the Lewiston National Bank, and they thereafter dealt with reference to the property on that theory. The full purchase price as agreed upon was paid by the bank and received by the vendor, and the bank and its successor received and maintained the peaceable, open, and uninterrupted possession continuously thereafter until the commencement of this action. This possession was surrendered by the vendor, and taken up by the vendee with the knowledge that the full purchase price had been paid, and under the belief that a good title had passed. Under this state of facts is the subsequent possession of the vendee adverse to the vendor? It must be admitted as settled law that the possession of a mortgagee, acquired by reason of being mortgagee, is the possession of the mortgagor, and cannot become adverse to him. 1 Cyc. 1071, and authorities cited. It has also been quite generally held that an entry under color of title is sufficient on which to predicate adverse possession. 1 Cyc. 1082-1085, and authorities cited.

The question here, then, is reduced to a somewhat simpler form, viz.: Did the bank or its successor in interest enter and hold possession as mortgagee, or as purchaser with title, or under color of title? There is no doubt but that all the parties thought the bank was taking possession as purchaser with title. If, then, what they supposed was title should prove to be only color of title, with reason, and not without authority, we must say the possession so taken and maintained was adverse and hostile to the appellant and her ancestor, Mary McQueen. The United States Circuit Court of Appeals for the Eighth Circuit discussed this identical principle in *Schlawig v. Purslow*, 8 C. C. A. 315, 59 Fed. 848, a case where some of the facts were very similar to the case at bar, and in the opinion by Judge Thayer it is said: "It follows from this view of the case that, when Schlawig and wife surrendered the premises to Purslow about December 1, 1878, it was understood by both parties that he went into possession under a claim of title as owner of the fee, and

not merely as an incumbrancer or mortgagee. All of Purslow's subsequent acts, as well as the conduct of his grantees, are consistent with this view, and wholly inconsistent with the theory that he merely took possession as mortgagee under an unsatisfied mortgage. * * * It is insisted, however, if the conveyance of December 1, 1877, was in fact and in legal effect a mortgage, that by taking possession under the same Purslow became subject to all of the liabilities and disabilities of a mortgagee in possession, and that neither he nor those claiming under him could assume a different relation with respect to the mortgaged premises. In other words, it is broadly contended that the possession taken by the grantee under the conveyance of December 1, 1877, could not ripen into a title under the statute of limitations, because, that instrument being merely a mortgage, such possession was not adverse to the mortgagor. We do not dispute the general proposition that, where one takes possession of lands under a written instrument, the nature of that possession is ordinarily determined by the character of the instrument, nor the further proposition that possession by a mortgagee of the mortgaged premises is usually not adverse, but consistent with the rights of the mortgagor. * * * These concessions, however, are of no benefit to the appellant on the state of facts disclosed by the present record. The distinguishing feature of this case is that the parties did not regard the conveyance of December 1, 1877, as a mortgage, and Purslow did not enter into possession as mortgagee, but as the rightful owner of the fee, of which fact Schlawig must have been well aware. It is doubtful, to say the least, whether, from the face of that conveyance, it should be construed as a mortgage, or as a deed which secured the grantor the right to repurchase the land at a fixed price within a specified time. That the parties did not intend it to operate as a mortgage is made manifest, we think, by the oral testimony, by the circumstances which attended its execution, and by the subsequent conduct of both of the parties thereto. Under the conveyance Purslow took possession on December 1, 1878, and for more than 10 years thereafter he and his grantees exercised a dominion and control over the property which would have convinced any one who was not wilfully unconscious of the significance of their acts that they claimed to be the rightful owners of the property, and that they were holding it discharged from the lien of the alleged mortgage. In view of these facts we are constrained to decide that the plea of the statute of limitations was fully sustained by the proof, and that the bill was properly dismissed on that ground. In our judgment, the record discloses more than 10 years' adverse possession of the premises in controversy under an open, notorious, and con-

tinuous claim of ownership, which is sufficient, under the Iowa statute, to bar the present suit." 1 Cyc. 1094.

Counsel for appellant call our attention to sections 4062 and 4039, Rev. St. 1887, and insist that those provisions of the statute support the contention that there could be no adverse possession by the defendants in this case. The sections cited are as follows:

"Sec. 4062. An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor of those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage."

"Sec. 4039. In every action for the recovery of real property, or the possession thereof, a person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by another person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action."

The provisions of these sections applicable to appellant's contention amount to this: That the mortgagee, as such, cannot initiate an adverse possession until after breach of some condition of the mortgage, and that a person seeking to redeem must commence his action before the full period of five years' adverse possession is completed. Under section 4039, a person seeking the recovery of real property, who establishes his legal title thereto, may thereupon rest on the presumption which the law raises, that he who holds the legal title has been, during the same time, in the possession of the premises, either in person or through his tenant or agent. What we have said above is, we think, in strict accord and harmony with these provisions of the statute. The defendants upon their trial, by legal and competent evidence, overcame the presumption of law which section 4039 gives to a plaintiff in such case. The foregoing sections must also be read in the light of and in harmony with the provisions of sections 4036 and 4037, which are as follows:

"Sec. 4036. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seised or possessed of the property in question within five years before the commencement of the action; and this section includes possessory rights to lands and mining claims.

"Sec. 4037. No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual unless it appears that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person was seised or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made."

Plaintiff's cause of action was clearly and undoubtedly barred by the provisions of the two latter sections. The bank and its successors had been in the actual, exclusive, open, and adverse possession of the premises for a period of about 10 years immediately preceding the commencement of this action, and this possession, the nature thereof, and the claim of right under which it was initiated and maintained, was within the actual, personal knowledge of the plaintiff and her ancestor, Mary McQueen. This action had therefore been barred for a period of about five years at the time it was instituted. *Ryan v. Woodin* (Idaho) 75 Pac. 261.

The conclusion we have reached as to the application of the bar of the statute of limitation makes it wholly unnecessary and unimportant for us to consider the other questions raised in the case, and especially the question as to whether or not the transactions narrated amounted to a transfer of title or remained in law a mortgage only. In view, however, of the great amount of labor and research that the respective counsel have evidently given this case, and the exhaustive briefs filed on the various branches thereof, we have examined very carefully into the merits of the case with a view to determining with whom the equities of the case rest. We are of the unanimous opinion that the equities of this case rest with the respondents. The bank evidently paid a good price for the land at the time of the transaction—as much as any other like premises similarly situated could be sold for at the time. The transaction was fair and open, and the grantor was satisfied with the terms of the sale and the price received. After many years of fluctuation in values and uncertainty as to the growth of the city, and the possibilities of this land becoming valuable as city property, and large expenditures having been incurred to make the property salable, it would be both inequitable and unjust at this late date, after all the parties to the transactions and all the witnesses but one are dead, to enforce a redemption of the property.

The judgment is affirmed, with costs, in favor of the respondents.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

SHERER v. RUBEDREW.

(Supreme Court of Idaho. Dec. 5, 1905.)

1. STATUTE OF FRAUDS — ASSUMPTION OF DEBT OF ANOTHER.

Where D. works for R., and on settlement therefor R. agrees to pay C. and S., to whom D. is indebted, the debt thus assumed is the debt of R., and is not within the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 27-29.]

2. NOVATION—SUBSTITUTION OF NEW DEBTOR.

In such case, the indebtedness of R. to D. is liquidated by a payment to C. and S., and the effect of the agreement is a substitution of a different payee.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Novation, § 5.]

3. SAME—EVIDENCE—SUFFICIENCY.

Evidence examined, and held sufficient to establish a novation and sustain the verdict and judgment.

(Syllabus by the Court.)

Appeal from District Court, Latah County; E. C. Steele, Judge.

Action by J. W. Sherer against George A. Rubedew. From a judgment for plaintiff, defendant appeals. Affirmed.

Stewart S. Denning, for appellant. George G. Pickett, for respondent.

AILSHIE, J. In this case judgment was entered for plaintiff, and defendant appealed therefrom, and from an order denying his motion for a new trial.

The appellant contends that the complaint does not state facts sufficient to constitute a cause of action, that the evidence was not sufficient to justify the verdict and judgment, and that certain of the court's instructions were erroneous. The complaint alleges that, during the year 1903, Collins & Sherer sold and delivered to one Fred L. Dahlgren paints and oils, for which there was a balance of \$60.03 due, no part of which had been paid, and that Dahlgren used the paints and oils so furnished in painting the dwelling house of the defendant Rubedew in Moscow, Idaho. It is further alleged that Dahlgren had entered into a contract with the defendant by which he agreed to furnish the paints and oils and paint defendant's dwelling house for the sum of \$100; that Dahlgren proceeded to, and did, perform the work agreed upon; that the defendant paid him the sum of \$40 on the contract price; and that at the time of making such payment the defendant promised and agreed with Dahlgren to pay the remaining sum of \$60 to Collins & Sherer for the paints and oils for which Dahlgren was indebted. Plaintiff alleges that Collins & Sherer assigned the claim to the plaintiff, and that thereafter the defendant personally acknowledged to the plaintiff that he had retained the sum of \$60 due Dahlgren

for the paints and oils, and thereupon promised and agreed to pay plaintiff such sum. We think the complaint clearly states a cause of action against the defendant.

Defendant answered this complaint by denying the principal allegations thereof. At the trial, however, the case resolved itself into practically only one issue. Rubedew admitted that he entered into the contract with Dahlgren whereby Dahlgren was to furnish the material and paint the house for \$100, and that he thereafter paid Dahlgren the sum of \$40 on the contract. He also admits that he agreed with the plaintiff that he would pay him \$60 as soon as the painting contract was completed. It seems that one door lacked a coat of varnish and a small place on one side of the house was lacking a coat of paint. Defendant claims that under the contract no part of the contract price was payable until the work was completed, and that he was withholding payment until the completion of the contract. Plaintiff produced Dahlgren as a witness, and he admitted that there was a small amount of work to be done on the contract; but he also testified that he had on different occasions offered to complete the work, and at one time was on his way to defendant's house to complete the work, and that defendant repeatedly refused to allow him to go upon defendant's premises or perform any work on the house, and that on the occasion when Dahlgren had started to complete the work Rubedew told him if he came on the place he would kick him off, and this latter statement is practically admitted by Rubedew. He, however, justifies the statement by saying that Dahlgren was intoxicated, and for that reason he would not have him on his place. The case reduced itself on the trial to the issue as to whether or not the defendant had prevented Dahlgren from completing the contract. On this phase of the case the evidence was conflicting. The court correctly instructed the jury as to the law of the case, and the jury found against the defendant on all the issues. There was sufficient evidence to justify them in so doing.

This is a case where, the defendant being indebted to Dahlgren and Dahlgren indebted to Collins & Sherer, defendant, at Dahlgren's request, promised and agreed to pay his (defendant's) debt to Collins & Sherer. Such an agreement is not within the statute of frauds, and is not required to be in writing. Section 6010, Rev. St. 1887; *Casey v. Miller*, 3 Idaho (Hash.) 507, 32 Pac. 195; *Smith v. Caldwell*, 6 Idaho, 436, 55 Pac. 1065.

Judgment is affirmed, with costs in favor of respondent.

SULLIVAN, J., concurs.

PACIFIC STATES SAVINGS, LOAN & BUILDING CO. v. DUBOIS et al.

(Supreme Court of Idaho, Aug. 14, 1905. On Rehearing, Dec. 23, 1905.)

1. MECHANICS' LIENS — MORTGAGE — PRIORITIES—JUDGMENT.

In adjusting the rights of lienholders, under the provisions of section 5 and other sections of an act to secure liens for mechanics and others, approved February 7, 1899 (Sess. Laws 1899, p. 148), where the erection or construction of building was not let to any one, but the owner employed men to furnish rock and do the rockwork, and employed others to furnish the brick, and others to lay them, others to furnish other materials, others to furnish and do the plumbing, and others to do the carpenter work, etc., the court, in the judgment, must declare the rank or class of liens in accordance with the provisions of section 11 (page 149) of said act, and, where a mortgage lien attached prior to the time that either or any of such lien claimants commenced work or commenced to furnish material, the lien of such mortgage is prior to the liens of the last-mentioned laborers or materialmen.

2. SAME.

The provisions of section 11 of said act (Laws 1899, p. 149), apply to cases in which there are no intervening mortgage liens. Where mortgage liens are involved in the foreclosure of mechanics' and materialmen's liens, the time or the date when the building was commenced, or the laborer began work, or the materialmen commenced to furnish material, must be taken into consideration in determining the priority of such liens over the mortgage liens.

Ailshie, J., dissenting.

(Syllabus by the Court.)

Appeal from District Court, Ada County; Geo. H. Stewart, Judge.

Action by A. J. Turley and others against J. K. Dubois. From the judgment, the Pacific States Savings, Loan & Building Company appeals. Reversed.

Alfred A. Fraser, for appellant. Quarles & Pritchard, Wyman & Wyman, Johnson & Johnson, Davidson & Stoutemeyer, Gustave Kroeger, J. T. Morgan, R. L. Blewitt, Henry Johnson, Neal & Kinyon, Charles F. Koelsch, Silas W. Moody, Hawley, Puckett & Hawley, and Hugh E. McElroy, for respondents.

SULLIVAN, J. This action was commenced by A. J. Turley and others to foreclose certain mechanics' and laborers' liens against the property of the respondent Dubois. The appellant corporation, among a number of others, was made a party defendant. During the progress of the case the court made an order changing the parties in said action, so that thereafter all further proceedings in said action were entitled "Pacific States Savings, Loan & Building Company, Appellant, v. Jesse K. Dubois," and certain other parties, as defendants. The appellant company was the owner and holder of two mortgages upon the property involved in this case—one for the sum of \$20,000, which was filed for record in the proper recorder's office on the 23d day of January, 1904; and the other for \$10,000, which was filed for record in the proper re-

recorder's office on the 18th day of June, 1904, which mortgages were executed by said Dubois and his wife to the said appellant corporation to secure the payment of said sums. The court, after hearing the evidence, held as a matter of law that the liens of all laborers, materialmen or contractors relate back to the time of the commencement of the building, irrespective of the question as to whether the work was done, the material furnished, or the contract entered into prior or subsequent to the time that the mortgages of the appellant corporation were filed for record. From the judgment of the court declaring that said liens were prior to the mortgage liens of the appellant, this appeal was taken.

In this case the contract to erect said building was not let to any one, but the owner employed men to furnish and do the rockwork, employed others to furnish the brick, others to furnish other material, others to furnish and do the plumbing, etc., and others to do the carpenter work, etc. Several errors are assigned, some of which go to the sufficiency of certain of the liens filed, but the main question is whether or not the claim of liens of persons performing labor upon or furnishing materials for the construction of the building on the premises referred to in the complaint relates in each case back to the time of the commencement of said building, or whether the lien attaches in favor of such parties from the date on which the labor was commenced to be performed, or the material was commenced to be furnished. It is conceded that if all of said liens relate back to the time of the commencement of the building, irrespective of the time when the labor was commenced to be performed or the material was commenced to be furnished, then the judgment should be affirmed as to that question, and if not, said judgment should be reversed. That question involves a construction of the statutes of this state relating to mechanics' liens, and particularly involves the construction of section 5 of the mechanic's lien law, found at page 148 of the Session Laws of 1899, which section is as follows: "The liens provided for in this chapter are preferred to any lien, mortgage, or other incumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage or other incumbrance of which the lienholder had no notice, and was unrecorded at the time the building, improvement or structure was commenced, work done, or materials were commenced to be furnished."

Counsel for respondents contend that under the provisions of said act the lien of laborers and materialmen in all cases, regardless of when they performed the labor or furnished the material, attached from the time of the commencement of the erection of the building, regardless of whether the structure was

erected under an original contractor or by the owner of the premises; and it is conceded by counsel for appellant that if all of said liens relate back to the time of the commencement of the building, irrespective of the time when the labor was commenced to be performed or the material began to be furnished, the judgment should be affirmed on that question. It is conceded that the work done by some of the lien claimants, and the material furnished by some of the materialmen, was commenced to be done and furnished subsequent to the recording of the mortgages above referred to; and it is contended by appellant that under the provisions of said section 5 above quoted all such liens are subsequent to the mortgages. We will proceed and analyze the first half of section 5, and divide it into sentences, which sentences we think will clearly show the intent of the Legislature in enacting it: (1) "The liens provided for in this chapter are preferred to any liens, mortgages or other incumbrances which may have attached subsequent to the time when the building, improvement or structure was commenced." This would include all liens that are entitled to date from the commencement of the construction of a building, improvement, or structure of any kind. All of said liens are referred to any mortgage given subsequent to the commencement of such building, etc. (2) "The liens provided for in this chapter are preferred to any lien, mortgage or other incumbrance which may have attached subsequent to the time when the work was commenced to be done." That provision prefers all liens for work or labor, which work or labor was begun prior to the filing of a mortgage, but begun after the commencement of the erection of the building, etc., by a person or persons not theretofore connected with the construction of the building, and entitled to a separate and distinct lien from those who commenced the building. (3) "The liens provided for in this chapter are preferred to any lien, mortgage or other incumbrance which may have attached subsequent to the time when the materials were commenced to be furnished." That provision prefers all liens for material, which material was commenced to be furnished prior to the recording of a mortgage, and which was commenced to be furnished some time after the commencement of the building, etc. Separating said section into distinct sentences as above, it seems clear to me that, when mortgages and other liens are involved in the foreclosure of mechanics' and materialmen's liens, the time or date when the building was commenced, or the laborer begun to work, or the materialman commenced to furnish the material, must be taken into consideration in determining the priority of such liens over such mortgage lien. All liens for labor commenced and materials commenced to be furnished prior to recording

said mortgages are prior and superior liens to said mortgages, and the liens of all laborers for labor commenced, and materialmen for material commenced to be furnished, subsequent to the recording of said mortgages, are subordinate to said mortgages, when such work is done and material furnished by persons not theretofore connected with the construction of the building. If that were not intended, why did not the Legislature simply say that all liens for labor and material furnished in the erection or construction or repair or change of a building took effect from the commencement of the construction of such building or of such repair or change? It is clear to me that the Legislature intended to make all liens for work commenced and material commenced to be furnished after the recording of a mortgage subsequent and inferior thereto, especially when such work is done and materials furnished by persons who had no connection with the erection of the building until after the recording of the mortgages.

The mechanic's and laborer's lien law containing said section 5 was enacted in 1893, and approved February 27th of that year. Laws 1893, p. 51. We first find said section in the Session Laws of 1881 (section 819, Code Civ. Proc.). That section was evidently copied from the laws of the state of California, as section 1186, Code Civ. Proc. of that state is identically the same. We first find it in the laws of California in 1872. The state of Washington borrowed that section from California the same as Idaho. Each section has a caption or index preceding it as enacted in our law of 1893, and those are identically the same as we find in the lien laws of Washington. This would indicate that said captions and sections were taken, many of them, literally, from the Washington law. We find a few slight changes in some of the sections, and a new section or two added not contained in the Washington law. For the Washington mechanic's lien law, see Hill's Ann. St. & Codes 1891, § 1663 et seq. Section 1194 of the California law provides that in every case where different liens are asserted against the same property the court, in its judgment, must declare the rank of each lien, which shall be in the following order: (1) All persons performing manual labor in, on, or about the same. (2) Persons furnishing materials. (3) Subcontractors. (4) Original contractors. Section 11 (page 149) of the Idaho act provides substantially the same as section 1194 of the California law, and Section 1673 of the Washington law is to the same effect, except that it places laborers and materialmen on the same footing. The provisions of those sections apply when there are no mortgage liens intervening between the mechanics' and laborers' liens, and were not intended to interfere with mort-

gage liens that had attached prior to the lien claimant commencing to perform the labor or the materialman commencing to furnish the material. We turn to California to ascertain if the Supreme Court of that state has construed the provisions of said section 1186 of the California statutes. In *Preston v. Senora Lodge*, 39 Cal. 116, the court say: "These provisions of the law having thus fixed the rights of the statutory lienholders *inter sese*, the act further provides in substance that such liens shall be preferred to that of any mortgage subsequently attaching upon the premises, or subsequently recorded. It contains, however, no provision authorizing, under any circumstances, the displacement or disturbance of a mortgage lien once attached, nor its postponement to any lien arising at a subsequent time; nor does it contemplate that the mortgagor and materialman, or laborer, may, as the result of a contract made between themselves, without consulting the mortgagee, improve the latter out of such absolute prior lien upon the premises as he may have theretofore lawfully obtained. * * * As it is conceded that the respondents Scott, Zelian, Ford, and Fitzgerald only commenced work on the premises long after (Scott, the earliest of them, fully one month after) the mortgage was recorded, the court below erred in preferring their liens to that of the mortgage." This decision was rendered in 1870, and said section 1186 was amended in phraseology in 1872; but its effect is the same on the point under consideration as the law of 1868, under which said decision was rendered. In *Crowell v. Gilmore*, 18 Cal. 370, it was held, under the mechanics' lien law of 1856, that the mechanic making the first contract or first commencing work on a building had no priority over others commencing work subsequently, and that said law placed all lien claimants on an equality. In that case it was held that the rule of equity there stated would not apply, if some of the mechanics began work before a mortgage was executed by the owner of the property thereon, and some afterward; that in such case the first lienholder would have priority over the mortgagee, while the latter would not. As touching upon the question under consideration, see *Root v. Bryant*, 57 Cal. 48. The court held in that case that the lien of the mortgage was superior to the lien claimed by plaintiffs, unless the plaintiffs, at the time they performed the labor or commenced to furnish the materials, had no notice of the existence of the then unrecorded mortgage, and cites said section 1186 of the Code of Civil Procedure. It is held by the California courts that liens for furnishing materials or work and labor relate to the time of beginning to furnish the material or commencing the work. In *Pacific Mutual L. I. Co. v. Fisher*, 106 Cal. 224, 39 Pac.

738, it is held that the lien for furnishing materials relates to the date of beginning to furnish them, and includes all the materials thereafter furnished for the building, and that such lien has priority over a mortgage after the date of the commencement to furnish the material, and it is there stated that "for the purpose of constructing the building the owner may enter into different original contracts for the different departments of work involved therein (as was done in the case at bar). If he should enter into a contract with one person for the construction of the building in all its parts, except the painting, and he afterward entered into a contract with another person to do the painting of the building, each of these individuals would be an original contractor, within the meaning of the statute; and it would be immaterial whether the latter contract was entered into prior to the completion of the former one. If the owner did not enter into the latter contract until after the completion of the former contract, it could not be claimed that a lien to be filed therefor would in any respect depend upon the completion of the building." When a building is constructed by several persons under different contracts, as when A. digs the cellar and does the stonework thereof, and puts in the foundation, and B. then does the carpenter work and furnishes the wood material, and C. furnishes and does the plumbing, and D. furnishes the paint and does the painting, all of which work is done under the supervision of the owner, and under distinct and separate contracts, D.'s lien would not relate back to the commencement of the cellar and stonework by A., provided that prior to D. commencing the work done by him the owner had placed a mortgage on such premises, and D. had notice thereof. Now, if A. had the contract to complete said building, and employed men to do so, his lien therefor would date from the commencement of the building, and would have been prior to any mortgage executed subsequent to the commencement of the building. In a case like the one at bar it is apparent that the lien is not prior to those mortgages which were recorded prior to the commencement of the work for which the lien is filed.

If the contention of counsel for respondent was sustained, we would have this condition of things. Supposing Dubois had let the contract for digging and walling the cellar and completing the foundation for the building, and, when that was done, he was not able to pay the contractor for doing that part of the work, and the contractor thereupon proposed to the owner that he give him a mortgage on the premises for the contract price of the work done, as he would prefer that to a mechanics' lien, and Dubois thereupon executed a mortgage to the contractor for the amount due him, and we will say that on the next day after the execution and recording of such mortgage the owner purchas-

ed material and employed workmen to complete the building, and they proceed immediately to do so, and thereafter said lien claimants file their liens for labor and material; under that state of facts, to hold that such liens would be prior to the mortgage of the contractor who commenced the building and took a mortgage thereon for the amount due him for the materials furnished and the labor done thereon would not be just to the mortgagee. In the case before us it is more than probable that the greater portion of the money realized on said two mortgages was paid for labor and material done and used in the construction of said building, and, if that be true, the mortgagees ought certainly to stand in the shoes of those who did such work and furnished such material, as all subsequent lien claimants had notice of the mortgages before they commenced work or commenced to furnish materials. In the case at bar the owner let various contracts for the construction of the building under consideration, but the greater portion of the building, so far as constructed, was done by days' works, except the plumbing, and perhaps a few other parts of the work. Each of the parties, except those who were paid, who furnished materials or performed work, filed a claim of lien on his own behalf, and we think it clear that, if no mortgage had intervened, each of said parties, under the law, are placed on an equal footing. But, as two mortgages intervened, they must be considered as prior liens to such subsequent laborers' and materialmen's liens. In the case of *Home Saving & Loan Ass'n v. Burton*, 56 Pac. 940, the Supreme Court of the state of Washington, in a case very much like the one at bar, construed the provisions of section 1666, Hill's Ann. St. & Codes Wash. 1891, which section is the same as section 5 of the act under consideration, and said: "The language of this section is so clear and unequivocal that there is no necessity of resorting to any rule of construction to determine its meaning. When the Legislature said that the liens for which provision is made were preferred to any lien, mortgage, or other incumbrance of which the lienholder had no notice, and was unrecorded, they also, in effect, said that such liens are not preferred to mortgages of which the lienholder had notice, or were recorded at the time the lien arose." It will be thus seen that the two states that have statutes identical with our section 5 have construed said section, and we are inclined to follow the construction placed upon it by the courts of those states. But it is suggested that, in case of a mortgage lien intervening between prior and subsequent mechanics' liens, injustice will in some way be done to the holder of the subsequent liens. It is sufficient to say that such lienholders have no rights other than such as the statute gives, and, if the liens as given are rendered less valuable because of

the mortgage intervening, they cannot complain, because they took their liens subject to such contingencies, and subject to those provisions of said law. As to the time when materialmen's liens attach, see *Mechanics' Mill Lumber Company v. Denny Hotel* (Wash.) 82 Pac. 1073. Counsel for respondents have cited cases from Montana, Minnesota, Texas, and Iowa in support of their contention. Those decisions are not in point, for the reason that the lien laws of those states are not the same as our own.

It is contended by counsel for appellant that the court erred in finding that the defendants Kromer and Ferguson, or the Boise Light Company, are entitled to a lien against the premises in controversy, for the reason that their claims of lien fail to show by direct and unequivocal averment any name of the person by whom each of said claimants was employed, or to whom they each furnished materials. We have examined said claims of lien, and find that they each substantially comply with the requirements of the law and are sufficient. We, therefore, conclude that the judgment of the court below must be reversed, and the cause remanded, with instructions to enter judgment in accordance with the views expressed herein. Costs of this appeal are awarded to the appellant.

STOCKSLAGER, C. J., concurs.

AILSHIE, J. (dissenting). The provisions of the lien law under consideration are, it seems to me, too plain and clear to require any construction, but the view taken of them by my associates is so diametrically opposed to what I conceive to be the plain and simple meaning of the English language in which these statutes are expressed that I find myself poring over them to find the meaning my Brothers give them. The first territorial Legislature, in 1864, enacted a lien law, and nearly every succeeding Legislature from that time until the 1881 session either amended the law as it then existed, or repealed the entire law and enacted a new and different one in its stead. At the 1881 session a new lien law was enacted, some of the sections of which were similar to provisions then found in the California lien laws, while other provisions were entirely different from the California law, and were evidently taken from the laws of other states. Taken, therefore, as a whole, it cannot be truly said that the lien law of 1881 was copied from the California statute. Section 819 of the Code of Civil Procedure of that session, however, was practically the same as section 3 of the lien law of California, as approved March 30, 1868 (St. 1867-68, p. 589, c. 448), and which was subsequently adopted as section 1186 of Deering's Code of Civil Procedure. And, indeed, this same

section was then, and is still, to be found in substance in the lien laws of many states of the union. The Idaho Legislature continued to amend the act of 1881 from time to time until 1893, when the entire lien law which was then embodied in title 4 of part 3 of the Code of Civil Procedure of 1887, was repealed, and the new law was enacted and approved February 27th of that year. Sess. Laws 1893, p. 49. By the act of 1893 the entire theory of our lien law was changed, and under it a subcontractor, laborer, or materialman might have an absolute lien direct upon the property, irrespective of the status of the original contractor, or the amount which might be due him on the contract. On the other hand, the old lien law, as found in the 1887 statutes, made the lien of subcontractors, materialmen, and laborers dependent entirely upon the original contractor's status, and, if he had no lien, then the subcontractor, materialman, or laborer had no lien, and, if he did, their lien only extended to "the amount then or thereafter due such contractor from such owner or person employing him under the contract." By the act of 1893 our Legislature changed from what is sometimes called the "New York lien system" to that frequently designated as the "Pennsylvania system," as discussed in Jones on Liens, § 1285, and Bolsoi on Mechanics' Liens, § 225 et seq. It should therefore be borne in mind, when examining California cases, that those decisions were announced upon lien statutes following the New York system, and the discussions of the statutes therein contained rest upon that theory of the law. It is true that section 5 (page 51) of the act of 1893 is also found in the California statute, and has frequently been referred to by the courts of that state; but the views of the court upon that section have but little weight in construing our statute, when it is remembered that the general theory and trend of the other provisions of their statute have differed so widely from ours. My examination, however, of the California statutes, convinces me that the court of that state has never at any time gone to the extent of directly announcing the doctrine that is claimed in this case.

I shall briefly review the authorities cited in the majority opinion, since to my mind they all fall so far short of holding what is claimed for them. *Preston v. Sonora Lodge*, 39 Cal. 116, and *Crowell v. Gilmore*, 18 Cal. 370, are two cases more frequently misquoted and misquoted on the various phases of mechanics' liens, and perhaps decide less, than any other cases I have examined on this subject. In the former case the only question before the court was as to whether or not certain persons who had furnished material and performed labor in a quartz mine were entitled to have their liens preferred to that of a mortgage which was executed and

recorded prior to the commencement of work by numerous lien claimants. That was the sole and entire question before the court and it was not contended that work in extracting ore from a quartz mine, or running tunnels or opening up or developing the same, should be held or construed as work done or material furnished upon any "building, improvement or structure," so as to allow the lien to attach as of the date of the commencement of such "building, improvement or structure." Indeed, the court said in the course of that opinion: "In the record before us there is nothing indicating, nor do we understand the respondents as claiming in argument here, that the work or repair upon this mine resulted in placing thereon any improvement of the distinctive and exceptional character just mentioned, but the respective claims of all the parties to this controversy are conceded to extend to the entire mining premises, including, of course, all the improvements thereon." In a case like the *Preston-Sonora Lodge Case*, involving work done in a mining claim, as disclosed by the facts of that case, the question here presented could not well arise, because under those facts there is no such thing as the commencement of a "building, improvement or structure" to which such liens could refer for their inception. It was purely a question of commencement of "work." In the *Crowell-Gilmore Case* the only question before the court was as to whether or not the mechanic who made the first contract or first commenced work had a prior lien over one who commenced work subsequently on the same building or structure, and the court applied the principles of equity, and held that they were all on the same footing. After deciding the point before it the court indulged in some speculations which decided no question in the case, and which apparently had reference to no statute found upon the books. In *Root v. Bryant*, 57 Cal. 48, the mortgage was executed in May, 1877, and, while it was not recorded until November, 1878, the court held that the lien claimant who performed the labor between March and July, 1878, was presumed to have had notice of such mortgage, and that his lien was therefore subordinate to such mortgage. *Pacific Mutual L. Ins. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758, does not pretend to decide any such question as is before the court in this case. The point the court was passing upon when it used the language quoted in the majority opinion in this case was as to whether or not a person who furnished materials for building under a direct contract with the owner might file his lien within the statutory time after he completed his contract, or whether he should wait until the building was completed before filing his claim. In a discussion of that question the court used

the language cited, and held that each laborer or materialman who contracted directly with the owner should be held to be an "original contractor" and to that extent departed from its former holding, which this court had refused to follow in *Colorado Iron Works v. Rickenberg*, 4 Idaho, 262, 38 Pac. 651. It is true that some things are said in the syllabus to this case (which was not written by the court) that are in no way passed upon or decided in the opinion.

It is claimed, however, that our statute is very similar to that of the state of Washington, and that the Washington court has construed the section here involved in *Mechanics' Mill & Lumber Company v. Denny Hotel Company*, 32 Pac. 1073, and *Home Savings & Loan Ass'n v. Burton*, 56 Pac. 940. In each of these cases the Washington court has held that the lien must date from the time the work was commenced or the material was commenced to be furnished, and not from the commencement of the building. Each of those cases was decided by merely a majority of the court; the minority apparently having expressed no opinion in the cases. An examination of those cases discloses, also, that they were decided upon the provisions of section 1666, vol. 1, Code of that state, which is the same as section 5 of our lien law (Laws 1899, p. 148), and that no consideration was given to the other significant provisions of the same act. The most casual reading of the *Home Sav. & L. Ass'n Case* will disclose the fact that the learned judge who wrote that opinion overlooked the vital portion of the section when he said: "When the Legislature said that the liens for which provision was made are preferred to any lien, mortgage or other incumbrance of which the lienholder had no notice, and was unrecorded, they also in effect said that such liens are not preferred to mortgages of which the lienholder had notice, or were recorded at the time the lien arose." Now, it is generally recognized, where recording laws prevail, that a person dealing with real property is not bound by any unrecorded mortgages unless it be shown that he has actual notice of them; and that statement of the learned judge does not in any respect answer the portion of the section which says: "The liens provided for in this chapter are preferred to any lien, mortgage or other incumbrance which may have attached subsequent to the time when the building, improvement or structure was commenced." The vital question there was as to when the lien "arose" under the Washington statute.

In the majority opinion, after some analysis of section 5, and the conclusion that each lien dates from the time the work was begun or the material furnished, the question is asked: "If that were not intended, why did not the Legislature simply say that all liens for labor and material furnished in

the erection or construction or repair or change of a building took effect from the commencement of the construction of such building, or of such repair or change?" The answer to the question is simple. Section 5 provides the preference for all liens enumerated in that chapter, and the chapter contains numerous matters and things for which liens are provided, other than that for "labor and material furnished in the erection or construction or repair or change of a building." Section 5 consists of one sentence, and there is nothing complicated or difficult in the language used. The first part of the sentence, namely, "the liens provided for in this chapter are preferred to any lien, mortgage or other incumbrance which may have attached subsequent to the time when the building, improvement or structure was commenced," is to be found in the lien statutes of several states, and the courts of those states have had no difficulty in holding that such a statute entitled all liens to relate back to the time of the commencement of "the building, improvement or structure." *Gardner v. Leck* (Minn.) 54 N. W. 748; *Oriental Hotel Co. v. Griffiths* (Tex. Sup.) 33 S. W. 652, 30 L. R. A. 765, 53 Am. St. Rep. 790; *Neilson v. Iowa Eastern Railway Co.*, 44 Iowa, 71; *Ins. Co. v. Slye*, 45 Iowa, 615; *Davis v. Bilsland*, 85 U. S. 659, 21 L. Ed. 969; *Kansas Mortg. Co. v. Weyerhaeuser* (Kan.) 29 Pac. 153; *Haxtun Steam Heater Co. v. Gordon*, 2 N. D. 246, 50 N. W. 708, 33 Am. St. Rep. 776; *Norris' Appeal*, 30 Pa. 122; *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615; *Vilas v. McDonough Mfg. Co.*, 91 Wis. 607, 65 N. W. 488, 30 L. R. A. 778, 51 Am. St. Rep. 925; *Dubois' Administrator v. Wilson's Trustee*, 21 Mo. 213. But the Idaho statute is a much more comprehensive and liberal statute in the allowance of liens than most states have, and allows a lien for labor done in the construction, alteration, or repair of any building, wharf, bridge, ditch, dyke, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct, or work in any mine, or for work done in grading any lot, or filling and grading any street in front of any lot, or for work done on any public improvement or structure for any city, town, county, or school district, and allows a lien for any material furnished in connection with any such work. Following upon the enumeration of the various work for which liens are allowed, section 5, in prescribing the preference for such liens, goes beyond the mere enumeration of "buildings, improvements or structures," and provides that in case the lien should be one for which the work was not done, or the materials were not furnished, upon a "building, improvement or structure," then the lien should date from the time the work was commenced or the materials were commenced to be furnished. For instance, if the work was done in a mine,

then the only period of time from which the right of the lien to attach could date would be from the commencement of the work, and if he should furnish materials for a mine, tunnel, or in grading a lot or a street, then the only time from which the lien right could date would be from the commencement to furnish such materials, since they were not furnished in the erection or construction of a "building or structure."

It seems to me that the Legislature could not have written a statute plainer if they had tried, and that this one is only capable of the one meaning. There is no such thing known to the statute as a lien for commencing a building or structure, or for anything other than labor in some form or materials furnished. It takes both labor and material for the construction of a building, and, when the Legislature said that liens for constructing a "building, improvement or structure" should be preferred to any lien, mortgage or other incumbrance which might attach subsequent to the commencement of such building, improvement or structure, it certainly meant to allow liens for every kind of labor and every kind of material which go to the erection and completion of such building, improvement, or structure. Any other view that may be taken of it leaves this language absolutely meaningless and surplusage. By the construction placed upon this statute by the majority of the court a contractor who has done one day's work toward the construction of the building for which he has contracted may have a lien for the labor and material necessary to the completion of the building, and yet the laborers who commenced work the next day, and the materialman who began furnishing the material on the following day, may all be deprived of their right of lien by reason of a mortgage which has been executed during the intervening night. This is neither reason, justice, nor, in my opinion, the purpose or intention of the law. Under the construction placed upon this statute, if one man should commence to labor on a building and another to furnish materials, and the next day a \$50,000 mortgage should be placed upon the premises, these two men might continue—the one to labor and the other to furnish material—for 10 years, and finish the building and be entitled to their lien, but if the owner or contractor should, on the following day after the execution of the mortgage, employ a large crew of men to labor, and a sufficient number of others to furnish materials, so that the building might be completed in a half a year, both the mortgagee and the owner of the building would have received the benefit of the improvement and the use of the building, and yet these additional laborers and materialmen would be entitled to no lien. Such a proposition, to my mind, discloses one of

the innumerable absurdities into which such a conclusion must inevitably lead.

The statute, however, furnishes still further potent reasons why the conclusion of the majority in this case is contrary to every thought and intention of the lawmakers when writing and enacting the statute. Section 11 (page 149) of the act provides the rank and classification of the liens as follows: "In every case where different liens are asserted against any property, the court in the judgment must declare the rank of each lien or class of liens which shall be in the following order. (1) All laborers, other than contractors. (2) All materialmen, other than contractors or subcontractors. (3) Subcontractors. (4) The original contractor; and in case the proceeds of sale under this chapter shall be insufficient to pay all lienholders under it: (1) The lien of all laborers, other than the original contractor and subcontractor, shall first be paid in full, or pro rata, if the proceeds be insufficient to pay them in full. (2) The lien of materialmen, other than the original contractor or subcontractor, shall be paid in full, or pro rata, if the proceeds be insufficient to pay them in full. (3) And out of the remainder, if any, the subcontractors shall be paid in full, or pro rata, if the remainder be insufficient to pay them in full, and the remainder, if any, shall be paid to the original contractor; and each claimant shall be entitled to execution for any balance due him after such distribution; such execution to be issued by the clerk of the court upon demand, on the return of the sheriff or other officer making the same, showing such balance due." Section 12 (page 150) provides that any number of persons making liens against the same property may join as plaintiffs in the action for the foreclosure of their liens, and that in case they commence separate actions the court by its order may consolidate them. Now, it is obvious that the Legislature would never have authorized lien claimants to join as plaintiffs whose interests were adverse to each other. But under the holding in this case there would in most cases be more rivalry and adverse interests displayed among the various lien claimants themselves in the effort of each to show that his lien is superior and preferred to that of his coplaintiff than would often be manifest or developed as against the real defendant and owner of the property. Whenever we say that each lien dates its inception and attaches from the date the claimant commenced work or furnishing material, we at once abrogate every provision of section 11, supra, and leave the entire section a dead letter on the statute books. By the terms of that section the original contractor is the fourth and last in the list of preferences and priorities as among the lien claimants, and, of course, he is always the first man who

makes a contract with reference to a building, and the first one to do any work with reference thereto. Now, under the holding of my Brothers, it is stated that such contractor might take a mortgage on the property for his claim, and that he would thereby have secured a lien prior to that of all laborers or materialmen who might commence work or the furnishing of material subsequent to the date on which the mortgage was executed. It is even said that it "would not be just to the mortgagee" to allow the lien claimants a preference over him under such a state of facts. I ask the question: Is it possible that we have a lien law which could be evaded in such a palpable manner, and its provisions, which were intended as a shield and protection to laboring men, turned into an instrument and means for cheating and defrauding them in such a manner? Is it possible that a lien created by law for the protection of laboring men is so much inferior to the devices and machinations of wily contractors and irresponsible property owners that they may create a lien by contract that will rise so superior to the statutory lien as to deprive the very persons for whom it was enacted of its protection? When the money lender takes his mortgage on a property on which a building is being erected he can see with his own eyes what is being done—that a building is under course of construction, and that its completion will enhance the value of his security to the extent of the value of such structure. He also has notice that the men who performed the labor and furnished the material in the construction of such building must be paid, and that they are entitled to liens on the property, and that the statute says their liens are "preferred to any lien, mortgage or other incumbrance which may attach subsequent to the time when the building, improvement or structure was commenced." This is manifest justice, and any departure from it is a departure from the spirit and intent of the statute and the plainest dictates of equity. Is it possible that every carpenter, mason, hod carrier, painter, or plasterer employed to work on a \$50,000 building, who knows neither the owner of the building nor the contractor, must, before doing a day's work on the building for the sum of \$3 or \$4, spend two or three days in traveling, as it would be necessary in many counties in this state, a distance of 100 miles or more to the county seat to examine the records and ascertain whether the owner has placed a mortgage of record upon the property? And, perhaps, if he found no mortgage of record, before his return and commencement of work, the mortgage would be of record, and then the court tells him that the mortgage is ahead of his lien claim. It is a notorious fact that the laboring man is not the man who examines the records. He has other

things to do, and this was undoubtedly one of the many considerations which led the Legislature to provide that a lien for his labor might have its inception and date from the commencement of the building. The individual, corporation, or trust company that loans money has time both for the examination of the records as well as the property on which they take their mortgage, and they always do so, and their means of ascertaining whether a building is under course of construction are ample and never overlooked by them.

The principle involved in this statute is clearly this: That the commencement of a building on the premises constitutes actual notice to all the world that a building is to be constructed, and that such notice rises superior to all subsequent constructive notices that can be given under the recording laws. The statute of Texas, so far as it goes, is very similar to our section 5, and the Supreme Court of that state, in *Oriental Hotel Company v. Griffiths*, 33 S. W. 652, 30 L. R. A. 765, 53 Am. St. Rep. 790, held that the statute intended to place all liens upon an equal footing, and that, when claimed upon a building, all dated from the commencement of the building. In discussing this question the court said: "When a building or other improvement is in course of construction, and any person takes a mortgage on the land upon which such building or improvement is situated, or on the improvement itself, he does so with the knowledge that it may be necessary, for the completion of the building, that other contracts should be made for labor and material; and it is clearly the policy of this state, as shown by its statute law, that an intervening mortgagee shall not destroy the statutory rights of persons that may be acquired thereafter in the course of constructing such building. The deed of trust in this case expressly reserves a lien upon the building thereafter to be constructed, and it is evident from the facts that the principal security for the bonds which were being sold was to be created by the completion of the contemplated hotel building. If the position taken by the counsel for the Oriental Investment Company be correct, then an intervening mortgagee could arrest the progress of such work, destroy the statutory rights and liens of all persons who might be engaged in the work, and assert a lien by contract which would be superior to that given by the law under which the contract was made. This, we believe, cannot be maintained. * * * The man who lays the foundation has an equal claim upon the whole structure with all others, and the man who completes the work has an equal claim upon the foundation with him who does the work thereon or furnishes the material therefor. The lien, then, which is secured by statute, extends in favor of each,

from the beginning to the completion of the work, and, if it so extends and embraces all that has been done from the beginning to the completion, its 'inception' must be the time to which it is made to relate in giving effect." This case contains a very able and lucid discussion of the question, and of the purpose and intention of the lien statutes, and is worthy of much consideration. In *Davis v. Bilsland*, 18 Wall. 659, 21 L. Ed. 969, this question arose over a Montana statute very similar to ours, so far as it went, though less comprehensive, and in the course of its consideration Mr. Justice Bradley said: "The liens secured to mechanics and materialmen have precedence over all other incumbrances put upon the property after the commencement of the building; and this is right. Why should a purchaser or lender have the benefit of the labor or materials which go into the property and give it its existence? At all events the law is clear." In *Neilson v. Iowa Eastern Ry. Co.*, 44 Iowa, 71, the Supreme Court, in considering a statute of Iowa substantially the same as section 5 of our statute, with the exception that it did not contain the words "work done or materials were commenced to be furnished," held that all liens attached from the commencement of the building. The first paragraph of the syllabus to that case is as follows: "A mechanic's lien attaches from the commencement of the building, and takes precedence over a mortgage executed after that time, although the particular work for which the lien is claimed was not commenced until after the execution of the mortgage." See, also, *Ins. Co. v. Slye*, 45 Iowa, 615. The same conclusion has been reached under the statute of Kansas, substantially the same as the Iowa statute. See *Kansas Mortg. Co. v. Weyerhaeuser* (Kan.) 29 Pac. 153; *Warden v. Sabins* (Kan.) 12 Pac. 520. The Supreme Court of Missouri held to the same effect as early as 1855. See *Dubois' Adm'r v. Wilson's Trustee*, 21 Mo. 213. In *Gardner v. Leck*, 54 N. W. 746, the Supreme Court of Minnesota overruled its former decisions on this question, and held that all liens for work done and materials furnished in the construction of a building should date from the commencement of such building. This decision was by a divided court, but the reasoning found in the opinion of Justice Collins appeals to me as sound, and founded upon the true intent and spirit of the statute. In course of the opinion it is said: "A majority of this court are clearly of the opinion that the views expressed in the *Finlayson Case* (47 Minn. 74, 49 N. W. 398, 645), are unsound. If such a method of distribution were adopted, it would result in deferring to some extent the lien claims of those who had performed work or furnished material before the execution of the mortgage to its lien in every case where

the premises sold for more than sufficient to pay prior, in point of time, claimants, because those ahead would have to share with those behind the mortgage. It would compel those who had performed their labor or furnished materials upon the strength of an unincumbered title to submit to a possible postponement of their claims to an incumbrance in no manner connected with the improvements, and brought into existence during, or perhaps subsequent to, the fulfillment of their contracts. It would place it in the power of the owner of the real estate to mortgage it so as to substantially affect rights already assured and relied on, and virtually to destroy the statutory security. Significant illustrations of this kind might be multiplied, but are unnecessary. To permit assured rights to be thus displaced, really at the option of the owner, is opposed to the spirit and intent of the law. * * *

There is nothing novel or unjust in a law which gives priority to the liens of mechanics and materialmen over those of other parties, originating subsequent to the commencement of the improvements on the land. In at least 20 states such laws have been enacted, and again and again have they been sustained by the courts. These states are named, and a synopsis of their lien statutes given, in *Jones on Liens*, §§ 1187, 1469." After proceeding to announce the two theories presented to the court it is again said: "The inevitable logic of what we have said is that, whenever a mortgage or other incumbrance or distinct lien originates subsequently to the commencement of the work on the ground, or the furnishing of materials at the same place, so that the world may have notice of the proposed improvement, it must yield to the claims of all who have contributed to the completion of the structure with their work or materials. A mortgage placed upon real property subsequent to the commencement of a building, after lien rights have attached, must be subordinated to the liens provided for in chapter 200, p. 313, Gen. Laws 1889. The rights of the person who first labors, or those of the materialman who first furnishes material, in respect to the time they attach, are fixed by statute; and it was the plain and unmistakable intention of the Legislature to date all lien rights from this time, and to place all who may be engaged in a common enterprise—the erection and construction of a building—upon the same footing."

Again reverting to our statute, we find that the Legislature was careful in every section to provide the manner and method of securing a lien to every person entitled thereto under chapter 1 of the act. Section 6 (page 148) prescribes that every original contractor must file his claim within 60 days, and every other person within 30 days, "after the completion of any building, improvement or structure, or after the completion of the alteration

or repair thereof or after he has ceased to labor thereon from any cause, or after he has ceased to furnish materials therefor, or after the performance of any labor in a mine or mining claim." This is a further illustration of the fact that the Legislature meant all liens for labor or material used in the construction of a building to date from the commencement of the building, and if for labor on something other than a building, as in a mine or on mining claim, then from the commencement of the labor, etc. Another significant fact disclosed by this section is that wherein it provides the kind and character of lien to be filed. It nowhere requires the claimant to state when he commenced work or furnishing materials. After prescribing these numerous provisions in detail the entire act closes by admonishing the courts that "its provisions and all proceedings under it are to be liberally construed with a view to effect its object"; and there can be no question as to what its object is. That object is to secure liens to the laborers and materialmen enumerated in the act. I am thoroughly satisfied that the trial court arrived at the correct conclusion as to the intent and purpose of this statute, and, indeed, the clear and unequivocal expression of the statute itself, and his judgment should be affirmed.

On Rehearing.

SULLIVAN, J. A rehearing was granted in this case and again submitted on a reargument. It is very earnestly contended that the court has failed to apply the plain rules of statutory construction in construing the mechanic's lien law under consideration. We are quite well acquainted with the rules of statutory construction quoted and cited by counsel for the petitioners, and are fully satisfied that we have faithfully and correctly applied these rules to the construction of the act under consideration, and see no cause for changing the views heretofore expressed in this case.

The main question for consideration is whether the mortgages should be subrogated and declared subsequent to other liens, or whether said liens all relate back to the time of the commencement of the construction of the building, irrespective of the time when the labor was performed or the material furnished. The decision of that question rests largely on the provisions of section 5 of the lien law under consideration (Laws 1899, p. 148), and we think it clear that our construction of that statute heretofore given is the correct one. In arriving at that conclusion we have not overlooked the various provisions of said act in their objects and purposes. And the provisions of section 11 (page 149) apply to cases where no mortgages intervene, and also in cases where mortgages intervene, and the lien claimants are thereby divided into classes. It was not the intention of the

Legislature enacting said law to make valueless a mortgage lien that had attached to the premises involved in this case prior to the time the lien claimant furnished any material or performed any labor toward the construction, repair, or alteration of the building. It is suggested by counsel for the petitioner that the Legislature intended to protect the poor against the "avaricious," and against the "machinations" of those who would defraud and defeat them of their honest, hard-earned wages. That, no doubt, is true, but there is not an intimation in this case, and the record shows none, that the mortgagees have conspired in any manner to defraud or cheat any of the lien claimants, and that the mortgages are not valid. It is no doubt true that the very money for which the mortgages were given was used in payment for material and labor used in the construction of the said building. If it were anywhere shown that either of said mortgages, or any part thereof, were fraudulent, a court of equity, upon the proper showing, would grant relief against them. As heretofore stated, the mechanic's lien laws of California and Washington are substantially the same as our own, and their objects and purposes are the same. The same is true of the lien laws of Nevada, so far as the provisions of section 5 of our law is concerned. While some of the details of the Nevada law differ from our own, the objects and purposes are the same, and in *Capron v. Strout*, 11 Nev. 304, it is said: "Capron's mortgage was recorded February 25, 1874, and all work done by Stewart after the expiration of his then current month was done under contracts made by him after legal notice of Capron's rights, and his lien for such work is subordinate to Capron's mortgage." It does not seem possible that any unprejudiced mind can fairly construe said provisions of our lien law as counsel for petitioners attempt to construe them. Under their construction, if, at the time the \$20,000 mortgage was given on the premises in question, the workmen and materialmen (there was no original contractor) had all and every one of them ceased work, and never thereafter performed any work nor furnished any material in connection with said building whatever, and the owner had executed the \$20,000 mortgage to raise money with which to pay them what was due them, and thereafter other materialmen and laborers performed labor in the completion of said building, the mortgagees' rights must be subrogated to the claim of the latter. That is a most monstrous proposition to my mind, and I do not believe the Legislature ever intended such a result, and it would be contrary to the plain provisions of the act under consideration. Under counsel's theory no mortgage or other incumbrance could attach, if the improvement of the structure was commenced, work done, or materials were commenced to be furnished prior thereto; and, if that were

the intention of the Legislature, it certainly would have been expressed in plain and unequivocal language.

Section 1186 of the Code of Civil Procedure of California is the same as section 5 of our mechanic's lien law, and section 1606 of Hill's Annotated Statutes and Codes of Washington of 1891 is the same as our said section 5. Section 1194 of the Code of Civil Procedure of California and section 1673 of the Washington law are the same as section 11 of our lien law, in that it is provided in each that the court, in its judgment in lien cases, must declare the rank of each lien or class of liens. However, the order of classification is a little different, both in California and Washington. It is sufficient to say that the Supreme Court of Washington, in the case of *Mechanics' Mill & Lumber Co. v. Denny Hotel Co.*, 32 Pac. 1073, and *Home Savings & Loan Ass'n v. Burton*, 56 Pac. 940, held that the liens must date from the time the work was commenced or the material was commenced to be furnished, and not from the commencement of the building. In each of those cases mortgages intervened, and at the time those decisions were rendered the lien laws of Washington required the court to declare the rank of each lien. The argument of counsel for appellant, to the effect that the Supreme Court of Washington in those cases overlooked or disregarded the provisions of said section 1673 of the Washington law, has very little force with us. And, even though the mechanic's lien law of California did not contain provisions requiring the court to declare the rank or class of each lien until 1885, we are fully satisfied with the California court's construction of the provisions of section 1186 of the California law, which is identically the same as said section 5 of our own. We are unable to see any good reason for placing a different construction upon the provisions of said section 5 after the adoption of an amendment requiring the court to declare the rank or class of the liens.

It is suggested by counsel for appellant that the court in its former opinion failed to pass upon the validity of the Flannagan lien, and he now urges that we pass upon it. We are not satisfied that it appears from the record that all of the evidence produced at the hearing of the trial in regard to that lien is before the court, and for that reason we are not inclined to disturb the findings of that court in that regard.

It is urged by counsel for the petitioners that this court ought to instruct the trial court what judgment it should enter in this case, or whether it should rank or classify the liens. But it is contended by counsel for one of the lien claimants that that question was not presented on the original hearing, and should not be considered now by this court. The mortgagees were the only appellants, and the only question presented on the appeal was whether the liens related

back to the time of the commencement of the building, irrespective of the time when the labor was commenced to be performed or the material commenced to be furnished. Counsel for respondents contended that all liens related and should date from the time of the commencement of the building. The question of the rank or class of the several laborers', mechanics', or materialmen's liens was not raised on the hearing. That being true, under the recognized rule that questions which were not raised on the original hearing will not be considered on rehearing, applies here. See *Powell v. Nevada C. & O. Ry. Company* (Nev.) 82 Pac. 96. However, a question similar to the one under discussion is decided by the Supreme Court of Nebraska in *Henry & Coatsworth Co. v. Fisherdick, Administrator*, 87 Neb. 207, 55 N. W. 643.

We are fully satisfied that our decision on the original hearing in this case is right, and the views therein expressed are hereby confirmed. The judgment of the trial court is reversed, and the cause remanded. Costs are awarded to appellant.

STOCKSLAGER, C. J. (concurring). From some of the arguments of counsel in support of the petition for rehearing, and in dissenting opinion of our Brother, it would seem that they are laboring under the impression that in some way the majority opinion does the laboring man a great injustice. It will always be conceded that laws are enacted with the view of equal justice to all. Indeed, our civil and political liberties—our property rights—are founded on this rule. "Equal justice to all, special privileges to none," should and does apply to capital and labor and to every avocation in this country of boasted freedom, independence, and justice. The mechanic's lien law of this state furnishes ample protection for the laboring man, the materialman, the capitalist, and any and all who may furnish labor, money, or material for the erection or construction of a building in this state. There was no contractor in the erection of the building in controversy. Dr. Dubois, the owner, was constructing the building, employing the labor, buying the materials, and making settlement for such material and labor on his own contracts. After the building had progressed, and a large amount of labor and material had been employed and furnished, a mortgage was given and recorded for the sum of \$20,000 covering said building. It is not contended by counsel for appellant, nor would it be held by this court, that any and all labor done or materials furnished prior to the recording of the mortgage would not be a prior lien upon the premises. Subsequent to the recording of the mortgage all labor done or material furnished was with notice of the existence of the lien created by the mortgage, and the laboring men and materialmen were privileged to say to the owner of

the building: "You have placed a mortgage lien in the sum of \$20,000 on this property. We do not care to take chances on a lien for our labor or material, with the record fact of the existence of this mortgage. If you desire our labor or material, it will be necessary for you to pay for it as you get it." If they could not make satisfactory arrangements for their pay, they were certainly under no obligations to furnish the labor or material. It is more than probable that most, if not all, the proceeds of the mortgage were used in payment for work done and material furnished prior to its execution. In all reason the builder was under obligations to the mortgagee to pay up and cancel any liens or obligations prior to the mortgage, at least so far as the proceeds would go toward making such payment.

If we were to accept the contention of counsel for some of the respondents as the law governing this case, it might, and we think would have, a disastrous effect on the upbuilding of our cities, towns, and villages. Money is absolutely necessary for building anywhere, and, if security cannot be given until the building is completed and all liens cleared, it would in many cases be impossible to complete the work. We think the case at bar furnishes a good illustration of the evil effects of such a construction of our statute. Dr. Dubois did not have the ready money to complete this building. Work and labor could not be had without means to pay. Mortgages were given for the purpose of raising the money to complete the work of construction. If, after he had executed the two mortgages and placed them on record, materialmen and laborers did not think the building of sufficient value to pay the liens thus created, and then after satisfying such liens, then it was their privilege, as well as duty, to refuse to furnish material or perform labor without pay, or sufficient and satisfactory security that they would be paid. In that case, if the building would not sell for a sufficient amount to satisfy the mortgage liens, no one would suffer, excepting the mortgagor and mortgagee, as all claims for material and labor prior to the mortgages would be prior liens. If my conclusion is correct, and I think it certainly is, the law surrounds the laboring man with every safeguard. He is protected with a lien prior to the execution of the mortgage, and thereafter he need not perform labor without daily pay or satisfactory security.

AILSHIE, J. (dissenting). The results of this case furnish a rigorous example of either a grave defect and injustice existing in our lien laws, or an unfortunate misconstruction and application of its provisions. Here, as will occur in most cases, a materialman commences to furnish material for the building before any labor is performed in its construction, and immediately thereafter, and

prior to the commencement of work by certain laborers, mortgages to the amount of \$30,000 are given on the premises. In this case the men who performed the labor, and out of this material erected a completed structure, must stand by and see the materialman paid first, and then the mortgagee receives his money, and, if the unexpected and unusual should happen, he may then, thirdly, in the order of preferences, receive his pay. This, too, directly in view of the provisions of section 11 of the lien law (Laws 1899, p. 149), which says the laborers' lien shall rank first in the order of preferences and priorities among lien claimants. Under these conditions and circumstances it seems to me that the burden of loss falls unequally and unjustly heavy upon the shoulders of labor. On the reargument of this case it was urged by the respondent that, in the event the court should adhere to the majority opinion originally filed, then the court should direct the trial court as to the kind and character of decree to be entered, and the priorities and order of preferences to be recognized in the decree, as among the various lien claimants and the mortgagee. The majority, however, decline to point out the preferences among these claimants, or to direct the trial court as to the decree, although the opinion refers to *Henry & Coatsworth Co. v. Fisher*, 37 Neb. 207, 55 N. W. 643, as being a case similar to this, and one which might afford proper direction to the court. I am not yet prepared to believe that the majority of this court would approve of a decree entered in conformity with the decree directed in this Nebraska case. Indeed, that case ought not to be considered for a moment as authority under our statute. An examination of chapter 54 of the Compiled Statutes of Nebraska of 1881 will disclose the fact that the Nebraska mechanic's lien law bears no similarity to ours, and is entirely destitute of any provisions corresponding to sections 5 and 11 of our lien law. As I read and understand section 3818, Rev. St. 1887, it becomes the duty of this court in a case like the one at bar, where judgment is reversed without granting a new trial, to direct, or at least indicate, the correct judgment to be entered in the lower court. This question must necessarily arise when the remittitur goes down. The lower court has proceeded upon the theory that it was his duty, in entering judgment in such a case, to follow the requirements of section 11 of the lien law, and I think he was entirely correct in that view. The court here, however, has reversed the judgment entered in conformity with that section of the statute. The question will at once arise in the district court as to whether or not the court shall give the materialman the preference over the laborer or the laborer preference over the materialman, or whether they shall all be thrown into hodgepodge, and laborers, materialmen, and contractors be all

classed together. My associates in the majority opinion say: "The provisions of section 11 apply to cases where no mortgages intervene, and also in cases where mortgages intervene and the lien claimants are thereby divided into classes." I am not sure that I understand just what is meant by this observation, but it is quite clear to me, after reading section 11, that it does not contain such language, nor do I find any exception made therein as to the application of the rule of priorities among claimants. I know of no authority to be found in the books that justifies interpolating new and additional language into a statute that is already clear and explicit. I am still the more firmly convinced that the judgment of the district court should be affirmed.

Since writing the foregoing the Chief Justice has written his concurring opinion. It is there held in effect that every man who seeks employment on a building in course of construction must, at his peril, examine the county records from time to time to ascertain whether any mortgage or incumbrance has in the meanwhile been placed on the property. The view I have endeavored to express is that, as I read the statute, the Legislature intended that the fact a building is in course of construction when a loan is made on the property is itself actual notice to the lender that the building is to be completed, and that those who complete it must be paid, and that therefore the laborer and materialman may work and furnish material without examining records or incurring the penalties of constructive notice.

BUCKLE v. McCONAGHY.

(Supreme Court of Idaho, Dec. 4, 1905. On Rehearing, Dec. 30, 1905.)

1. NEW TRIAL—ORDER PREMATURELY MADE.

An order granting a new trial, made before the statement on which the motion is based is settled and filed, is prematurely made, and must be set aside.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 330.]

2. SAME—STATEMENT OF CASE.

The provisions of section 4442, Rev. St. 1887, contemplate that a motion for a new trial shall not be passed upon before the statement of the case upon which such motion is based is settled and filed.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 315.]

3. SAME—MANDATORY PROVISIONS.

The provisions of that section in that regard are mandatory.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; R. T. Morgan, Judge.

Action by Frank Buckle against William McConaghy. From an order granting a new trial, plaintiff appeals. Reversed.

Charles L. Heltman, for appellant. Edwin McBee, for respondent.

SULLIVAN, J. This is an appeal from an order granting a new trial, which order was based on the insufficiency of the evidence to justify the verdict. It appears from the record before us that the order granting a new trial was made in open court on the 15th day of May, 1905, and that the statement on motion for a new trial was not settled until the 31st day of May, 1905, and not filed until the 1st day of June, 1905. Counsel for the appellant contends that the court had no jurisdiction to act upon said motion until after the settlement and filing of the statement to be used on that motion. Section 4442 of the Revised Statutes of 1887 is in part as follows: "The application for a new trial shall be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court, and in other cases, after the affidavits, bills of exceptions, or statement, as the case may be, are filed, and may be brought to a hearing upon motion of either party." Those provisions clearly contemplate that the hearing of the motion for a new trial based upon a statement of the case must not be heard until after such statement is settled and filed. In *Stevens v. Northwestern Stage Co.*, 1 Idaho, 604, the Supreme Court of this territory said: "Again, it appears that the statement was not settled until after the decision of the court upon the motion, for the order of the court granting a new trial and the plaintiff's exceptions thereto are incorporated into and form a part of the statement itself. This practice cannot be too strongly condemned. The whole theory of the use of a statement is that the court may have something definite and certain upon which to act. Any other practice would lead to great confusion, giving rise to controversies as to what state of facts the court had acted upon after the very questions in issue had been decided." The provision of the statute requiring the settlement and filing of the statement on motion for a new trial before the court or judge can decide such motion is mandatory. See 2 *Spelling on New Trials*, 425. In this case the order granting a new trial was made in open court on the 15th of May, and the statement was not settled until the 31st of May following, and was not filed until the 1st of June, 1905.

Said order granting a new trial was therefore prematurely made, and must be set aside, and it is so ordered, and the cause remanded. Costs of the appeal are awarded to the appellant.

AILSHIE, J., concurs.

On Rehearing.

AILSHIE, J. Respondent has filed a petition for rehearing, in which it is insisted that previous to the submission and determination of the motion for a new trial the appellant's counsel joined with counsel for

respondent in a stipulation which amounts to a waiver of any error committed by the court in prematurely passing on the motion. This stipulation is as follows: "It is hereby stipulated and agreed, that the motion of the defendant for a new trial herein be submitted to the court without argument, and without further notice to each party. And it is further hereby stipulated and agreed, that the proposed amendment of the plaintiff to the defendant's statement of the case, to be used on his motion for a new trial herein, may be adopted, and allowed by the court, and incorporated in said statement of the case. Signed and dated this, the 12th, day of December, A. D. 1904." An examination of the stipulation will at once disclose that the appellant only waived the right to make an argument upon the motion and notice of the time and place of the submission of the motion. The stipulation does not amount to a submission of the motion for a new trial as contended for by respondent, but, on the contrary, it specifically refers to the fact that the statement had not yet been settled. The clear import of this stipulation is that the motion should be presented and submitted in an orderly way and after the settlement and allowance of the statement. The stipulation further recognizes the fact that the motion for new trial was to be made upon the statement which was thereafter to be settled and allowed by the court. We do not think the error in this case was either invited or waived by appellant. The case of *Crosby v. North Bonanza Silver Min. Co.* (Nev.) 42 Pac. 583, cited and relied on by respondent, differs from this case, in that the stipulation which was there held to be a waiver of error provided "that defendant's motion for a new trial is hereby submitted to Hon. A. E. Chaney, who presided as judge in the above-entitled action, for his decision." That stipulation, it will be observed, provided for an act in present. It was an actual, present submission of the motion for a new trial, and left nothing further to be done antecedent to the determination of the motion by the court. We have found no good reason why a rehearing should be granted in this case. Upon receipt of the remittitur the trial court will take such further proceedings as may be necessary for the regular and orderly determination of the motion for a new trial.

Petition for rehearing denied.

SULLIVAN, J., concurs.

PETER v. KALEZ et ux.

(Supreme Court of Idaho. Dec. 18, 1905.)

1. NEW TRIAL—MOTION—PREMATURE HEARING AND SUBMISSION.

Under section 4441, Rev. St. 1887, where a motion for a new trial is to be made on affidavits, the adverse party is entitled to 10 days after service on him of the affidavits of the moving party in which to file and serve counter

affidavits, and within the period allowed for filing such counter affidavits the court has no power or authority to hear and consider a motion for a new trial based on the affidavits of the moving party.

2. SAME.

By Rev. St. 1887, § 4442, the court is prohibited from hearing a motion for a new trial based on affidavits until after the expiration of the 10 days allowed the adverse party in which to file counter affidavits.

3. SAME—NOTICE OF HEARING.

The adverse party is entitled to notice of the time and place of the hearing on a motion for a new trial, and to be present at the hearing and present his side of the case.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 314.]

4. SAME—PROOF OF SERVICE.

Sufficiency of proof of service of notice and motion for a new trial considered and discussed.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; R. T. Morgan, Judge.

Action by Paul Peter against Martin J. Kalez and wife. Judgment for plaintiff, and defendants appeal. Reversed.

Edwin McBee, for appellants. McClear & Burgan, Barnes & Latimer, and Robertson, Miller & Rosenhaupt, for respondent.

ALLSHIE, J. This is an appeal from an order granting a new trial. The respondent has filed a motion to dismiss the appeal on the ground that service of the transcript on appeal was admitted by the stenographer employed in the office of Robertson, Miller & Rosenhaupt, of counsel for respondent, residing in Spokane, in the name of the firm in whose office he was employed, and that such stenographer had no authority to admit service or accept copy of transcript in cases on appeal. It appears that on or about the 15th day of September, 1905, one of the attorneys for the appellants went to the office of Robertson, Miller & Rosenhaupt in Spokane, and, finding no one but the stenographer in the front room of the office, presented to him a copy of the transcript and requested him to admit service for the firm, and that he did so in the name of the firm of attorneys with whom he was employed. It appears by the affidavit of the stenographer that at the time he accepted service one of the attorneys was in an adjoining room. There is no pretense made in this case that the attorneys for the respondent did not receive a copy of the transcript. While technically the stenographer might have had no authority to accept service and sign the names of his employers thereto, still it is admitted that the transcript was actually received by the attorneys, and it is clear that they were in no way deceived, misled, or prejudiced by the service in the manner it was made. The motion is denied.

The appellants contend that the order granting a new trial in this case must be reversed upon the grounds that it was prematurely made without notice to the appellants,

and without giving them the statutory time in which to prepare, serve, and file their counter affidavits, to be considered on the hearing of the motion. Notice of intention to move for a new trial was served and filed April 15, 1905. Motion for a new trial, accompanied by affidavits of A. E. Barnes, Mike Desartin, and James Justice, were filed April 24, 1905. The motion for a new trial recites that "the plaintiff in the above-entitled cause will on the 1st day of May, 1905, at the hour of 2 o'clock p. m., of said date, or as soon thereafter as counsel can be heard, at the courtroom at Rathdrum, in the county of Kootenai, state of Idaho, move the court to vacate the judgment or decision of the court found in this cause," etc. It is claimed that this motion and notice was served on the attorney for the defendants on the 24th day of April, 1905. Counsel for appellants, however, claim that there is no proof of service of the notice and motion, and that the attempted proof is totally defective and insufficient under the statute. The proof of service as found in the transcript is as follows: "Fred L. Burgan, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action; that he served a true copy of the motion for a new trial in the above-entitled action, and a copy of all of the affidavits used by plaintiff in support of said motion on Edwin McBee, one of the attorneys for defendant, by leaving said copies with the stenographer employed by said Edwin McBee in his office in the town of Rathdrum, county of Kootenai, state of Idaho, at about 11 o'clock a. m., on the 24th day of April, 1905." On May 1st it appears that the district court was in session at Rathdrum, and at the hour of 2 o'clock p. m. one of the attorneys for respondent called up his motion and argued and presented the same, and the motion was thereupon taken under advisement by the court. It appears by the affidavits of the attorney who presented the motion that Edwin McBee, attorney for appellants, was present in the courtroom, but did not appear in the matter, and made no objection and took no part in the presentation of the motion. The court held the matter under advisement until August 10th, on which date he made his written order granting the motion and ordering a new trial.

Counsel for appellants takes the position that at the time this motion was argued, submitted, and taken under advisement by the court appellants' time for filing counter affidavits had not yet expired, and for that reason the hearing was premature, and the court had no authority to hear or consider the matter. Section 4441, Rev. St. 1887, provides that, where a party intends to move for a new trial, "if the motion is to be made upon affidavits, the moving party must, within ten days after serving the notice, or such further

time as the court in which the action is pending, or a judge thereof may allow, file such affidavits with the clerk and serve a copy upon the adverse party, who shall have ten days to file counter affidavits, a copy of which must be served upon the moving party." It will at once be observed from the provisions of this statute that the motion for a new trial was argued and submitted to the court and taken under advisement some four days prior to the expiration of the time which was allowed the adverse parties for filing their counter affidavits. The notice of intention to present such motion on that day was therefore a nullity, for the reason that it specified a date previous to the time limited by statute within which the defendants were authorized to file their proofs in opposition to the motion. One of the grounds upon which the motion was noticed to be heard was the affidavits of E. A. Barnes, Mike Desartin, and James Justice, attached to the motion and made a part thereof. Section 4442, Rev. St. 1887, provides that "the application for a new trial shall be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court, and in other cases, after the affidavit, bill of exceptions, or statement, as the case may be, are filed, and may be brought to a hearing upon motion of either party." Now, keeping in mind the fact that the adverse party is allowed 10 days after service upon him of the moving party's affidavits in which to file and serve his affidavits, it is clear that the court or judge thereof has no power or authority to hear and determine a motion for a new trial prior to the expiration of this period allowed for the filing of affidavits.

Respondent admits that his motion for a new trial was prematurely submitted to the court and by the court taken under advisement; but he says the court did not pass on the motion for some months thereafter, and that in the meanwhile appellants' time for filing counter affidavits expired. There can be no doubt but that the motion was noticed for and heard at a premature date, a date some four days short of the time allowed by positive statute. *Buckle v. McConaghy*, 83 Pac. 525. It therefore follows that, although the order was actually signed and filed after the expiration of defendants' time for filing counter affidavits, still that order stands here as having been made without notice to the adverse party of the time and place of hearing thereon and without any opportunity for the defendants to be heard. The litigants on both sides have a right to be heard on a motion for a new trial, and each has a right to be present when his adversary is presenting his side of the case. There is no more reason for submitting such a motion one side at a time, and when the adverse party is absent, than there would be

for allowing a plaintiff to offer proofs and submit the case on the part of the plaintiff prior to the expiration of the time in which the defendant had for filing his answer.

Since we are under the necessity of reversing this order granting a new trial on the ground that it was prematurely heard and submitted, we think it also advisable to notice the proof of service heretofore set out. Section 4889, Rev. St. 1887, which provides for service of notice and other papers on the attorney for a litigant, provides: "If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence be not known, then by putting the same, inclosed in an envelope into the postoffice, directed to such attorney." The service provided for in this subdivision of the statute is known as a constructive service. It will be noticed that in order to justify a service on any one other than the attorney, or the leaving of a copy in his office, the attorney should be absent from his office. If delivered to some other person for the attorney, it must appear that such other person was either his clerk or a person having charge of the office, and, in case there is no person meeting either of these requirements, then it must appear that the notice was left in "a conspicuous place in the office between the hours of eight in the morning and six in the afternoon." The

proof of service in the present case makes no attempt to show a personal service on Mr. McBee, nor does it show that he was absent from his office. On the other hand, it shows that the copies were left "with the stenographer employed by said Edwin McBee, in his office in the town of Rathdrum." It might be presumed that the stenographer was in charge of the attorney's office, and possibly that the stenographer was his "clerk," within the meaning of section 4889, supra; but it cannot be reasonably presumed that the attorney was absent from his office, in the absence of a statement in the proof of service to that effect. The question as to the sufficiency of service of this kind has frequently been before the courts and construed in the light of the statute above quoted. *Warner v. Teachenor*, 2 Idaho (Hash.) 88, 2 Pac. 717; *Doll v. Smith*, 32 Cal. 476; *Gallardo v. Atlantic, etc., Tel. Co.*, 49 Cal. 510; *Dalzell v. Superior Court*, 67 Cal. 458, 7 Pac. 910; *Mohr v. Byrne*, 131 Cal. 288, 63 Pac. 341. We do not mean to be understood as saying that we would or would not reverse the judgment on account alone of the defect in the foregoing proof of service. It is sufficient in this case to say that the defect deserves and requires consideration. Parties litigant cannot be too careful in making proof of service where service is required by statute.

The motion for a new trial having been prematurely argued, submitted, and taken under advisement, and having been eventually made and entered without notice, is therefore erroneous, and is reversed, and the cause is remanded for further proceedings. Costs awarded to appellants.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

(47 Or. 444)

MOUNT v. McAULAY et al.*

(Supreme Court of Oregon. Jan. 30, 1906.)

1. QUIETING TITLE—CLOUD ON TITLE OCCASIONED BY DEED VOID ON ITS FACE—RELIEF.

In a suit to remove a cloud from the title to real estate, equity will give relief, though the deed alleged to be a cloud is void on its face.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quietting Title, § 20.]

2. TAXATION—TAX TITLES—ACTION TO TRY TITLE—LIMITATIONS.

B. & C. Comp. §§ 8128, 8146, providing that any action for the recovery of land sold for taxes shall be commenced within three years from the recording of the tax deed, apply only to actions for the recovery of land sold for taxes, and not to suits to quiet title or determine an adverse claim thereto.

3. SAME.

B. & C. Comp. § 8135, (Laws 1901, p. 73, § 5), providing that no action to set aside a sale of land for taxes, or to quiet title to the same, or to remove a cloud therefrom, shall be brought, unless within two years from the date of record of the deed by the sheriff, when considered in connection with sections 3, 4, pp. 72, 73, Laws 1901, which make it the duty of the sheriff of every county which has bid in land for taxes and to which title has been acquired to sell the same and to make deeds to the purchasers, has reference only to lands bid in by counties at delinquent tax sales.

Appeal from Circuit Court, Baker County; Samuel White, Judge.

Suit by Elsie L. Mount against Robert McAulay and others. From a decree of dismissal, on sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

This suit was commenced in June, 1905, to remove a cloud from title caused by a tax deed, and comes here on appeal from a decree entered on a demurrer to the complaint, which avers that from 1893 to the 16th day of April, 1895, L. O. Stearns was the owner of the premises in controversy, except a right of way 100 feet wide over and across the same, owned and occupied by the Oregon Railway & Navigation Company, for railroad purposes; that prior to the 1st day of March, 1895, Martha E. Hallett and Fred N. Hallett purchased Stearns' interest in such property under a decree foreclosing a mortgage thereon, and received a sheriff's deed on April 16, 1895, which was duly recorded on the 25th of May following; that the Halletts owned and possessed the property, except the right of way referred to, until June 5, 1905, when they sold and conveyed the same to the plaintiff, ever since which time she had been the owner in fee simple and in the possession thereof; that the defendants claim some interest or estate therein by virtue of a tax deed dated September 23, 1899, and recorded on the 4th of October of the same year, made in pursuance of a sale by the sheriff of Baker county to satisfy what purported to be the delinquent taxes assessed against the property for the year 1895, a copy of which deed is annexed to and made a part of the complaint; that such deed is void and

of no effect for divers and sundry reasons set out; that since the execution thereof and prior to the commencement of this suit the plaintiff tendered to defendants the amount for which the lands were sold at tax sale, together with 20 per cent. additional thereon, and all taxes which had been paid by the purchasers after such sale, together with interest thereon at the rate of 10 per cent. per annum from the respective times of payment of such sums up to the time of the filing of the complaint, and deposited in court the sum of \$75, from which the above amounts might be paid.

O. B. Mount, for appellant. F. M. Saxton, for respondents.

BEAN, C. J. (after stating the facts). It is admitted by the defendants, if we understand their position, that the allegations of the complaint are sufficient, if true, to avoid the tax sale and deed. Their contention, however, is that, if the tax deed, as plaintiff claims, is void on its face, it does not create such a cloud on the title of the plaintiff as will be relieved against by a court of equity; and that, if it is not so void, this suit is barred by the short statute of limitations. The fact that a deed or instrument purporting to convey real estate is void on its face is no objection to the interposition of a court of equity at the suit of the owner, who is in possession, to cancel and annul such deed. A void deed is often apt to create doubt and uncertainty in respect to the title of the true owner and to interfere materially with the enjoyment and disposition of his property, and therefore equity will relieve against it. *Murphy v. Sears*, 11 Or. 127, 4 Pac. 471; *White v. Espey*, 21 Or. 328, 28 Pac. 71; *George v. Nowlan*, 38 Or. 537, 64 Pac. 1; *Hughes v. Linn County*, 37 Or. 111, 60 Pac. 843; *Moore v. Clackamas County*, 40 Or. 536, 67 Pac. 662. And so there is no merit in this objection.

If, on the other hand, the deed is not void on its face, we do not think the suit is barred by the short statute of limitations. There are three sections of the statute now applicable to the limitation of actions and suits concerning land sold for delinquent taxes (B. & C. Comp. §§ 8128, 8135, 8146), but one of which, however (section 8146), was in force at the time the deed in question was made. Sections 8146 and 8128 provide, in substance, that any action or suit for the recovery of land sold for taxes, except where the taxes have been paid or the land redeemed, shall be commenced within a certain definite time; but both of these sections apply only to actions or suits for the recovery of such land, and not to suits to quiet title or determine an adverse claim thereto. *Farrar v. Clark*, 85 Ind. 449; *Bowen v. Striker*, 87 Ind. 317; *Earle v. Simmons*, 94 Ind. 578; *Kraus v. Montgomery*, 114 Ind. 103, 16 N. E. 153. Section 8135 is section 5 of an act to amend

*Rehearing denied.

the act of 1893 (Laws 1901, p. 73), authorizing county judges and clerks of school districts to bid in property sold for taxes and to provide for the sale of the same (Laws 1893, p. 28), and the limitation clause therein clearly has reference to suits involving the validity of deeds given by a sheriff for property bid in by the county for delinquent taxes, and which, by this latter act, he is authorized and required to sell. By section 3, p. 72, of the act of 1901, it is made the duty of the sheriff of every county in the state which had theretofore bid in land for taxes, and to which the county had acquired title, to sell the same to the highest bidder for cash in manner and form as upon sales under execution, and by section 4, p. 73, as soon as practicable thereafter, to make to the respective purchasers deeds for the several parcels sold to them. Section 5 declares the force and effect of deeds given by the sheriff at "sales of real property herein provided for," and, after declaring that in any action, suit, or proceeding brought to set aside the sale of lands to counties and other public corporations for taxes, or to quiet title against the same, or remove cloud therefrom, the person claiming the ownership as against the purchaser shall tender and pay into court with his first pleading the amount of taxes and costs for which the lands were sold, together with interest thereon, and all taxes and assessments paid by the purchaser since the sale, provides "nor shall any such action, suit, or proceeding be brought unless within two years from the date of record of the deed by the sheriff." As appears from the title and body of the act, it has reference to lands bid in by counties at delinquent tax sales and to the sale and disposition thereof. The only deed therein mentioned or referred to is the one to be given by the sheriff, as provided in section 4, and therefore the clause quoted necessarily must have reference to such deed, and not to a deed given by a sheriff to a purchaser at a delinquent tax sale.

For these reasons, we think the court below was in error in sustaining the demurrer to the complaint. The questions sought to be litigated can be more intelligently considered after a trial upon the issues tendered by the complaint, and we therefore refrain from expressing any opinion upon the other questions argued by counsel.

The decree will be reversed, and the suit remanded to the court below, for such further proceedings as may be proper, not inconsistent with this opinion.

IN RE BUREN'S WILL.

(Supreme Court of Oregon. Jan. 23, 1906.)

1. WILLS—TESTAMENTARY CAPACITY—SUFFICIENCY OF EVIDENCE.

In a will contest, evidence held to show testamentary capacity.

2. SAME—MEASURE OF TESTAMENTARY CAPACITY.

Where testator understands what he is doing at the time of the execution of his will, and has full knowledge of his property and how he wishes to dispose of it among those entitled to his bounty, he is of sufficient testamentary capacity, notwithstanding old age, sickness, debility of body, or extreme distress.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 92, 94, 96-100.]

Appeal from Circuit Court, Marion County; William Galloway, Judge.

Will contest by Max O. Buren against Leda V. Buren Reeves. From a decree of the circuit court setting aside the will on appeal from the county court, contestee appeals. Reversed.

This is a will contest, instituted in the county court of Marion county by Max O. Buren, only son of A. B. Buren, deceased, to have declared void the will of his father, for the reason, as stated in the petition, that his father at the time he signed the instrument in question was not of sound and disposing mind and memory, but was in his dotage, and suffering from disease, old age, and great physical and mental disability and infirmity, and his mind and memory were so impaired as to render him entirely incapable of making a will or of understanding the terms of any will or of making any valid disposition of his property, and that he never made or executed said pretended will, and did not intend that its provisions should take effect, and did not know or understand the contents thereof. At the hearing the will was sustained, but an appeal was taken to the circuit court, where a decree was entered setting aside the will, from which decree this appeal was taken by Leda V. Buren Reeves, contestant's only sister, who was unmarried at the time of the death of their father. The father of these litigants had been a resident of Salem for many years, and died on February 24, 1904, leaving surviving him as his sole heirs the contestant, Max O. Buren, his son, aged about 34 years, and one daughter, Leda, aged about 19 years, who resided with her father, while her brother was married and had three young sons, and resided in a neighboring residence. At the time of his death the father was between 64 and 65 years of age, and had been afflicted for many years with what is commonly called "locomotor ataxia," and also with defective hearing. From 1890 to 1894 he was engaged in the furniture business in Salem with his son, Max, under the firm name of A. B. Buren & Son, but in the latter year he sold his interest to his son and a Mr. Hamilton, and thereafter loaned money and looked after his property interests, which were quite extensive, and at the time of his death aggregated about \$35,000. During the winter of 1903-1904 his physical troubles so progressed as to confine him to his home, where, during the pleasant weather, he frequently sat in the front yard and chat-

ted with his friends and neighbors as they passed. In the month of February, 1904, he became confined to his house, and on the 16th day of that month sent for an attorney and gave him directions about drafting his will, and two days later the will was drawn at the residence of the testator in the presence of himself and three witnesses, and by him duly executed. By this will he gave certain residence property to his daughter and certain other like property to his son, and certain other real property to them jointly, and made a bequest of \$2,000 to each of his three grandsons, the children of his son, Max. And "as a matter of kindly remembrance" made two small bequests, one for \$250 to Mrs. Fannie Wain, a friend and former member of his household, and a like amount to Carolyn Holman, the infant daughter of Mrs. Rachel Holman, who was also a friend and at one time a member of his household; this latter bequest being made "on account of the many kindnesses bestowed on me and my family by her mother." The will further provided that the bequest made to his grandsons should not be paid to them until they had attained the age of 24 years, and he appointed their father as guardian of their funds, and directed that the same should be loaned to the best advantage and upon security, to be approved by the probate court of Marion county, Or., and that neither the principal nor interest thereon should be used, except to pay taxes and other public charges thereon. The residue of his estate was willed to his daughter, Leda, and she was appointed executrix of his last will and testament, to serve without bonds. This will was executed on the 18th day of February, 1904, in the presence of N. J. Judah, W. H. Holmes, and Mary Eliza Cotter, the trained nurse who was then attending him. During his last illness Mr. Buren at times suffered great physical pain, to relieve which he was given morphine, and at times to allay his nervousness was also given bromide, which drugs had a depressing effect on him and caused more or less stupor.

W. H. Holmes and John H. McNary, for appellant. John A. Carson and A. M. Cannon, for respondent.

HAILEY, J. (after stating the facts). The only question involved upon this appeal is the testamentary capacity of the deceased at the time of the execution of the will. It is contended on the part of the contestant that by reason of the morphine and other drugs administered to his father during his last illness, together with the progress of the disease from which he was suffering, he was not of sound and disposing mind and memory, and the instrument is therefore void. To support this contention, the contestant relies almost wholly upon the opinion testimony of experts versed in mental disorders, only two of whom actually saw the testator during his last illness. One of these

called on the evening of the 17th of February, the day before the will was written, when the testator was in a stupor from the effects of morphine given him during the day, and did not arouse him so as to have any conversation with him, while the other was his attending physician, who ordinarily made two calls a day, one in the morning and one in the evening, and was not present at the time of the execution of the will. The other expert witnesses based their opinions upon a reading of the testimony of these two. The appellant and proponent contends that her father was of sound and disposing mind and memory at the time of the execution of the instrument, and relies upon the testimony of the subscribing witnesses and of friends and acquaintances who saw and conversed with her father, both before and after the execution of the instrument.

We have carefully read and considered all the testimony in the record, and also inspected the original will, which was submitted for that purpose. The testimony of friends and associates of the deceased shows that he was a careful, prudent, and capable business man, who kept close watch over all his affairs, and fully understood all his business dealings. The evidence also discloses that for some time prior to the execution of his instrument he had been talking about making a will, and had told former members of his household what he purposed doing with a part of his property, and after its execution again told at least two persons besides his daughter what disposition he had made of parts of his property by will, specifying the particular property and to whom it was given. On February 16, 1904, he sent for his attorney, Mr. W. H. Holmes, of Salem, whom he had frequently consulted in legal matters, and requested him to draw his will and gave him directions as to the disposition he desired to make of his property, all of which was noted down by his attorney, who returned the next day to draft the will, but, no witnesses being present, the matter was deferred until the following day, when N. J. Judah, a personal friend of the deceased, was present to act as a witness, and also acted as scrivener in drafting the will, writing from dictation given him by Mr. Holmes, and in doing so sat near the testator, who was bolstered up in bed, and who, as testified to by Mr. Holmes, "paid very close attention to what was going on and interrupted me a time or two in some formal matters or unimportant matters, showing that he was paying very close attention to what I said." After the will was written it was carefully read to the testator by Judah in the presence of Mr. Holmes and Miss Cotter, the nurse. He then signed it and declared it to be his will, and requested the persons present to witness it as such, and after they had done so he asked his attorney, as testified to by the witness Judah, "if in

the event of recovery from that illness, if the making and declaration of this will would hinder or prevent him from making any other disposition of his property, if he wanted to sell it, or anything else." His daughter, Leda, also testified that later on the same day he asked her to read the will, and when she had done so asked her if it was satisfactory, and "talked about it the next day," and "knew exactly what was in the will," and "mentioned each particular instance." Mrs. Rachel Holman, a friend and former member of the family, testified that in the evening after the will was made she heard the old gentleman and his son, Max, talking, and "heard Max say: 'Has Leda been any nearer and dearer to you than you should favor her.' The old gentleman was indignant, and he said: 'Max, don't you think I am in my right mind? Don't you think I know what I want to do with my property?' He seemed to be angry because Mr. Buren was trying to impress upon him that he was as dear to him as Leda." She further testified that on the morning following the execution of the will she called and conversed with Mr. Buren, and he mentioned the bequest of \$250 to her baby, Carolyn, and asked her to remind the child of the bequest, and that it came from him, whenever she was old enough to appreciate it.

The only testimony given by the contestant himself regarding his father's physical and mental condition is the following: "Q. Did you see your father during his last illness or shortly preceding his death? A. I saw him during his sickness; yes. Q. State to the court the condition of his hearing, and confine your testimony solely to that one matter. A. My father's hearing was always bad, and he was very inattentive, making it harder for him to hear a person than one who had the same hearing. At a number of times I noticed that when it came to giving his medicine that Miss Cotter had to talk very loud to him, and I had to talk loud to him, and had to repeat it a number of times. It was practically impossible to carry on an extended conversation with him. Q. What was the reason of that? A. He was dull; his mind seemed dull. Q. I mean about his hearing? A. Well, the reason that it was so hard to carry on a conversation with him was because his hearing was so hard, and he did not look directly at you, and he had a poor conception of the reading of one's lips if he did look at you." He does not contradict the testimony of Mrs. Holman or attempt to detail the mental condition of his father, although he visited and talked with him on the day the will was signed and on the preceding day, and saw him a number of times during his last sickness.

Personal friends, who had been acquainted with him for years and who visited with him both before and after the execution of the will, testified that they found him suffering

physically, but that his mind was clear, and he talked rationally about business and other matters and was in his normal mental condition, which was that of a careful and cautious man of good business capacity. Holmes and Judah, the subscribing witnesses, both testified that his mind was perfectly clear when the will was drafted and executed, and the attending circumstances as detailed by them and the nurse, together with the testimony of other witnesses who saw him before and after the execution of the will, fully establish the fact that he understood what he was doing at the time he executed the will, and had full knowledge of his property and how he wished to dispose of it among those entitled to his bounty, and this was "sufficient testamentary capacity, notwithstanding his old age, sickness, debility of body or extreme distress," within the rule now firmly established in this state and recently reiterated by Mr. Justice Moore in the case of Ames' Will, 40 Or. 495-504, 67 Pac. 737, where all the decisions of this court upon this subject are collated.

The decision of the circuit court will therefore be reversed, and this cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

BAKER COUNTY v. HUNTINGTON et al. (Supreme Court of Oregon. Jan. 23, 1906.)

1. PRINCIPAL AND SURETY—INCOMPLETE INSTRUMENT—DELIVERY.

Where a sheriff as tax collector delivered a bond to the county court, without signing the same himself, without the names of any of the sureties except one being entered therein or certain other sureties qualifying, and without obtaining the signatures of sureties sufficient to complete the bond, the liability of the sureties who had signed the bond depended on whether the sheriff had authority to deliver the uncompleted and imperfect instrument as their act and deed, and not whether there was any definite understanding or agreement between the sheriff and such sureties at the time the instrument was signed by them, that it should not be so delivered.

2. SAME.

A principal's authority to deliver an uncompleted bond as the act and deed of certain sureties, who had signed the same, may be implied from the sureties' acts and conduct.

3. SAME—EVIDENCE.

Where certain sureties signed an uncompleted and imperfect bond of a sheriff and tax collector, attempting to limit their liability by writing amounts before their names, their mere act in so signing the bond and leaving it with the principal, without any express restriction as to its delivery, was insufficient as a matter of law to show authority of the principal to deliver the bond in its uncompleted condition.

Appeal from Circuit Court, Umatilla County; W. R. Ellis, Judge.

Action by Baker county against A. H. Huntington and others. From a judgment for plaintiff, defendants appeal. Reversed.

William Smith, for appellants. Thomas G. Greene, for respondent.

BEAN, C. J. This is an action upon an instrument alleged to be a sheriff's bond as tax collector. The facts are substantially stated, and the law applicable thereto declared, in the opinion on the former appeal. 79 Pac. 187. Upon the second trial it appeared that Huntington was elected sheriff of Baker county, in June, 1900, and qualified by taking the oath of office in July, and giving the undertaking required by section 2892, Hill's Ann. Laws. His bond as tax collector was fixed by the county court at \$10,000, but he seems to have had some difficulty in obtaining sureties thereon, and at the meeting of the county court in September, he had been able to obtain only the signatures of the defendants to this action, each of whom had attempted to limit his liability by writing or causing to be written before his name the amount for which he intended to become liable, and which amounted in the aggregate to only \$7,000. Without signing the instrument himself and without the names of any of the sureties, except Brown, being entered therein, or the sureties Brown and Fleetwood qualifying, and without obtaining the signatures of sureties sufficient to complete the bond, the uncompleted instrument, a copy of which is set out in the former opinion, was, as the plaintiff alleges, delivered by Huntington to the county court, and received by it as and for his bond as tax collector.

The defendants requested the court to instruct the jury that "it was incumbent upon Baker county, owing to the irregularities appearing on the face of the instrument, to make all reasonable efforts to ascertain if there were conditions limiting the obligations of the sureties, and to ascertain whether or not the sureties thereon had consented to its delivery in the condition in which you find it. I instruct you that if you find that the instrument in question was handed to the county judge of Baker county in its present condition by Huntington, and that at said time the defendants had not consented to its use by said county as the tax collector's bond, that the receipt by said county of such instrument under those circumstances did not constitute a delivery, and such receipt does not render defendants liable thereon." The court refused to give the instruction as requested, but gave it as modified, by adding at the end of the first sentence the words "unless the defendants by the assent or understanding of Huntington imposed no restrictions as to its delivery," and also charged: If the bond "was signed by the defendants and delivered to Huntington * * * without any agreement or understanding between the sureties and Huntington that it was not to be delivered to the county until other qualified persons had signed it, * * * Huntington had the right to deliver the same to the county court, and if you find that thereafter he did deliver it as his tax bond, and the county

court accepted it as such, your verdict should be for the plaintiff." And if the "bond was signed and delivered to Huntington without any conditions or restrictions as to when and how it was to be further signed or executed, if at all, before the delivery, the failure of the court to inquire regarding his authority to deliver it would not affect his right to so deliver the bond." And that if the bond was signed by the defendant sureties, and they "gave it or left it in the hands of Huntington as his tax bond, without imposing upon him definite or any conditions that it should not be delivered until signed by other persons, * * * they thereby made him their agent to deliver it to the county court in the form in which it left their hands."

By these instructions and others of similar import, which were given, but not here set out, the right of Huntington to deliver the bond was made to turn on the question whether there was any definite understanding or agreement between him and the defendants at the time the instrument was signed by them that it should not be delivered in its then condition, and not whether he had authority to deliver the uncompleted and imperfect instrument as their act and deed. This is not the law as declared in the former opinion. After stating that "Huntington must have been clothed with authority from the sureties, real or apparent, to deliver the bond, as a completed instrument, or his disposition of it could not bind them," the opinion proceeds to show that the defects and infirmities of the instrument were such that the doctrine of apparent authority could not be invoked, and therefore it "became a question of fact for the jury to determine from the evidence whether, in reality, Huntington was given authority—not whether he had apparent authority, as the bond on its face refutes that—from the sureties signing to deliver this bond to the county court as their act and deed." We do not think we can make the question any clearer by elaborating on the former opinion. It is not necessary for the plaintiff to show express authority from the defendants to Huntington to deliver the bond. His authority may be implied from their acts and conduct, but he must have authority, either express or implied, to make the delivery before it could become effective. The mere signing by them of the uncompleted and imperfect instrument in the manner in which they signed it, and leaving it with Huntington, without any express restriction as to its delivery, was not enough to show authority to deliver it, as a matter of law. It would be an important fact to be considered along with all the other evidence in determining whether they intended to vest him with authority to deliver the instrument in its then condition as their act and deed, or whether the understanding was that it should not

be delivered until the aggregate amounts assumed by the several sureties should equal the face of the bond. If, at the time they executed the bond, they imposed no restrictions upon its delivery, and nothing was said about that matter or the obtaining of other sureties. It would evidence an intent to make Huntington their agent to deliver it to the county court; but it would not be conclusive. Huntington's authority must be determined from all the circumstances in the case, and not from one single item of evidence. The uncompleted condition of the instrument, the manner of its execution by the defendants, their attempt to limit their liability by writing the amount each intended to assume opposite his signature, the fact that the sum of such amounts did not equal the face of the bond, are all important factors, and should be considered.

The instructions as given were not in harmony with these views, and the error was not cured by the instructions given at the request of the defendants.

The judgment is reversed, and a new trial ordered.

HAILEY, J., having been of counsel, took no part in this decision.

MORGAN et al. v. SHAW.

(Supreme Court of Oregon. Jan. 23, 1906.)

1. WATERS AND WATER COURSES—APPROPRIATION OF RIGHTS IN PUBLIC LANDS—TIME WHEN RIGHT ATTACHES.

The right to the use of the waters of a stream relates back to its initiation by a settler of public lands, and not to the time when his ditches were completed, provided the work of digging them was prosecuted with reasonable diligence.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, §§ 10-12.]

2. SAME—PRIORITY—EVIDENCE.

Where the prior appropriation of waters of a public stream was in issue, declarations of defendant that his right to the use of the water was a subsequent one was sufficient to show a prior appropriation by plaintiff when corroborated by the fact that for 18 years defendant permitted sufficient water to flow in the channel of the stream to irrigate plaintiff's land.

3. SAME—RIPARIAN RIGHTS—COMMON LAW DOCTRINE—PRIOR APPROPRIATION.

Where, as in Oregon, the common-law doctrine of riparian rights, as modified by the rule of prior appropriation, is recognized, when a prior settler on public land through which a stream flows appropriates the waters of such stream for irrigating purposes, the stream is not flowing through public lands at the time of a diversion of the water thereof made by a subsequent settler.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, §§ 11-14.]

4. SAME—APPROPRIATION OF WATER—EFFECT.

An appropriation of water is a grant by the general government to a settler on public land of the right to its use from a nonnavigable stream, to the injury of all public land above

the point of diversion, which may be within or beyond the boundaries of the settler's claim.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, §§ 15, 16.]

Appeal from Circuit Court, Baker County; Robert Eakin, Judge.

Action by Anna M. Morgan and others against John B. Shaw. From the decree, plaintiffs appeal and defendant files cross-appeal. Decree modified.

This is a suit by Anna M. Morgan, Maud J. Estes, and Albert J. Morgan, the widow and the heirs at law respectively of William H. Morgan, deceased, to enjoin the defendant, John B. Shaw, from interfering with the flow of water in the channel of a non-navigable stream to the head of plaintiffs' ditches, and to recover damages caused by his diversion of such stream. The complaint states that plaintiffs by inheritance are the owners in fee and in the possession of 160 acres of land, particularly describing it, in Baker county, and that in 1884 their predecessor in interest diverted 110 inches of the water of the Middle Fork of Burnt river and made a prior appropriation thereof to such premises, where that quantity has ever since been used, until 1902, and thereafter, when the defendant unlawfully diverted all the water from that stream to their damage in the sum of \$995. The answer denies the material allegations of the complaint, and avers that the defendant is the owner of 320 acres of land, describing it, in that county, through which such fork flows, and that in May, 1884, he made a prior appropriation of the water of that stream, to the extent of 550 inches, by diverting the same at points on the public domain, which quantity he thereafter continuously used in irrigating his premises. The reply having denied the allegations of new matter in the answer, the cause was referred, and from the testimony taken the court found that the plaintiffs and the defendant, as parties, had an equal right to the use of the water, and that by the defendant's diversion thereof plaintiffs had sustained damages in the sum of \$100, and a decree having been rendered in accordance therewith, both parties appeal.

William Smith, for appellants. A. B. Winfree, for respondent.

MOORE, J. (after stating the facts). The testimony shows that the Middle Fork of Burnt river, a nonnavigable stream, flows southeasterly in a well-defined channel through defendant's land, and thence to and through plaintiffs' premises. In May, each year, the snow melting in the mountains where this fork has its source, creates a volume of water of about 400 inches, which continues to flow undiminished about a month, when it begins to subside, and in July the stream affords only about 60 inches, which stage is not increased until the drought is broken. The lands of the respective par-

ties are arid, and, without the artificial use of water, unproductive, but, when properly irrigated, they yield valuable crops; hay being the chief product. Dr. E. J. Stevens, in May, 1884, established his residence upon the land now owned by plaintiffs, and soon thereafter dug ditches and diverted from such fork water which has ever since been used in irrigating such premises, except in 1902, and the seasons following, when the defendant, by diverting all the water, interfered with such use. Stevens made final proof in support of his entry and having received a United States patent for this land conveyed the premises, December 10, 1889, to William H. Morgan, who died seised in fee and in possession thereof, February 3, 1893, whereupon the plaintiffs, as his widow and heirs respectively, succeeded to his estate therein.

The defendant, as a witness in his own behalf, testified that in May, 1884, he dug a ditch a few rods in length whereby water was diverted from the Middle Fork of Burnt river and flowed into a small swale on land then selected and now owned by him, whence the water returned to the stream from which it was taken; that in 1885, he extended such ditch, and used the water flowing therein to irrigate his land, and dug other ditches by means of which he was enabled to grow crops by the artificial use of water; and that his first ditch was prior in time to the ditch constructed by Dr. Stevens. This witness further testifies that having made an appropriation of the water of the stream mentioned, he returned to the premises now owned by plaintiffs, and found Dr. Stevens and men employed by him in digging his ditch. George Elliott, a witness for plaintiffs, testified that as Dr. Stevens' team was light, he was sent by his employer with a heavier team, to plow a ditch on the land now owned by plaintiffs, and referring to a memorandum made at that time, he said it was June 2, 1884, but that he had no recollection of seeing the defendant when he was working there. The defendant offered in evidence the deposition of Thomas Gardner, taken at Omaha, Neb. to the effect that the deponent, in May, 1884, assisted the defendant about two days in digging the first ditch from the Middle Fork of Burnt river, whereby water was diverted for irrigation, and that Dr. Stevens did not begin the construction of his ditch until the fall of 1884, or the following spring. The witnesses, George Whited, Michael Rouse, and Daniel Elliott, severally testified that prior to the defendant's diversion of all the water from the stream, he admitted to each that plaintiffs' right to the use of the water for irrigation was superior. The defendant denies the statements so imputed to him, and asserts that, though he at Mrs. Morgan's request, permitted the water to flow in the channel of the stream to her premises, prior to 1902, his acts in these respects were neighborly only and with no

intention to relinquish his rights. Dr. Stevens' ditches were completed about June 15, 1884, whereby water was diverted from the stream, and used to irrigate crops grown on the land now owned by plaintiffs. The right to such use relates back to its initiation by Dr. Stevens, and not to the time when his ditches were completed, assuming as we must, that the work of digging them was prosecuted with reasonable diligence. It nowhere appears in the evidence that the ditch, which the defendant dug in May, 1884, and which was never seen by any person, except himself and Thomas Gardner, was commenced before Dr. Stevens began the construction of his ditches. The defendant's admission to the witnesses named that Mrs. Morgan's right to the use of the water was first and his second concedes that Dr. Stevens initiated a prior appropriation.

We adhere to the general rule that testimony of the oral declarations of a party against his interest should be viewed with caution, and place our decision herein on the corroborating fact that from 1884 to 1902, a period of 18 years, the defendant permitted sufficient water to flow in the channel of the stream to irrigate the arable land now owned by plaintiffs. Gardner's declaration under oath, that Dr. Stevens did not begin the construction of his ditches until the fall 1884 or the spring of 1885, is so at variance with the fact, admitted by the defendant, that these ditches were completed June 15, 1884, as to render his deposition of but little value in determining the truth. Much importance seems to be placed by defendant upon the averment in his answer that he diverted water from a stream at a point on the public domain, and that as the plaintiffs failed to allege such fact in the complaint, he, having given evidence thereof at the trial, had established the better right. This contention is without merit, for where, as in this state, the common-law doctrine of riparian rights, as modified by the rule of prior appropriation, is recognized, it follows that, as Dr. Stevens was a prior settler on public land, through which the Middle Fork of Burnt river flowed, and his title to the premises secured from the United States related back to the date of his settlement, that stream was not flowing through public lands when the defendant made his diversion. *Brown v. Baker*, 39 Or. 66, 65 Pac. 799, 66 Pac. 193. An appropriation of water is a grant by the general government to the settler of the right to its use from a non-navigable stream, to the injury of all public land above the point of diversion, which may be within or beyond the boundaries of the settler's claim. The evidence shows that plaintiffs have in cultivation about 90 acres of land, which requires an inch of water, under six-inch pressure, properly to irrigate an acre thereof.

The decree of the lower court will therefore be so modified as to allow to plaintiffs,

or the irrigation of their land, this quantity of water as a prior appropriation, and the defendant will be perpetually enjoined from interfering with the flow of the volume so awarded in the channel of the stream to the head of their ditches; the plaintiffs to recover from the defendant the sum of \$100 for the damages sustained by reason of his diversion, and their costs and disbursements in this court and in the court below.

(48 Or. 128)

HIGINBOTHAM et al. v. FROCK et al.

(Supreme Court of Oregon. Jan. 9, 1906.)

1. VENDOR AND PURCHASER—BOND FOR TITLE—CANCELLATION—FORFEITURE—DEFERRED PAYMENTS—FAILURE TO MAKE.

Where a bond for title stipulated that, if default was made in any of the deferred payments, the vendors might declare the bond void and repossess themselves of the premises, such provision only gave the vendors power to put an end to the agreement at their election after reasonable notice because of the vendees' default, which default did not of itself terminate the contract or work a forfeiture of the vendees' rights.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 172.]

2. SAME—FORFEITURE—RIGHT TO DECLARE.

Where plaintiffs agreed to convey certain premises free from all liens and incumbrances, they were not entitled to declare a forfeiture for the vendees' failure to make deferred payments within the time specified, so long as the vendors suffered a mortgage lien to remain upon the property and were unable by reason thereof to perform on their part.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 148, 162.]

3. EQUITY—FORFEITURES—ENFORCEMENT.

A court of equity, in a suit to cancel a bond for a deed, will not declare a forfeiture, but will leave the plaintiffs entitled thereto to their remedy at law, if any.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 121-166.]

4. VENDOR AND PURCHASER—BOND FOR DEED—FORECLOSURE OF VENDEES' INTEREST.

A suit in equity to cancel a bond for a deed and foreclose the vendees' interest in the property is a recognition that the vendees have some interest in the property which would not be cut off without giving them a reasonable time in which to comply with their contract.

Appeal from Circuit Court, Sherman County; W. L. Bradshaw, Judge.

Suit by Maggie Higinbotham and another against Henry Frock and another. From a decree in favor of defendants, plaintiffs appeal. Affirmed.

C. J. Bright, for appellants. J. B. Hosford, for respondents.

BEAN, C. J. This is a suit to cancel and annul a bond for a deed. On December 20, 1902, the defendant Henry Frock purchased of the plaintiffs 160 acres of land in Sherman county for \$2,500. He paid \$1,200 in cash, giving his three promissory notes for the balance, due the 1st day of October, 1903,

1904, and 1905, respectively. Each note bore interest at 8 per cent., payable annually, and provided that, if the interest was not so paid, the whole sum, both principal and interest, should become immediately due and collectible at the option of the holder of the note. At the same time the plaintiffs executed and delivered to the defendant a bond for a deed, whereby they obligated themselves to convey the land to him in fee simple, by good and sufficient deed, clear of all incumbrances, except certain taxes, which bond contained a stipulation that the defendant should have immediate possession, and, if he "shall make default in any of the above deferred payments, or shall violate any of the agreements herein contained, the said obligors [the plaintiffs] may declare this bond void and may forthwith repossess themselves of said premises." The defendant immediately went into possession. Soon thereafter the plaintiffs assigned and transferred the promissory notes for the deferred payments to Moore Bros. as collateral security. When the first note matured, the defendant offered to pay all the notes upon the delivery to him of a deed to the premises, as stipulated in the bond. Nothing definite was done at that time, however, and in November, he paid \$125 to Moore Bros. on the first note, and again requested a deed, offering at the same time to pay all the notes in full. In January, 1904, the plaintiffs redeemed the notes from Moore Bros., and on the 25th of February notified the defendant that they had elected to terminate the contract and to repossess themselves of the land because of his default in making the payments, at the same time offering to return the unpaid notes. The defendant refused to accept the notes or to relinquish his claim under the bond. On March 7th he tendered to plaintiffs and offered to pay the entire amount due on the purchase price, and demanded from them a deed as stipulated in the contract. At the time of the attempted rescission by the plaintiffs the property was incumbered by mortgages to the amount of about \$3,600, and they were then in no position to comply with their contract and convey the property to the defendant, free of all liens and incumbrances. Soon thereafter this suit was brought by the plaintiffs. In his answer the defendant pleads the tender made on March 7th, brings the amount thereof into court, and prays for a decree, requiring the plaintiffs to comply with their contract. The defendant had a decree in his favor, and plaintiffs appeal.

There are several reasons why the decree of the court below should be affirmed. In the first place, the mere failure of the defendant to make the deferred payments on the purchase price of the land did not, ipso facto, entail a forfeiture of his rights under the contract. The stipulation in the bond is that, if default is made in any of the deferred payments, the obligors (the plaintiffs) may declare the bond void and repossess themselves

of the premises. This provision gave the plaintiffs power to put an end to the agreement if they elected to do so, but the mere default of the defendant did not terminate the contract or work a forfeiture of his rights, unless the plaintiffs should elect to insist upon a strict performance according to its terms, in which case they were required to give him timely and reasonable notice of their intention to cancel the contract, so he might have an opportunity to comply with its terms and make the payments. *Pomeroy, Contracts* (2d Ed.) § 393; *O'Connor v. Hughes*, 35 Minn. 446, 29 N. W. 152. "Such notice," says Dickinson, J., in *O'Connor v. Hughes*, supra, a case similar to the one at bar, "might have been given before the time named for payment, or, if not so made, notice might have been given after default, fixing a reasonable time within which payment would be required; but the rights of the purchaser under a contract not absolutely terminated cannot be extinguished by a summary declaration of forfeiture."

Again, the plaintiffs could not declare a forfeiture at the time they attempted to do so, because they were not then in a position to comply with the contract on their part. The property was subject to mortgages for about \$3,600, and they could not convey it to the defendant in fee simple, free from all liens and incumbrances, as they had agreed to do. The rights of a vendee under a contract like the one under consideration cannot be forfeited by the vendor, although default has been made in the payments, unless he is in a position to perform his part of the agreement. 29 Am. & Eng. Enc. Law (2d Ed.) 683; 2 Warvelle, *Vendors* (2d Ed.) § 822; *Wells Fargo & Co. v. Page* (Or.; decided October 30, 1905) 82 Pac. 836; *Baker v. Bishop Hill Colony*, 45 Ill. 264.

And, finally, this is a suit in equity, either to declare a forfeiture or to foreclose the defendant's equitable rights in the property. It is a familiar doctrine that a court of equity will not declare a forfeiture, but will leave a party entitled thereto to his legal remedy if any. 1 *Pomeroy, Equity* (3d Ed.) § 459. So that plaintiffs are not entitled to relief on that ground. If, on the other hand, the suit is to be treated as one for the foreclosure of defendant's interest in the property, the plaintiffs are not entitled to the relief demanded; for, having invoked the aid of a court of equity, they are bound themselves to do equity. The bond for a deed transferred to the purchaser an equitable title. *Burkhart v. Howard*, 14 Or. 39, 12 Pac. 79; *Sayre v. Mohnney*, 30 Or. 238, 47 Pac. 197; *Security Savings Co. v. Mackenzie*, 33 Or. 209, 52 Pac. 1046; *Sievers v. Brown*, 34 Or. 454, 56 Pac. 171, 45 L. R. A. 642. By instituting this suit the plaintiffs recognized that defendant has some interest in the property which they desire to have forever barred and foreclosed. An application for a strict foreclosure is always addressed to the sound discre-

tion of the court, and when enforced at all will not be done without giving the defendant a reasonable time to comply with his contract. *Sec. Sav. Co. v. Mackenzie*, supra; *Flanagan Estate v. Great Central Land Co.* (Or.) 77 Pac. 485.

The decree of the court below is affirmed.

YODER v. RANDOL et al.

(Supreme Court of Oklahoma. Sept. 8, 1905.)

1. BROKERS—ACTION FOR COMMISSION—PETITION.

Where a petition properly alleges a contract of employment in relation to the sale of real estate, and avers facts showing a full performance of the broker's duty to his employer, and the accomplishment of all he undertook to do under his contract, *held*, a sufficient pleading, as against demurrer, of a cause of action for compensation for such services.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 101.]

2. SAME—DUTIES.

As a general rule, the entire duty of a broker employed to assist in the sale of property is to find and introduce or report to his employer a person who is willing and able to purchase at the price and upon the terms which the employer has designated, although this rule is to be applied as abridged or extended in any specific case by the terms of the contract of employment.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 75.]

3. PLEADINGS—JUDGMENT ON PLEADINGS.

Where the essential averments of a petition in an action for commission earned as real estate brokers are the contract of employment and a full compliance with the terms thereof, and the answer, after a general denial, definitely recognizes the procurement of a purchaser by the plaintiffs for the land in question and an acceptance of the purchaser by the landowner, and discloses further the execution of a binding, valid, and enforceable contract of sale between the two, and an agreement to compensate the brokers in accordance with the terms of the contract of sale, *held*, that in such case a motion by plaintiffs for judgment on the pleadings was properly sustained, and the trial court committed no error in rendering judgment for plaintiffs thereon.

4. SAME—RIGHT TO COMPENSATION.

Where a broker has fully performed his undertaking by producing a person ready, willing, and able to purchase his employer's property at the price and upon the terms stipulated, and the landowner has accepted the purchaser so procured and entered into a binding and enforceable contract with him, the broker is entitled to his commission, and his right thereto is not defeated by the fact that the purchaser refuses to consummate the transaction because of a defect in the landowner's title to the property, where knowledge of such defect was not communicated by the employer to the broker at the time of entering into the contract of employment with him.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 78, 92, 93.]

(Syllabus by the Court.)

Error from District Court, Custer County; before Justice C. F. Irwin.

Action by W. A. Randol and E. R. Nix against Moses T. Yoder. Judgment for plaintiffs, and defendant brings error. Affirmed.

Harkins and Jones, for plaintiff in error.
Geo. T. Webster, for defendants in error.

PANCOAST, J. This was an action brought by defendants in error for commission on the sale of certain real estate under a contract of employment with plaintiff in error. Defendant below demurred to the amended petition, which was overruled. He thereafter filed a general denial, verified, coupled with certain allegations and admissions, to which plaintiffs replied, and filed their motion for judgment on the pleadings. This motion was sustained, and judgment rendered for defendants in error, and plaintiff in error brings the case here for review. The action of the trial court in overruling the demurrer of plaintiff in error to the amended petition, and in sustaining the motion for judgment upon the pleadings and rendering judgment thereon, are the errors to which our attention is directed.

As to the first ground relied upon, it may be stated as a general rule, the entire duty, and also, the limit of authority, of a broker employed to assist in the sale of property, is to find and introduce or report to his employer a person who is willing and able to purchase the property at the price and upon the terms which the employer has designated. 23 A. & E. Enc. of Law (2d Ed.) 900. And, in any specific case, the general rule is, of course, abridged or extended in accordance with the particular contract of employment, and to such contract, in controversies as to right to compensation, reference must be had for guidance in determining whether or not the broker has performed his full duty towards his employer, and accomplished all he undertook to do. *Millan v. Porter*, 31 Mo. App. 563; *Maze v. Gordon*, 96 Cal. 61, 30 Pac. 962. To plead properly, therefore, such a cause of action, it is incumbent upon the plaintiff to incorporate in his petition the requisite allegations of employment, followed by sufficient averments of a compliance with that contract on his part to show he has accomplished the whole of what was entailed upon him thereby. In the case at bar, to apply these general rules thereto, the amended petition alleges that the defendants in error were "to find for said defendant a purchaser" for the land concerned, "at the agreed price of \$2,750; this sum to be net to the said defendant," and that plaintiffs were to receive as their compensation for "such services, a commission, which defendant agreed to pay, equal to the difference between the net price of \$2,750 thus set by the said defendant and the contract price agreed to by the proposed purchaser." This, of course, constitutes the contract of employment, specifies the amount of compensation, and defines the conditions upon the full accomplishment and pleading of which depended the right of plaintiffs below to maintain their action. To meet, then, the requirements of a compliance with their contract,

plaintiffs alleged, in the language of their amended petition, that they "immediately began to search and labor for a purchaser, and finally, on August 15, 1903, they introduced to said defendant * * * one H. J. Vandenburg as a purchaser for said land, at the agreed price of \$3,000, and said defendant being satisfied with said purchaser, then and there * * * entered into a written contract with said H. J. Vandenburg for the sale of said land, and has since then duly conveyed said land to said purchaser, and did then and there agree to pay the plaintiffs the sum of \$250 for said services so rendered to defendant," followed by averments of a demand for payment and refusal thereof. Under the contract of employment, which the demurrer admitted, the entire duty of the plaintiffs below consisted in finding a purchaser for the land, at the agreed price of \$2,750, net to the said defendant, with the usual proviso attached by the law that the purchaser be ready, willing, and able to buy; and the full performance of such duty was necessary to be pleaded, together with an allegation of the contract of employment, to render the petition proof against demurrer, and entitle plaintiffs to recover. The allegation as to compliance is that they, the plaintiffs, "introduced to said defendant one H. J. Vandenburg as a purchaser for said land, at the agreed price of \$3,000," and there being no question raised here or in the court below as to the willingness of the purchaser to buy or as to his financial ability to consummate a purchase, we think this allegation is amply sufficient to meet the requirements of the contract, that plaintiffs below were to "find a purchaser for said land, at the agreed price of \$2,750." It follows, therefore, the demurrer to the amended petition was properly overruled.

The action of the court below in sustaining the motion for judgment on the pleadings and rendering judgment thereon is the subject of particular complaint by plaintiff in error, for the reason, as he says "there were certain questions of fact raised by the pleadings which were material to the rights of plaintiff in error, and which should have been determined by the court or a jury." Now, the material allegations in the amended petition some one or more of which it was necessary for defendant below to deny in order to raise successfully a direct and essential question of fact, are the contract of employment, the procurement by plaintiffs of a purchaser at the agreed price of \$3,000, and that as a result of their procurement of a purchaser, such purchaser and the plaintiff in error entered into a written contract for the sale of the land at said price of \$3,000. The answer, as stated before, while it contained a general denial, in another paragraph admitted all the allegations of the petition, and if there be a basis for the action of the court below in sustaining the me-

tion for judgment on the pleadings, it must be found, it would seem in the admissions, in that part of the answer following the general denial. After the allegation of certain facts not material for the purpose of this discussion, it is alleged by plaintiff in error that "he entered into a written contract with H. J. Vandenburg for the sale of said land, and that in accordance with the terms of said contract, the defendant was to make deed to said Vandenburg for said land, and that the said H. J. Vandenburg agreed to pay as the purchase price for said land the sum of \$3,000," and that "he agreed to pay the said plaintiffs, Randol and Nix, any excess above \$2,750, which he should receive from the said H. J. Vandenburg for said land, in accordance with the contract then and there entered into between defendant and H. J. Vandenburg for the sale of said land."

Now, thus far, considered in its application to those allegations of the amended petition above mentioned, the answer not only plainly fails to rebut the averment of employment and of a compliance with the terms of the contract, but, on the other hand, definitely and distinctly recognizes the procurement of Vandenburg by plaintiffs below as a purchaser for the land in question, pleads an acceptance of the purchaser by the landowner, and discloses the execution of a binding, valid, and enforceable contract of sale between the two. This, if unqualified by the pleading, in any other portions, would of itself entitle plaintiffs to judgment, for the rule seems established that where the purchaser presented by the broker is accepted by his employer, and the landowner and the purchaser enter into a binding, valid, and enforceable contract of sale, the broker is entitled to his commission. 23 A. & E. Enc. of Law (2d Ed.) 917; Betz v. Williams, etc., Land Co., 46 Kan. 45, 26 Pac. 456; Whitaker v. Engle, 111 Mich. 205, 69 N. W. 493; Rothschild v. Burritt, 47 Minn. 28, 49 N. W. 393; Gibbons v. Sherwin, 28 Neb. 146, 44 N. W. 99; Gilder v. Davis, 137 N. Y. 504, 33 N. E. 599, 20 L. R. A. 308; Mattes v. Engel, 15 S. D. 330, 89 N. W. 651. And when this is the language of the answer, not tempered by other allegations in the pleading, it certainly would seem to us not only insufficient to constitute a defense, but an adequate foundation, in connection with the amended petition and reply, to base thereon a judgment for plaintiffs below, on the pleadings. And from a careful consideration of the entire answer, we cannot say that plaintiff in error successfully opposed those essential averments of the amended petition which it was obligatory upon him to rebut. Nor is he aided by the exculpatory plea in his answer by which he seeks escape from liability, that "he presented to said H. J. Vandenburg a

deed for said land, together with an abstract, and that said abstract showed a cloud upon the title to said land, and the said H. J. Vandenburg refused to accept the same or pay anything therefor," for no condition of the obligation or contract of employment he had entered into with the brokers demanded an absolute showing of perfect title before compensation was due them, and although the law might perhaps connect with every obligation not otherwise specific in its terms applicable thereto the requirement of good title, yet the right of defendants in error to compensation for the services alleged to have been contracted for and fully performed had become fixed and absolute by such performance of their duty to their employer, and by the execution of a valid, binding, and enforceable contract of sale by plaintiff in error and the purchaser; and such contract is here pleaded by defendant below himself. It was the duty of the plaintiff in error to have communicated to his brokers his title to the land he desired to sell, at the time of making the contract of employment with them, and, not having done so, he impliedly assumed an obligation to convey good title, and Randol and Nix, his brokers, were entitled to assume, on their part, that this would be done; and where, as in this case, the customer's refusal to complete the transaction is due to the fact that the employer's title is defective, the broker is still entitled to his commission, inasmuch as the failure to consummate the sale is directly attributable to the default of the broker's employer. *Hammond v. Crawford*, 66 Fed. 425, 14 C. C. A. 109; *Phelps v. Prusch*, 83 Cal. 626, 23 Pac. 1111; *Davis v. Lawrence*, 52 Kan. 383, 34 Pac. 1051; *Stange v. Gosse*, 110 Mich. 153, 67 N. W. 1108. When defendants in error had fully performed their undertaking by producing a person ready, willing, and able to purchase their employer's property, at the price and upon the terms stipulated, and Yoder, the landowner, had accepted the purchaser so procured, and entered into a binding and enforceable contract with him, the brokers then became entitled to their commission, and their right thereto was not defeated by the fact that purchaser refused to complete the transaction because of the defect shown by the abstract furnished by the landowner. The authorities above cited are in point here.

A reply was filed by plaintiffs below to the answer, which affected but little the question raised by the motion for judgment on the pleadings, and serves merely to strengthen the position of defendants in error.

For the reasons above given, the judgment of the court below is affirmed. IRWIN, J., who tried the case below, not sitting. All the other Justices concurring.

O'KEEFE v. DILLENBECK.

(Supreme Court of Oklahoma. Sept. 5, 1905.)

1. APPEAL — OBJECTIONS TO EVIDENCE — REVIEW.

Where an objection is made to the introduction of evidence, and the objection is sustained, the evidence should be set up in the record, or so much thereof as may be necessary to show to this court that its rejection was injurious to the party complaining, or the assignment of error for this reason will not be considered by this court.

2. TAXATION — TAX DEEDS — PRESUMPTIONS — PLEADING AND PROOF.

In an action of ejectment, where the plaintiff relies upon a tax deed for his title, such deed, when signed and executed by the county treasurer in his official capacity and acknowledged before some officer authorized to take acknowledgments of deeds, shall be presumptive evidence, first, that the real property deeded was subject to taxation for the year or years stated in the deed; second, that the taxes were not paid at any time before the sale; third, that the real property deeded had not been redeemed from sale at the date of the deed; fourth, that the property had been listed and assessed; fifth, that the taxes were levied according to law; sixth, that the property was sold for taxes as stated in the deed, and was duly advertised before being sold. And before such a deed can be defeated it must be clearly pleaded and clearly proven that some one of the above six requisites was wholly omitted and not done, and a showing that any one of them was irregularly done will not be sufficient to defeat the deed, and until these facts are properly pleaded it is not error to refuse proof of such facts.

3. SAME — ACTION TO AVOID DEED — LIMITATIONS.

Under the laws of this territory, where real estate is sold for nonpayment of taxes, and a deed not void upon its face is signed and executed by the county treasurer in his official capacity, and acknowledged before some officer authorized to take acknowledgments of deeds, and recorded in the proper record of titles to real estate, and the purchaser has gone into possession under such deed, no action shall be commenced by the former owner or owners of the land, or by any person claiming under him or them, to avoid such deed, unless such action shall be commenced within one year after the recording of such deed.

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice Jno. H. Buford.

Action by Aaron Dillenbeck against James O'Keefe. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action brought by Aaron Dillenbeck, defendant in error, plaintiff in the court below, to quiet title to lots 5, 6, 7, 8, and 9, in block 43, in Capitol Hill, Guthrie. His title to said lots is based on two tax deeds, and by order of court subsequently obtained the copies of the tax deeds were attached to said petition and marked as exhibits. James O'Keefe, plaintiff in error, defendant below, filed his answer and cross-petition. By his answer the defendant below denies that plaintiff is the owner of said premises, or has the legal title to the lots described in said petition, and for his cross-petition the defendant avers and alleges that he has the legal title and equitable estate in and to the lots described in plaintiff's petition, under and by virtue of

deed from the townsite trustees to said defendant; and for reply to said cross-petition the plaintiff denies the allegations thereof, except that he admits possession of the premises therein described, and in such reply pleads as to such cross-petition the statute of limitations. A jury having been waived, and this cause submitted to the court on the issues formed by the pleadings herein, and the court having heard all the evidence and the argument of counsel, and being fully advised in the premises, finds from the evidence that the plaintiff, Aaron Dillenbeck, has, and had when this suit was commenced, a good and valid tax title in fee simple to the property therein described, and that he was in possession of this land when this suit was commenced, and that the claim of James O'Keefe to said land is invalid. Judgment is therefore rendered in favor of the plaintiff, quieting title and possession in him against the claims of the said defendant. Motion for new trial was duly filed, overruled, and excepted to. Time given for case-made; case-made served and signed; and the case brought here for review.

Lawrence & Huston, for plaintiff in error.
H. M. Adams and Strang & Devereux, for defendant in error.

IRWIN, J. (after stating the facts). The first assignment relied upon by the plaintiff in error for a reversal of this case is: "The court erred in admitting in evidence the tax deed of the defendant in error, dated February 10, 1898, as a valid tax deed." We have examined the record as to this assignment of error, and we can see nothing from an examination of the deed on its face that would render it invalid; and hence it would be admissible in evidence.

There are six assignments of error, by the plaintiff in error, but we think they can be considered under three heads, and we will consider them in the inverse way; that is, at this point we will consider assignment No. 4, to wit: "The court erred in excluding evidence offered by the plaintiff in error to show that the county commissioners did not meet as a board of equalization for equalization of taxes on either of the two days required by statute in June, 1894." This assignment of error may be considered in connection with assignment No. 3, to wit: "The court erred in excluding proper evidence offered by plaintiff in error to show that the tax deeds offered in evidence by defendant in error are based on illegal taxes of the year 1894." The plaintiff in error, defendant in the court below, offered to prove by the deputy county clerk and the county treasurer that some of the tax levies upon which Dillenbeck's tax deeds are based were unauthorized and illegal, and also offered to prove by the county commissioners' records of 1894 that no meeting of the board of county commissioners as a board of equalization was held on the first Monday in June, 1894, or on the second day, or on

either of the two days fixed by statute for the equalization of taxes by the county commissioners as a board of equalization; and on objection the court excluded this testimony. Now, we think this action of the court can be sustained upon two grounds:

First, the record only discloses that the defendant in the court below offered certain records, but does not show what the records offered to be introduced contained, or what the testimony of the deputy county clerk or the county treasurer would be; and this court is unable to say whether the answers of the deputy county clerk or the county treasurer would be favorable or unfavorable to the party offering the witness. Neither can this court say what that record as offered contained. We take the rule to be that where evidence is offered, and an objection to which is sustained, before error can be predicated thereon the record must contain the evidence, or sufficient of the evidence, to show that its rejection was injurious to the party complaining. This rule seems to have the approval of the United States Supreme Court. In the case of *Shauer v. Alterton*, 151 U. S. 617, 14 Sup. Ct. 444, 38 L. Ed. 236, the court say: "The refusal of the court to allow the plaintiff to read the answer of the witness Nash to the question, 'you may state whether or not that check has all the appearances of having passed through the bank in the ordinary course of business,' cannot be assigned as error. The bill of exceptions does not state what answer was made to the question in the deposition of the witness. It does not even state the facts the answer tended to establish. We cannot therefore say that the exclusion of the answer was prejudicial to the plaintiff. For aught that appears in the record, the witness may have made an answer that was injurious to the plaintiff, or one that was of no value to either party." In the case of *Packet Co. v. Clough*, 20 Wall. 528-542, 22 L. Ed. 406, the rule is laid down that a party complaining of the rejection of evidence must show that he was injured by its rejection, and his bill of exceptions must make it appear that, if it had been admitted, it might have led the jury to a different verdict. In *Whitney v. Fox*, 166 U. S. 644, 17 Sup. Ct. 713, 41 L. Ed. 1145, the Supreme Court follows this rule, and refuses to pass on an assignment of error for refusing to allow a deposition to be read, because the deposition was not in the record. Now, applying the rules laid down in this case to the case at bar, we think it was not error for the court to reject this testimony. It is true the plaintiff in error offered certain records; but these records are not set up in the case-made for this court, and it is impossible for this court to say that their rejection worked any harm to the plaintiff in error. The record of the board of county commissioners, which was said to have been introduced for the purpose of proving that the equalization board did not meet in 1894, is not set out in the case-

made so that this court can see what it does contain, or what it tends to prove.

Another reason why we think the objection was properly sustained is on account of the condition of the pleadings. The answer of the defendant is as follows: "Now comes said defendant, and for his answer to plaintiff's petition filed herein denies that plaintiff is the owner of and has the legal title to the lots described in said petition. And for his cross-petition in said action defendant avers and alleges that he has a legal and equitable estate in and to the lots described in plaintiff's petition, under and by virtue of a deed from the townsite trustees to said defendant, and that he is entitled to the possession thereof, and that the plaintiff unlawfully keeps him, said defendant, out of the possession of said lots. Now, if the pleadings do not raise an issue of the validity of the tax deed relied upon by the plaintiff, then any evidence which does not tend to prove an issue raised by the pleadings would be properly rejected. Under St. 1893, c. 70, § 25 (running section 5667), under the heading of 'Revenue,' and in reference to tax deeds, the following language is used: 'That it shall be signed and executed by the county treasurer in his official capacity, and acknowledged before some officer authorized to take acknowledgments of deeds; and when substantially thus executed and recorded, in the proper record of titles to real estate, shall vest in the purchaser a full right, title, and interest in and to said lands. Such deed shall be presumptive evidence in all the courts of the territory, in all suits and controversies in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts: (1) That the real property deeded was subject to taxation for the year or years stated in the deed. (2) That the taxes were not paid at any time before the sale. (3) That the real property deeded had not been redeemed from sale at the date of the deed. (4) That the property had been listed and assessed. (5) That the taxes were levied according to law. (6) That the property was sold for taxes, as stated in the deed, and was duly advertised before being sold, and to defeat the deed it must be clearly pleaded and clearly proven that some one of the above-named six requisites was wholly omitted and not done and a showing that any one or all of them was irregularly done will not be sufficient to defeat the deed. * * *"

An examination of the answer will show that the answer and cross-petition which attacks this deed does not set out any defect whatever in the deed, and does not contain the necessary statutory requisites to raise the question of the validity of the deed, or raise the issue as to whether any one of the six statutory requirements have been complied with; and where a special statute expressly directs what the pleading in a particular case must contain, and where the

pleader desires to attack the pleading described in such statute, he must conform to the statute. Now, we take it from the brief of the plaintiff in error that he does not claim that the board of equalization did not meet at all, but only that it did not meet on a certain day, or that it did not meet on either of the days provided by law for its meeting. While, if it met on some other day than the particular day appointed by statute, it does not necessarily follow that its meeting would be illegal and void, but would only at best be irregular; and section 5667 above referred to contains the express provision that to defeat the deed it must be clearly pleaded, as well as proven, that there was an entire failure to do some one of the acts required by statute. And, to hold that the irregular doing of one of the requirements would defeat the deed, would be to entirely ignore the statute. We think on this ground this evidence was properly rejected.

The only remaining assignment of error which we deem it necessary to consider is the second assignment of error, to wit: "The court erred in holding that the statute of limitations had run in favor of said tax deed of February 10, 1898, and that plaintiff in error is barred from attacking said tax deed by evidence aliunde." In considering this assignment of error, we desire to keep in mind at all times the distinction between a tax deed that is void because of some inherent want of power to sell the land for taxes, such as payment of taxes before sale, or that the land is not subject to taxation and a voidable tax deed because of some irregularity in the deed. Now, we think this deed comes within the latter class. We think that an examination of the record and the brief of counsel for plaintiff in error will show that the objection raised to this deed was largely, if not entirely, of a technical character. The fact that taxes for two years were included in one deed does not render it invalid. In *Hunt v. Chapin* (Mich.) 3 N. W. 873, it is held that a tax deed based upon distinct taxes of different years is valid, if any one of the sales was valid, whether the others were or not. In regard to objections to tax deeds which are purely technical, the case of *Callanan v. Hurley*, 93 U. S. 390, 23 L. Ed. 931, is interesting as bearing directly on this point. In that case the Supreme Court of the United States, in construing a statute almost exactly like ours, says: "The whole act exhibits an intention of the Legislature to enforce the payment of taxes by securing purchasers of tax sales in their purchases, and thus make it dangerous for owners of property to neglect payment of taxes due the state. It removes difficulties which had before existed in the way of establishing a tax title, and at the same time it works no injustice to owners of land subject to taxation. The law determines when the taxes should be levied, and when they shall be paid, and

it gives ample time within which to make the payment. * * * If the act is to have any effect at all, it is plain that the deed cuts off most of the averments upon which the plaintiff bases his attempt to obtain the cancellation he seeks." In the case of *Pillow v. Roberts*, 13 How. on page 476, 14 L. Ed. 228, the Supreme Court of the United States uses the following language: "It is easy, by very ingenious and astute construction, to evade the force of almost any statute, where a court is so disposed. We might say that the expression, 'deeds so made by the collector,' means deeds made strictly according to the requirements of all the preceding sections of the revenue law, and decide that only deeds first proved to be completely regular and legal can be received in evidence, and thus by qualifying the whole section by such an enlarged construction of these two words, and disregarding all the others, evade the obvious meaning and intention of the law. For, if you must first prove the sale to be regular and legal before the deed can be received, what becomes of the provision that the deed itself shall be evidence of these facts? Such a construction annuls this provision of the law, and renders it superfluous and useless. The evil plainly intended to be remedied by this section of the act was the extreme difficulty and almost impossibility of proving that all the very numerous directions of the revenue act were complied with antecedent to the sale and conveyance by the collector. Experience has shown that, where such conditions were enforced, a purchaser at tax sales, who had paid his money to the government, and expended his labor on the faith of such titles in improving the land, usually became the victim of his credulity, and was evicted by the recusant or some shrewd speculator. The power of the Legislature to make the deed of a public officer prima facie evidence of the regularity of the previous proceedings cannot be doubted. And the owner who neglects or refuses to pay his taxes or redeem his land has no right to complain of its injustice. If he has paid his taxes or redeemed his land, he is, no doubt, at liberty to prove it, and thus annul the sale. If he has not, he has no right to complain if he suffers the legal consequences of his own neglect." It will be noted that in this case this tax deed is not absolutely void. There is no contention that the land was not taxable, but the form of the deed only is attacked. Our statute for 1893, running section 5668, provides: "No action shall be commenced by the holder of the tax deed, or the former owner or owners of the land by any person claiming under him or them to recover the possession of the land which has been sold and conveyed by deed for the nonpayment of taxes, or to avoid such deed, unless such action shall be commenced within one year after the recording of such deed."

This question came directly and squarely

before the Supreme Court of the United States in the case of *Pillow v. Roberts*, 13 How. 472, 14 L. Ed. 228, and the court used the following language: "But, assuming these deeds to be irregular and worthless, the court erred in refusing to receive them in evidence, in connection with proof of possession, in order to establish a defense under the statute of limitations. The first section of the act of limitations of Arkansas bars the entry of the owner after 10 years. And the thirty-fifth section enacts that 'all actions against the purchaser, his heirs, or assigns, for the recovery of lands sold by any collector of the revenue for the nonpayment of taxes, and for lands sold at judicial sales, shall be brought within five years after the date of such sales and not after.' Statutes of limitations are founded on sound policy. They are statutes of repose, and should not be evaded by a forced construction. The possession which is protected by them must be adverse and hostile to that of the true owner. It is not necessary that he who claims their protection should have a good title, or any title but possession. A wrongful possession, obtained by a forcible ouster of the lawful owner, will amount to a disseisin, and the statute will protect the disseisor. One who enters upon a vacant possession, claiming for himself, upon any pretense or color of title, is equally protected with the forcible disseisor. Statutes of limitations would be of little use, if they protected those only who could show an indefeasible title to the land. Hence color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and, of course, adversely to all the world. A person in possession of land, clearing, improving, and building on it, and receiving the profits to his own use, under a claim of title, is not bound to show a forcible ouster of the true owner, in order to evade the presumption that his possession is not hostile or adverse to him. * * * In order to entitle the defendant to set up the bar of this statute after five years' adverse possession, he had only to show that he and those under whom he claimed held a deed from a collector of the revenue, of lands sold for the nonpayment of taxes. He was not bound to show that all the requisitions of the law had been complied with, in order to make the deed a valid and indefeasible conveyance of the title. If the court should require such proof before the defendant could have the benefit of this law, it would require him to show that he had no need of the protection of the statute before he could be entitled to it. Such a construction would annul the act altogether, which was evidently intended to save the defendant from the difficulty, after such a length of time, of showing the validity of his tax title."

In *Leffingwell v. Warren*, 2 Black (U. S.) 599, 17 L. Ed. 261, the Supreme Court of the

United States says: "The statute of Wisconsin, limiting the time within which suits for the recovery of lands sold for taxes must be brought, begins to run from the time of the recording of the tax deed, whether possession has or has not been taken by the purchaser. It is immaterial whether the sale and the deed be void or valid. It is sufficient that a sale has been made, and the deed recorded, to bring the statute into activity, and, after the lapse of the period limited, to entitle the purchaser, and those claiming under him, to its protection." This was an action brought to the Supreme Court of the United States by writ of error to the District Court of the United States for the District of Wisconsin; and the Supreme Court of the United States, in passing upon this case, say (page 605 of 2 Black. [17 L. Ed. 261]): "The lapse of the time limited by such statutes not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder. It tolls the entry of the person having the right, and, consequently, though the very right be in the defendant, yet he cannot justify his ejecting the plaintiff." In the case before the District Court for the District of Wisconsin, it was admitted by stipulation of the parties that the deed was recorded on the 6th day of February, 1845, and that this suit was commenced on the 2d day of October, 1857. The statute creating the bar was repealed between those dates and after the bar of the statute of limitations had become complete. Upon this state of facts, the court below instructed the jury "that the deed being void, neither it, nor the subsequent possession under it, for three years after the recording thereof is a bar to the plaintiff's recovery." The Supreme Court say: "This was clearly error. According to the rulings referred to of the Supreme Court of the state, it is immaterial whether the sale and the deed be void or valid. It is sufficient that a sale has been made, and the deed recorded, to bring the statute into activity, and, after the lapse of the period limited, to entitle the purchaser, and those claiming under him, to its protection. Statutes of limitation are now regarded favorably in all courts of justice. They are 'statutes of repose.' Usually they are founded in a wise and salutary policy, and promote the ends of justice. The equities in behalf of the plaintiff below are strong. We have all felt their force. Without any fault on his part, he has been divested of the title of his land. But our duty is to apply the law—not to make it. If this statute be unwise or unjust, the remedial power lies with the Legislature of the state, and not with this court. The judgment of the court below must be reversed, and the cause remanded for further proceedings in conformity with this opinion."

In the case of *Peck v. Comstock* (C. C.) 6 Fed. 22, it is held that, although the deed was void, yet the tax purchase is protected by the statute of limitations.

In *Coutler v. Stafford* (C. C.) 48 Fed. 268, the court says: "The defendant also relies on the statute of limitations as a bar to this action. Section 2939 of the Code provides that 'any suit or proceeding for the recovery of land sold for taxes, except in cases where the taxes have been paid, or the land redeemed as provided by law, shall be commenced within three years from the time of recording the tax deed and not thereafter, except by the purchaser at the tax sale.' The defendant's deed was recorded more than three years before this suit was commenced. The land was sold for a tax which has not been paid, and it has not been redeemed. If the deed is held to be valid, there can be no question but that the case is fully within the statute, and barred by it. The only argument of the plaintiff on this point is that the deed is void, and entirely impotent to serve, either as a conveyance of the title or as a starter to set time running and bring the case within the protection of the statute. If the bar exists only in cases where valid tax deeds have been recorded, in order to determine whether a case is barred or not, to try it on its merits. To so hold is equivalent to holding that the statute is not a bar in any case, for, if the deed conforms to the requirements of the law in all respects, it will convey the title, and a defendant claiming under such a deed must prevail by reason of having a perfect title—that is to say, win the case on its merits; and, if the tax deed be invalid by reason of nonobservance of any essential provision of the law, the plaintiff cannot be defeated within any period of time. Such doctrine is contrary to the manifest design of this species of legislation. The purpose of a statute of limitation is to put an end to strife by cutting off the right to dispute the validity of proceedings to divest the owner of his title after the lapse of a definite period of time."

In the case of *Walker v. Cronkite* (C. C.) 40 Fed. 133, which was a judicial sale where the plaintiff sought to attack the validity after the statute of limitations had run, on page 136 the court says: "The argument that the plaintiff is deprived of his property without having his day in court has no force; for it is the very essence of all statutes of limitations that the party shall lose his rights and his property, unless he shall assert these rights within a fixed time. Nor does it relieve the case from the statute because the plaintiff asserts that the judgment is void for want of jurisdiction. The property was sold on execution on a judgment legal on its face, and the debtor is barred from showing by evidence aliunde that the judgment is void or voidable after the period fixed by the statute."

In *Bullis v. Marsh* (Iowa) 2 N. W. 578, in a decision rendered by the Iowa Supreme Court, it is held that the validity of a tax deed cannot be attacked after five years from the sale, because it shows that several par-

cels were sold for a gross sum. To the same effect is *Monk v. Carbin* (Iowa) 12 N. W. 571; *Thomas v. Stickle*, 82 Iowa, 71; *Douglass v. Tullock*, 34 Iowa, 262.

In *Lindsay v. Fay*, 25 Wis. 460, it is said: "An action cannot be maintained under section 123, c. 15, Rev. St. 1849, by the original owner of land sold for taxes against one who has been in possession of it for three years, claiming title in good faith under a tax deed, although the deed is void upon its face." On page 463 of the same report, in the opinion the court says: "The statute of limitation makes no reference to the form of the deed. It does not say a tax deed valid on its face. For all that appears, it is in entire harmony with the intention of the Legislature that the deed should be such only as should create in the mind of the purchaser, a person not skilled in the learning and technicalities of the law, that he had acquired a good title; that it should be executed by the officer authorized by law, be signed, sealed, acknowledged according to the usual form for the conveyance of land, and purport by apt and proper words, on its face, to convey the land, notwithstanding it might be technically insufficient for that purpose."

In *Ward v. Huggins*, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285, it is said: "A void tax deed, under which the grantee has entered and held possession of the land in controversy, constitutes such color of title as will sustain the bar of the statute of limitations provided for in actions relating to tax deeds."

In *Colvin v. McCune*, 39 Iowa, 509, it was held that a tax deed, void upon its face, constitutes such color of title upon which the statute of limitations may be invoked.

In *Milledge v. Coleman*, 47 Wis. 184, 2 N. W. 77, the Supreme Court of that state used the following language: "In the very recent case of *Oconto Company v. Jerrard*, 46 Wis. 317, 50 N. W. 591, the effect of the tax deed, where the statute had run, was very fully considered. In that case there was no pretense that the tax for which the deed was issued proceeded upon a regular, fair, and equal assessment of the property to be taxed. A more fundamental and fatal defect in the tax proceedings than this could not well exist, since a valid assessment is the foundation of the tax. In answer to the argument that the statute was not intended to apply to such a case, and that the deed could be impeached for a radical defect, the Chief Justice uses this language: 'The respondents had their day to impeach the tax proceedings and avoid the tax deed. Then they might have said that the groundwork was so defective that there was no tax. This they did not then do, and they are now too late to do it. They suffered the statute to purge the tax proceedings of all defects to raise the tax deed above impeachment. Their objections may all be well founded, but they came out of time. What the respondents might have done they cannot now do. The statute has left them

like one estopped to speak the truth, because they did not speak it when they might.'"

While there is some conflict of authorities, and the doctrine as to whether a deed void upon its face will operate to put the statute of limitations in force is not entirely free from doubt or thoroughly settled, as there are many respectable authorities which hold to the contrary, we think there can be no doubt that where a deed is valid on its face, and is only void by reason of certain extrinsic facts which might be proven against it, such a deed, accompanied by possession for the statutory period, will, by virtue of the statute of limitations, be a bar to an action to set aside said deed by any former owner or those claiming under or through him. Now, we think that an examination of this deed will show that it is not void upon its face; and, in the absence of any proof showing any extrinsic facts that would invalidate it, it is sufficient to show title in the holder of such deed. The ground on which plaintiff in error claims that said deed is void upon its face is as to uncertainty in place of date and place of sale. Now, the deed plainly recites that these lots were sold at two distinct sales. One on the 5th day of September, 1894, and one on the 18th day of September, 1895, at each of which sales a certificate was issued to Joseph Stiles, who upon those dates was the treasurer of Logan county. From these certificates it appears that the county of Logan, by its treasurer, in the absence of other bidders, purchased at public auction the lots in question, which lots were sold to the county of Logan for the sum of \$28.59, being the amount due on said tracts of land, and for which the taxes on said land were wholly delinquent for nonpayment for the years 1893, and 1894, respectively. As to uncertainty as to place, the recital in the deed shows that the respective sales took place at the door of the courthouse, and at the county treasurer's office. This recital is evidently made to reconcile a conflict or apparent conflict of our statutes on this subject, as section 5632 of the Statutes of 1893 requires the sale to be made at the county treasurer's office, while the form of tax deed set up in section 5667 puts the place of sale at the courthouse door. Now, we would not be justified in indulging in the presumption that the recitals in said deed were not true, neither do we know of any valid objection to this sale taking place at both these places, to wit, the county treasurer's office and the courthouse door. If either place was the legal place for such sale, then the fact that a sale was made at some other place would not invalidate or make illegal such sale.

Another objection which the plaintiff in error raises to this deed is that the recitals show that the county of Logan purchased the lots at public auction for a lump sum in cash, to wit, \$28.59, and for that reason the sale is void. In support of this he cites *Magill v. Martin*, 14 Kan. 81, and *Larkin v.*

Wilson, 28 Kan. 514; but we think an examination of these authorities will not bear out his contention in this particular. Both these cases were where the recitals in the deed show that the county was a competitive bidder at the tax sale, and for this reason, and this reason only, the tax sale was decided to be illegal and the deed void. We think the recitals in this deed will not bear any such construction. In the case of *Larkin v. Wilson*, the recitals in the deed show that the county made the first bid, which was an offer to pay the full amount of the taxes and assessments due, and that after that bid no other bids were made; and for this reason the Supreme Court of Kansas say in fact that the action of the county treasurer in making the first bid for the county of the value of the amount of the taxes and assessments due was entering into competition with other bidders. In that case the recitals did not show that there was an absence of other bidders, but simply that they did not bid. In this case the recitals in the deed plainly show that there were no other bidders, or that no other bidders offered to bid. The plaintiff in error also cites the case of *Taylor v. Miles*, 5 Kan. 498, 7 Am. Rep. 558; but an examination of that case will show that it was decided upon a proposition which does not occur in the case at bar; that is, that the dates of the certificate and the date of the deed, together with the delinquent tax lists, showed upon their faces that at the time of this sale for taxes the same was for taxes levied upon the real estate for which the real estate was not liable, as the title to the real estate at that time was in the government of the United States, and not subject to taxation. This appearing as a matter of record, and from the recitals contained in the deed, would render the deed absolutely void. Plaintiff in error also cites the case of *Hall's Heirs v. Dodge*, 18 Kan. 277, but an examination of that case will show that the tax deeds in evidence show by their recitals that they were executed, both on the same day and for the taxes of the same year, and that each deed was for separate and distinct tracts of land situated in different parts of the same county, and in different townships and ranges, and that each deed shows that these different tracts were sold together in one single sale, and the court there held that such a sale was void; but in the same opinion the court says: "Of course, where two or more tracts of land adjoin each other, and are used and occupied as one tract, they may all be taxed together, and sold together as one tract." Now, in the deed in the case at bar there is nothing to show that the lots described in this tax deed were not lots or tracts of land adjoining each other, or that they were not used and occupied together as one tract, and there is nothing to show the illegality or impropriety of taxing them together. Plaintiff in error also cites the case of *Redfield v. Parks*, 132 U. S. 239-252, 10 Sup. Ct. 83, 33 L. Ed. 327,

but an examination of that case will show that there, by the recitals of the deed, the land sold for taxes was not subject to taxation at the time they were assessed, as it was then a part of the public domain of the United States; and upon this ground, and this ground alone, the Supreme Court of the United States holds that in such cases, the title being in the United States, no adverse possession could be obtained, so as to put the statute of limitations in operation; and that a deed which recites that the sale was for taxes assessed at a time when the title to the land was in the government of the United States was absolutely void, and would not put in operation the statute of limitation.

Now, as before stated in this opinion, there seems to be a decided conflict of authorities upon the question as to whether a deed, void upon its face, will be sufficient to put in operation the statute of limitation. One line of authorities as herein cited holds squarely and conclusively that the question of the validity of the deed is immaterial, where the party has gone into possession under it, and the time provided by the statute of limitations has expired. Another equally respectable and well-reasoned line of authorities holds to the contrary doctrine. Among these is the case of *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327; *Waterson v. Devoe*, 18 Kan. 223; *Mason v. Crowder*, 85 Mo. 526; *Sheehy v. Hinds*, 27 Minn. 259, 6 N. W. 781; *Cutler v. Hurlbut*, 29 Wis. 152; *Gomer v. Chaffee*, 6 Colo. 314; *Wofford v. McKinna*, 23 Tex. 36, 76 Am. Dec. 53. All of these cases, by able and well-reasoned opinions, hold to the doctrine that a tax deed, which by its recitals shows upon its face that it is void, will not be sufficient to support the statute of limitations. But all of these cases announce the rule that, where a deed is sufficient upon its face to make prima facie evidence of title, it is not necessary that it be sufficient to withstand all evidence offered against it to show that it was void; but, if it is good on its face, in the absence of proof extrinsic of itself of invalidity, it will be sufficient to support the statute of limitations. So, in view of the conflict of authority on the point, we do not deem it advisable at this time to announce what the decision of this court would be in the case where the deed was invalid on account of its own recitals or void upon its face; as this question is not necessary for the decision of the case at bar.

And we think there is another and conclusive reason why the decision of the district court was right. That is, that there is nothing upon the face of the second deed to show that it is invalid, and no evidence has been introduced to show that it is not in every way legal; and in fact no attack has ever been made upon it. And in the case of *Finley v. Brown*, 22 Iowa, 538, it was held proper to take in evidence two tax deeds for the same land, one of which was executed to

cure an informality of the other. Now, if this doctrine is correct, then we can see no reason why the title of the defendant in error was not complete by virtue of his second deed. This second deed was made, signed, and acknowledged by the county treasurer, in his official capacity, on a certificate of purchase of the date of the 18th of November, 1895, for the taxes and assessments of the year 1894, and was executed on the 21st day of May, 1902, and regularly acknowledged on the 28th day of May of the same year before a notary public. The time of redemption by the plaintiff in error would expire on the 18th day of November, 1897, which was four years and over prior to the execution of this deed, and we are unable to see why this deed and its recitals, its execution, and acknowledgment does not convey the legal title to the defendant in error, and why it does not fully sustain the judgment and decision of the district court.

For the reasons herein expressed, the judgment and decision of the district court is affirmed; all the Justices concurring, except Chief Justice BURFORD, who, having tried the case below, took no part in this decision.

BILYEU et ux. v. PILCHER.

(Supreme Court of Oklahoma. Sept. 7, 1905.)

1. JUDGMENT—RES JUDICATA.

Where, in an action before a justice of the peace, after verdict of the jury is returned in favor of the plaintiff, the justice permits the plaintiff to dismiss his action without prejudice to a future action, and adjudges the costs to the plaintiff, and no appeal is taken from such judgment, such proceeding is no bar to a future action by the plaintiff for the same cause.

2. PUBLIC LANDS—HOMESTEAD ENTRY—RIGHT OF POSSESSION—UNLAWFUL DETAINER—LIMITATIONS.

One having a homestead entry upon lands in this territory under the land laws of the United States is entitled to the possession of the land covered by his filing until his entry is canceled in a proper proceeding for that purpose, and no right of action accrues to a successful contestant for unlawful detainer of the land until the homestead entry is canceled, and the time limited by the statutes within which such action must be brought does not commence to run until the date upon which the right to commence the action accrued.

3. SAME—CONTEST—PREFERENCE RIGHT.

One contesting for a preference right has no right to the possession of the land pending the litigation, as against the homestead entryman.

(Syllabus by the Court.)

Error from District Court, Kay County; before Justice Bayard T. Hainer.

Action by Elijah P. Pilcher against Albert Bilyeu and Lennie M. Bilyeu. Judgment for plaintiff, and defendants bring error. Affirmed.

C. W. Ransom, for plaintiffs in error.
W. S. Cline and Claude Duval, for defendant in error.

BEAUCHAMP, J. This is an action for forcible and unlawful detainer to recover the possession of the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 34, township 27 N. of range 3 E., Indian meridian, Kay county. The facts, so far as necessary for the purposes of this case, are: On November 15, 1893, the defendant in error made a homestead filing for the entire N. E. $\frac{1}{4}$ of said section 34, and relinquished the W. $\frac{1}{2}$ on February 28, 1896, when C. C. Smock made homestead filing thereon. June 19, 1898, Smock relinquished, and Lennie M. Harris (now Bilyeu), one of the plaintiffs in error, made homestead entry. The defendant in error commenced contest proceedings against the entry of plaintiff in error Lennie M. Bilyeu, charging fraud and duress in the procurement of his relinquishment, which contest was finally determined on July 17, 1901, and Lennie Bilyeu's entry canceled and Plicher's entry reinstated. Albert Bilyeu and Lennie M. Bilyeu, plaintiffs in error, are husband and wife. At the time of the trial of this action in the district court, Albert Bilyeu had a contest pending against the defendant in error, on the grounds that defendant in error had alienated the land before filing proof. On the 28th day of February, 1902, the defendant in error commenced an action in the justice court against the plaintiffs in error for the unlawful and forcible detainer of the land in question, which case was heard before a jury, and the jury returned a verdict in favor of the defendant in error, and after the verdict was returned defendant in error dismissed the action without prejudice. This action was commenced March 24, 1902, in the justice court, and in that court resulted in a judgment for the defendant in error. Appeal was taken to the district court of Kay county, and the trial in that court also resulted in a judgment in favor of the defendant in error. Motion for a new trial was heard and overruled. Exceptions saved, and plaintiffs in error bring the case here by petition in error and case-made.

It is contended by counsel for plaintiffs in error, first, "that the former proceedings before the justice of the peace is a bar to this action." As disclosed by the docket of the justice of the peace, the defendant in error dismissed the cause without prejudice and at his costs, and the justice rendered a judgment against him for the costs. There was no objection or exception to this proceeding, and no appeal was taken from that judgment. The judgment speaks for itself, and by its express terms permitted the defendant in error to dismiss the case without prejudice to a future action. And, whether the action of the justice in permitting the defendant in error to dismiss his action without prejudice was error or not, he was permitted to do so, and that judgment was final. The authorities cited by counsel for plaintiff in error, wherein it is held that it was error to permit the plaintiff to dismiss his action with-

out prejudice after the final submission of the cause to the jury or court, are not in point here. That case was dismissed by the justice on the application of the plaintiff without prejudice to a future action. And we are not now inquiring as to the correctness of the ruling of the justice in that case. The ruling of the court that the proceedings had in that case were not a bar to the right of the plaintiff to maintain this action was not error.

It is next contended by counsel for plaintiff in error that the "statute of limitation had run against this cause of action, as the contest issues were for fraud only; or, if it be held that such contest for fraud operates to prevent the running of the statute, then, the pendency of the present contest on the same grounds renders this action premature." Mrs. Bilyeu had a homestead filing upon the land in question which remained intact until it was canceled by the decision of the Land Department of July 17, 1901. And, while such entry remains intact, she was entitled to the possession. *Reaves et al. v. Oliver*, 3 Okl. 62, 41 Pac. 353; *Woodruff v. Wallace*, 3 Okl. 355, 41 Pac. 357. And no right of action accrued to the defendant in error until that date. The statute of limitation did not commence to run until a right of action accrued. This action was commenced in less than one year from that time, and was not barred by the statutes of limitation. And the fact that Albert Bilyeu had a contest pending at the time this action was tried in the district court for a cancellation of this entry and for a preference right gave him no right to the possession of the land as against the defendant in error, whose homestead entry then remained intact. The defendant in error has the right of possession until his filing is canceled in a proper proceeding for that purpose. *Reaves v. Oliver*, supra.

This disposes of all the questions relied on and argued by counsel for plaintiffs in error in their brief; and, finding no error in the proceedings in the trial court, the judgment of the district court of Kay county is affirmed. All the Justices concurring, except HAINER, J., who tried the case below, not sitting.

SOVEREIGN CAMP, WOODMEN OF THE WORLD, v. WELCH.

(Supreme Court of Oklahoma. Sept. 7, 1905.)

1. EVIDENCE—INTENT—CHARACTER.

Where intent of the party charged is a material inquiry, and the facts and circumstances shown in evidence leave the question of intent in doubt, the character of the party charged may be shown, to aid in the determination of such question.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 177.]

2. TRIAL—DIRECTING VERDICT.

A motion for peremptory instruction to find a verdict as directed by the court can only be granted where there is no material fact in

dispute and no theory of the case under the evidence upon which the opposite party would be entitled to recover.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 876-895.]

8. SAME—INSTRUCTIONS.

It is not reversible error to refuse an instruction to the jury which states the law of the case correctly, where the court in its general instructions has covered the point presented by such refusal.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-659.]

(Syllabus by the Court.)

Error from District Court, Greer County; before Justice James K. Beauchamp.

Action by Mary J. Welch against the Sovereign Camp of the Woodmen of the World. Judgment for plaintiff, and defendant brings error. Affirmed.

Wells & Mathews, N. B. Maxey, and Brome & Burnett, for plaintiff in error. Garrett & Garrett, for defendant in error.

GILLETTE, J. It appears from the pleadings and evidence in this case that one M. M. Welch, on the 18th of April, 1900, became a member of the order of the Woodmen of the World, a fraternal beneficiary association, and on the 23d day of April, 1900, a beneficiary certificate was issued and delivered to said M. M. Welch by said association for the sum of \$1,000, made payable to the plaintiff in error herein, the then wife of the said M. M. Welch. On the 19th of October, 1901, said M. M. Welch died at the town of Leger, in Greer county, Okl. Certain conditions were attached to said beneficiary certificate, rendering the same void in case any one or more of them should be found true, among them the following: "(4) If the member holding this certificate shall be convicted of a felony, * * * or shall die in consequence of a duel, * * * or in consequence of the violation or attempted violation of the laws of a state or of the United States or any other province or nation." The answer of defendant admitted its existence as a corporation, admitted the membership of M. M. Welch and the issue of the certificate to him, but denied its liability thereon, because (it alleged) he came to his death by reason of a violation of the laws of the territory of Oklahoma. On the trial of the case the following admissions were made in open court: "It is admitted that the deceased member died on the 19th day of October, 1901, that proof of death was made, that he was a member of Camp No. 49, holding a certificate of membership on the order for \$1,000, and that he died within two years after the issue of the certificate. It is also admitted that, if the plaintiff recover in this case, the judgment shall be for \$750, with interest at the rate of 7 per cent. from the 19th day of December, 1901, and that the plaintiff is entitled to recover, unless the defendant shows that the deceased came to his death

in consequence of the violation of the condition of his policy which is, in substance, as follows: That if a member holding this certificate shall die in consequence of the violation or attempted violation of the law of the United States, or any state or territory or province of the United States, then this certificate to be void, and all moneys paid thereunder forfeited." Considerable oral testimony was taken upon the trial, the case tried to a jury, and they returned a verdict in favor of the plaintiff, upon which judgment was entered, and from that judgment the case comes to this court upon error.

Three allegations of error are argued by plaintiff in error, and we will consider these in their order. It is urged that the court erred in admitting testimony offered by the plaintiff as to the character of M. M. Welch, the deceased, for being a peaceable and law-abiding man, because his character was not an issue in the case. Was it error to admit, under the circumstances of this case, testimony touching the character of the deceased? The defense in this case is dependent entirely upon the charge of a violation of law by the deceased, which violation consisted of an assault upon Ennis at the time he was shot by Ennis. The testimony offered in support of this claim was principally that of one Ned McDaniel, who testified, in substance: That one Ennis, in an excited and hurried manner, came into his office in the rear of the bank, and then left. That about half an hour afterwards he left his office in the rear of the bank, and, passing through the bank, went out onto the sidewalk. That, as he went through the bank, he saw the deceased, Welch, transacting business at the cashier's window, as though making a deposit of money. That, when he got out on the sidewalk, Ennis was passing. McDaniel told Ennis that Welch was in the bank. That Ennis, upon passing the bank, turned off from the sidewalk upon a vacant lot next to the bank, and went about 15 feet back on the lot, and there waited until Welch came out of the bank. That deceased, Welch, came out of the bank and started down the street on the sidewalk in front of this vacant lot. Seeing Ennis, he stopped and turned towards him. That Ennis thereupon commanded Welch to stop, or he would shoot him. That Welch replied to Ennis, saying that he did not have the nerve to shoot. That Ennis replied that he did, and fired a shot, which struck the ground between Welch's feet. That Welch continued thereafter to advance on Ennis, and Ennis fired a second shot, which struck Welch in the region of the heart, and he died almost instantly. And he testified, further, that at this time he saw a knife in Welch's hand. It is further shown in the testimony that an old pocket knife, with the blade broken off to within an inch or inch and a half of the handle, was found lying on the ground where Welch fell, and near his hand. The testimony of

two or three other witnesses corroborated that of McDaniel in part only. On the other hand, the testimony of an equal number of witnesses tends to show that, when Welch came out of the bank, he started along the street in front of the vacant lot where Ennis stood, being then on the way from the bank to his own store, and, seeing Ennis, he stopped and turned around, facing him. That Ennis was abusing Welch, calling him a damned old son of a ———, and said that Welch told him to shoot if he had the nerve, and Ennis said he had it all right, and fired a shot, which struck the ground at Welch's feet, and immediately fired a second shot, killing him. That Welch was on the sidewalk where he stopped when the first shot was fired, and was about on the sidewalk still when the shot was fired that killed him. Whereupon Ennis ran away. This evidence is also corroborated by other witnesses; there being some evidence that Welch had papers in his hand. The knife found on the ground is not shown to have been Welch's knife, but it is in evidence that some time prior to the shooting a difficulty had occurred between them over the sale of a lot, and on the morning of this occurrence, some time before the shooting, it had been renewed. In this condition of the evidence before the jury, briefly stated, a question was propounded to some of the witnesses as to the character of Welch as a peaceable and law-abiding citizen, which was objected to, and the objection overruled by the trial court. This ruling is made the basis of the error now under consideration.

It will be observed that, in order to defeat the plaintiff in her right of recovery, it was incumbent upon the plaintiff in error to show that Mr. Welch came to his death while in the act and as the result of his violation of the law. He was not at the moment assaulting Ennis, and did not have the ability to assault him at the distance he was from him, nor can it be said that the broken knife shown in evidence was a dangerous weapon. If Ennis had at the time any right whatever to shoot in self-defense, it must have been predicated upon appearances as the same were presented to him by the circumstances then existing. We suppose that if the circumstances surrounding the transaction, as the same were presented to him, were sufficient to lead him to the conclusion that he was in danger of great bodily harm, and was in fact mistaken as to the extent of such danger, the fact that he had acted by reason of such mistake and killed Welch could not be made the basis of a refusal on the part of the defendant to pay the insurance on Welch's life. Welch must have lost his life in the act of actually violating the law before a reversal of this judgment can be justified, and whether he was acting in violation of law at the time is not only a question of fact for the jury, but such question of fact

was dependant largely upon the intent with which he performed the acts shown. This question has been determined by the jury against the plaintiff in error. They had before them the question of Welch's character, under the ruling of the court, and, as we understand the law, character of the parties may be offered in evidence, where the intent under which they acted is a material inquiry. A rule of evidence in the trial of issues as here presented would not be different from that in a case where the territory was proceeding against Welch for a violation of the law in making assault upon Ennis. In such case there could be no question but that the intent with which the act was done was a material inquiry in determining the question as to whether or not Welch was guilty of any assault or violation of the law. Where intent of the party charged is a material inquiry, and the facts and circumstances shown in evidence leave the question of intent in doubt, the character of the party charged may be shown, to aid in the determination of such question. In the case under consideration such a proposition was squarely presented, when the court ruled that evidence of character of Welch might be introduced. In *Scott v. Fletcher*, 1 Tenn. 488, it was said: "In questions of tort, or quasi tort, where the injury alleged is doubtful, character may be given in evidence, since as the jury must depend, either wholly or in some degree, on intentions to ascertain this, in doubtful cases, character becomes a material inquiry." In *Greenleaf on Evidence*, note to § 54, it is said: "The ground on which evidence of good character is admitted in criminal prosecutions is this: That the intent with which the act charged as a crime was done is of the essence of the issue, * * * and the prevailing character of the party's mind, as evidenced by the previous habit of his life, is a material element in discovering that intent in the instance in question. Upon the same principle the same evidence ought to be admitted in all other cases, whatever be the form of proceeding, where the intent is material to be found as a fact involved in the issue." We think there was no error in the admission of this evidence.

It is next contended by the plaintiff in error that "the court erred in overruling defendant's motion, made at the close of the testimony, for a peremptory instruction to the jury to find a verdict for the defendant." This instruction could only be granted in a case where there was no fact in dispute, no conflict in the evidence, and no theory of the case upon which the plaintiff would be entitled to recover. If Ennis had been upon trial under an indictment for murder, with the same evidence introduced in this case, a verdict finding him guilty of murder would surely have been warranted by the evidence.

The third and last contention of plaintiff in error is that "the court erred in refusing to instruct the jury, as requested by the de-

fendant, as follows: "The court instructs you that it is not necessary for the defendant to show that Ennis was justified in killing Welch, but it is sufficient if defendant shows that Welch was violating the law at the time he was killed, and, if you believe from the evidence that Welch was approaching Ennis with a knife in a threatening manner at the time Ennis shot him, then Welch was violating the law, and plaintiff cannot recover." In its third instruction the court did instruct the jury as follows: "The court instructs you that if you believe from the evidence that the deceased member, M. M. Welch, came to his death by reason of an assault or attempted assault upon one O. L. Ennis, and that the said Ennis killed said Welch while he was assaulting or attempting to assault him, then Welch was violating the law, and the plaintiff cannot recover in this action." And in its fourth instruction the court further instructed the jury as follows: "The court further instructs you that the condition in the certificate that, 'if a member should die in consequence of a violation or attempted violation of the law, then the certificate should become void,' is a reasonable provision, and is binding on the beneficiary; and if you believe from the evidence that Welch was violating the law, or attempting to violate the law, at the time he was killed by Ennis, then the plaintiff cannot recover in this action." We think these instructions covered the ground and correctly stated the law to the jury. See *Supreme Lodge v. Bradley* (Ark.) 83 S. W. 1055, 67 L. R. A. 770, and cases cited.

Finding no error in the record, the judgment of the court below is affirmed. All Justices concurring, except BEAUCHAMP, J., who presided in the court below, not sitting, and IRWIN, J., not participating.

BENNETT v. BENNETT.

(Supreme Court of Oklahoma. Sept. 7, 1905.)

DIVORCE—ALIMONY—DEFAULT—JUDGMENT.

Where, in an action for divorce and alimony, the court upon a proper showing orders the payment of temporary alimony pendente lite, which is by the defendant ignored and a compliance therewith refused, and where the defendant, in default for answer or appearance, comes into court on the day said cause is set for trial, asking leave to appear and defend the action upon its merits, without presenting his answer or showing any cause or reason why he has disobeyed the order of the court with reference to the payment of temporary alimony, the court grants the leave asked for, conditioned upon his compliance in seven days' time with such order for alimony, and he thereupon refuses to accept the leave granted upon such terms, and he does not show or offer to show his inability to comply therewith, and said cause is thereupon tried as upon default, no error is committed by the trial court.

(Syllabus by the Court.)

Error from District Court, Lincoln County; before Justice Jno. H. Burford.

Action by Sarah Grace Bennett against A.

W. Bennett. Judgment for plaintiff, and defendant brings error. Affirmed.

See 81 Pac. 632.

This is an action for divorce and alimony commenced in the district court of Lincoln county; the petition therein being filed on the 21st day of May, 1903. The petition alleges cruelty of a gross and aggravated character as the ground for divorce, and sets out a large list of property possessed by defendant, A. W. Bennett, valued at \$40,000 or more, and prays for a divorce and for alimony, and for the custody of the infant child of the parties. At the time of filing the petition the parties resided in the city of Chandler, in said county, and the process of the court was issued and served on the defendant, as shown by the sheriff's return, by leaving a certified copy thereof at defendant's place of residence on the 22d day of May, 1903, being the day following the filing of the petition. The record also shows that at the time of filing the petition (May 21st) an application for temporary alimony and a restraining order was also filed, and on the same day a copy of this application and notice of presenting the same to the judge of said court for an order therein was personally served upon the defendant. The application, notice, and service are as follows:

Application for temporary alimony and restraining order: "Comes now the plaintiff, Sarah Grace Bennett, and alleges and says: That she is the plaintiff in the action brought for divorce and permanent alimony in said court against the defendant; that she has charged in her petition against the defendant extreme cruelty; and that defendant is the owner of real estate and personal property of the reasonable value of \$40,000.00, as she has been informed by the defendant and believes; and that she has set forth in her petition as near as she can a description of his real and personal estate; that he has, upon receiving information from plaintiff that she intended to commence proceedings against him for divorce and alimony, made disposition of quite considerable of his real estate, as shown by the record in said county, by having same conveyed to his son Harry M. Bennett, of the age of 11 years, who is his son by his first wife; and that said conveyance is without a valuable consideration, and was made for the purpose of defrauding your petitioner and applicant of her legal and equitable rights in said property; and that she asks that defendant be restrained from making any further disposition of any of his property, real or personal, in the territory of Oklahoma, and that until this action has been finally tried, and plaintiff's rights in the premises passed on by the court; that defendant be ordered to pay into court for the plaintiff the sum of \$1,000.00 temporary alimony to support her and to carry on her suit, as she is unable on account of sickness and late confinement to do work of any kind or char-

acter; and that he also be ordered to pay into court for the support and maintenance of the child born to plaintiff and defendant the sum of \$500.00 as temporary alimony, and the further sum of \$500.00 for her attorneys, as she is unable and without means to pay counsel and carry on her suit; that the petition filed in said cause and affidavits will be presented to the court in support of this application. Decker & Wagoner, Attys. for Plaintiff."

"Territory of Oklahoma, Lincoln County—ss.: Personally appeared before me, a notary public, Sarah Grace Bennett, who being by me first duly sworn says: That she is the plaintiff in the above-entitled cause, that she has read the above and foregoing application, and the matters and things therein set forth are true. Sarah Grace Bennett. [Certificate and seal.]"

Notice: "Albert W. Bennett, Defendant in the Above-Entitled Cause: You are hereby notified that the above and foregoing application will on the afternoon of Saturday, May 23, 1903, be presented to the Honorable John H. Burford, judge of said court at chambers in Stillwater, Payne county, Oklahoma territory, to be acted on by him, and the petition filed in said cause referred to in said application and affidavits in support of this application will also be presented to said judge at said time and place. Decker & Wagoner, Attys. for Plaintiff."

Affidavit: "Victor S. Decker, being first duly sworn, says: That on the 21 day of May, A. D. 1903, as agent for the plaintiff in the above-entitled cause, that he went to the office of the defendant, Albert W. Bennett, and served an exact copy of the within application for temporary alimony and restraining order upon the said defendant, Albert W. Bennett, by offering to him an exact copy of said application for temporary alimony and informing him of the contents thereof, which application the said defendant, Albert W. Bennett, refused to receive. Victor S. Decker.

"Subscribed and sworn to before me this 21 day of May, A. D. 1903. Ray McElhinney, Notary Public. [Seal.] My Comm. expires March 6th, 1906."

Application was made to the judge of said court at chambers in accordance with the notice served on the defendant, and thereupon the following order was by him made:

"Temporary Order for Alimony. Now on this 23d day of May, 1903, this cause comes on to be heard before Hon. Jno. H. Burford, judge of the district court of Lincoln county, Oklahoma territory, in chambers, in the city of Stillwater, O. T., upon the application and motion of the plaintiff for an order granting this plaintiff temporary alimony, suit money and attorney fees; the plaintiff appeared by her attorneys Decker & Wagoner, and the defendant appeared not. And the court being fully advised in the premises, from the petition of plaintiff, and the evi-

dence adduced upon this hearing finds that the plaintiff should be granted temporary alimony and suit money and attorney fees herein. And upon further consideration of said application and motion, the court finds that the defendant should be restrained from in any manner disposing of his personal property or any of his real estate, as prayed for in said motion and application. It is therefore considered, ordered and adjudged that the defendant pay into the office of the clerk of the district court of Lincoln county, Oklahoma, within ten days from this date, the sum of one thousand dollars, for the use and benefit of the plaintiff, as and for temporary alimony and suit money, and the further sum of one hundred dollars, as and for the payment of plaintiff's attorney's fees. It is further considered, ordered and adjudged that the defendant, Albert W. Bennett, be and he is hereby restrained and enjoined from in any manner selling or disposing of or in any manner incumbering any of his real or personal property. John H. Burford, Judge of the District Court of Lincoln County, O. T."

On the day before the filing of the petition (May 20, 1903) the defendant, A. W. Bennett, made and executed to his minor son by a former marriage a deed to a large amount of the real property then owned by him. The grantee in this deed was at that time 11 years of age, and living in the state of Virginia, and the consideration expressed in the deed was "love and affection and \$1.00," and was filed for record in the office of the register of deeds of Lincoln county on the day of its execution. Defendant absconded from said county and from the territory of Oklahoma soon after the filing of plaintiff's petition, and, so far as the record shows, did not return to this territory until the month of February, 1904. On July 21, 1903, an amended petition was filed, making Harry M. Bennett, the said minor son of the defendant, a party defendant, and adding a more full and complete list and description of defendant's property in this territory, but not otherwise changing or enlarging the allegation of cause for divorce set out in the original petition. Service under this petition was obtained by publication. No appearance in said cause having been entered on the 19th of September, 1903, the court, being then in session, appointed a guardian ad litem for the said minor defendant, Harry M. Bennett, and ordered answer to be filed in his behalf within five days, and on September 30th the answer of said defendant was duly filed. On the 17th day of February, 1904, an alias summons was issued in said cause, and returned by the sheriff of said county personally served upon the defendant, A. W. Bennett. The answer day in this summons was March 12, 1904.

On April 6, 1904, the defendant, A. W. Bennett, appeared specially in said cause and filed the following motion:

"In the District Court of Lincoln County, Oklahoma Territory. Sarah Grace Bennett, Plaintiff, v. Albert W. Bennett and Harry M. Bennett, by His Next Friend and Guardian, A. W. Bennett, His Father, Defendants. No. 1, 455. Now on this sixth day of April, A. D. 1904, the same being one of the regular court days of the April term of the district court within and for the county of Lincoln and the territory of Oklahoma, the plaintiff appearing by her attorneys, and the defendant, Albert W. Bennett, appearing by his attorneys, this motion comes up for hearing on the motion of Albert W. Bennett, who appears specially by his attorneys for the purpose of this motion only, and for no other purpose, to set aside the service of the summons in this case, for the reason the same is false and untrue, to set aside the service of the alias summons herein for the reason the same was procured by fraud on the part of the plaintiff, and to have the court declare the notice of publication in this case of no force and effect, so far as the same might affect the personal rights of the defendant, Albert W. Bennett, for the reason that the said notice of publication is not the proper method of serving this defendant with notice of the filing of the amended petition, which motion was by the court overruled, to which ruling of the court the defendant excepted. Whereupon the defendant, Albert W. Bennett, by his attorneys, offered to file his answer in this cause, instant, which said offer was refused by the court for the reason that the said defendant is in contempt of this court by reason of his failure and refusal to comply with the order of the court, heretofore made, to pay to the plaintiff in this cause the sum of one thousand dollars as and for temporary alimony and one hundred dollars as attorney's fees in this case, but made the further order that the said defendant should be permitted to file said answer within five days on condition that he purge himself of said contempt by complying with said order within that time; to which order of the court the defendant, Albert W. Bennett, excepted at the time. Jno. H. Burford, Judge."

"District Court of Lincoln County, O. T., April 6th, 1904. 3d Judicial Day of the April Term, 1904. District Court Journal. Sarah Grace Bennett v. A. W. Bennett. Comes now the plaintiff and defendant by respective counsel, and the defendant submits a motion to set aside the service of the summons herein, and, the court being fully advised, it is by the court ordered that said motion be, and the same is hereby, overruled. To which ruling of the court the defendant duly excepts; and now the defendant asks leave to file his answer herein, and it is by the court ordered that the said request be granted upon condition that said defendant comply with former order of the court requiring said defendant to pay temporary alimony and attorney's fees, within five

days from this date. To which ruling and order of the court the defendant duly excepts."

On the 20th day of April, 1904, the cause was set for trial by the order of the court on the 28th of that month, and said cause came on for trial, and was duly heard by the court on the 29th day of April, at which time the court made the following findings, viz.:

"In the District Court of Lincoln County, Oklahoma. Sarah Grace Bennett, Plaintiff, v. A. W. Bennett and Harry M. Bennett, a Minor, by His Next Friend and Guardian, A. W. Bennett, Defendants. Journal Entry. Now, to wit, on this the 29th day of April, 1904, the same being one of the regular judicial days of the regular April, 1904, term of district court of Lincoln county, Oklahoma Territory, the above-entitled cause came on for hearing and final determination on the regular assignment of causes. And the court finds that the plaintiff, Sarah Grace Bennett, filed in said court on the 21st day of May, 1903, her petition asking for a decree of court dissolving the marital relations existing between plaintiff and defendant, A. W. Bennett, and also for \$1,000.00 temporary alimony to assist her in carrying on this suit and as support for herself and minor child, James Richard Bennett, and the further sum of \$500.00 as attorney fees for her attorneys, and a just division of defendant's real and personal estate as permanent alimony, and that the conveyance made by defendant, A. W. Bennett, to his son, Harry M. Bennett, minor, be declared as not affecting any right that plaintiff has in the property conveyed by the defendant, and for the care, custody and control of the child James Richard Bennett. The court further finds that the defendant, A. W. Bennett, was duly and legally served, personally, with summons in said action by leaving a certified copy of said summons at his usual place of residence in Lincoln county, Oklahoma, as shown by the return of the sheriff of Lincoln county indorsed thereon. The court further finds that the defendant, A. W. Bennett, has failed and refused to comply with an order made by the court on the 23d day of May, 1903, wherein the said A. W. Bennett was ordered and adjudged to pay to the plaintiff, within ten days from said date, \$1,000.00 for the use and benefit of plaintiff, as and for temporary alimony and suit money, and the further sum of \$100.00 as and for payment of plaintiff's attorney fees. The court further finds that said order was served on the defendant, A. W. Bennett, by the sheriff of Lincoln county, Oklahoma. The court further finds that the plaintiff, on the 21st day of July, her petition not having been pleaded to, filed in said court an amended petition for divorce on the same grounds, and for alimony, and in addition thereto asks that certain real estate, described in her petition, be awarded to her, being lots 19 and 20 in block 28 in East Chandler, Lincoln county, Oklahoma

Territory, the same being the homestead of plaintiff and defendant. And further that certain real estate described in plaintiff's petition, which was at the commencement of plaintiff's action transferred by A. W. Bennett by deed to Harry M. Bennett, the son of the defendant, a minor under the age of fourteen years and a resident of the state of Virginia, be set aside and subjected to the payment of plaintiff's alimony, and that Harry M. Bennett, minor under the age of fourteen years, was, by his next friend, guardian and father, A. W. Bennett, made a party defendant in said action. The court further finds that the defendant, Harry M. Bennett, a minor, on and after the filing of plaintiff's amended petition herein, has been duly and legally served by publication by the plaintiff, and that said action is one of the cases in which service by publication is authorized by law; that heretofore, to wit, on the 19th day of September, 1903, the same being a regular judicial day of this court, all other persons failing to apply, Chas. B. Wilson, Jr., one of the attorneys for A. W. Bennett and as a friend of Harry M. Bennett, minor, moves the court to appoint a guardian ad litem for Harry M. Bennett, minor defendant; that Chas. B. Wilson, Sr., a member of the bar of said Lincoln county and an attorney at law authorized to practice in all courts of record of said territory, a disinterested and capable person, was by the court appointed as guardian ad litem for the said minor defendant, Harry M. Bennett; and thereafter, on the 30th day of September, 1903, the said minor defendant, Harry M. Bennett, by and through his guardian ad litem, Chas. B. Wilson, Sr., appeared and answered herein as provided by law. The court further finds that after the filing of plaintiff's amended petition the defendant, A. W. Bennett, was duly and legally served, personally, with an alias summons in said cause, as shown by the return of the sheriff of Lincoln county, Oklahoma Territory, indorsed thereon. The court further finds that on the 5th day of April, 1904, the defendant, A. W. Bennett, appeared by his attorneys and asked leave to file his answer herein out of time, which request was objected to by the plaintiff for the reason that the said defendant had failed to comply with an order theretofore made to pay to the clerk of the court, for the use of the plaintiff, the sum of one thousand dollars as and for temporary alimony, and the further sum of one hundred dollars as and for temporary fees for her attorneys, and, the court being advised that the defendant had not complied with said order or offered any excuse for his failure to so do, his application for leave to answer is refused until he shall comply with said former order or show cause why he has not, and he is given five days to make said showing, and in which to file his said answer. And this cause coming on for trial now on this 29th day of April, 1904, the plaintiff appears in person and by her attorneys, S. D.

Decker and Fred A. Wagoner, and the minor defendant, Harry M. Bennett, appears by his guardian ad litem, Chas. B. Wilson, Sr., and by his counsel, Chas. B. Wilson, Jr., and the defendant, A. W. Bennett, having failed to comply with the former order of the court or make excuse for not complying, and having failed to answer the petition of plaintiff herein, the said defendant, A. W. Bennett, is now called three times in open court, but makes default, and fails to plead or otherwise appear in said cause, and the said A. W. Bennett is by the court adjudged to be in default for an answer, and not entitled to answer or plead until he shall comply with the order heretofore made," etc.

These findings of fact made by the court were followed by the judgment of the court awarding to the plaintiff the former homestead of the parties as her sole property, \$6,000 permanent alimony, and \$500 attorney fees, and the costs of this action.

On April 30, 1904, defendant, A. W. Bennett, filed in said court his notice of appeal, which notice, omitting the entitling of the cause, is as follows:

"Notice of Appeal. Notice is hereby given by the defendant, Albert W. Bennett, that it is his intention to appeal from the decree of the court in the above-entitled cause of action, granting the plaintiff, Sarah Grace Bennett, a divorce from this defendant and decreeing her, the said plaintiff, alimony and suit money and the costs of the suit against this defendant. Albert W. Bennett, by His Attys."

From the foregoing judgment and decree the case comes to this court upon petition in error and a transcript of the record.

Chas. B. Wilson, Jr., and Emery A. Foster, for plaintiff in error. S. D. Decker, Fred A. Wagoner, Roy V. Hoffman, and John Embry, for defendant in error.

GILLETTE, J. (after stating the facts). It is manifest from the brief of plaintiff in error filed in this case that but a single question is raised by this appeal calling for a review by this court; and that is: Is it within the province and power of the district courts of the territory in a divorce case, where defendant has been personally served with summons and fails to appear or answer for nearly one year, and where he has also been served with an order for the payment of temporary alimony and fails and refuses to obey the order, and when the case is called for trial, then, for the first time, appears and asks leave to answer, to impose any terms or conditions to the granting of such leave? The answer to this question must inevitably determine this case. If the court must, under such circumstances, receive the answer without terms or conditions of any kind or nature attached to the granting of such leave, then there was error in the trial court, and the cause must be remanded for a new trial. On the other hand, if, under such circumstances,

the court may in its discretion impose any terms or conditions to the granting of such leave, and the filing of such answer, then there was no error, and, unless there was an abuse of discretion, the judgment must be affirmed. The very fact of asking leave of the court to answer seems, to the writer of this opinion, to furnish the response to this inquiry. If the court could not impose terms, then the party has an absolute right to place his answer on the files of the court without any application to the court, and whether the court was willing or unwilling; and the request for leave to file the same was a mere formality, without significance, and tending rather to ridicule the court than to honor or respect its authority.

The case has been elaborately argued by counsel in their briefs, and we have therefore devoted to it more than ordinary attention, and have very carefully examined the cases cited and relied upon by the plaintiff in error. As a basis for his argument, it is first conceded that the plaintiff in error had never been legally convicted of any contempt of court. It must be remembered that the petition was filed on the 21st day of May, 1903, and that on the same day a notice of the application for alimony pendente lite was served personally on the plaintiff in error, notifying him that the application would be heard before the judge of the court at chambers on the 23d instant. The record shows that the application was presented, and the order for temporary alimony made, by the judge at chambers on the said 23d of May, 1903; also that the first appearance, and, so far as the transcript shows, the only attention ever given by the plaintiff in error to said cause, was made by his counsel on the 6th day of April, 1904, nearly 11 months after the filing of the suit, during most of which time plaintiff in error had been absent from this territory, though personally served with an alias summons on the 17th of February, 1904. The appearance, as shown by the transcript, was a special appearance only for the purpose of challenging the jurisdiction of the court, and on the motion being overruled "the defendant asked leave to file his answer herein." That defendant was in contempt of the order of the court for the payment of alimony is neither denied or questioned; in other words, that he had been notified of the application, and that the order had been made by the court on the 23d of April, 1903, in pursuance of the notice and motion, and that the order had been at once served upon him, and that he had never complied or attempted to comply with the same, and had offered no excuse or explanation for not complying, are all undisputed and unquestioned facts. With this state of facts, it is now gravely argued that, because defendant, A. W. Bennett, had not been attached and brought before the court, formally arraigned, and adjudged guilty of contempt, therefore the court could not impose any terms or condi-

tions to the leave granting him permission to answer the petition several months after his time for answering had elapsed. It must also be noticed that this request was made without the slightest attempt to explain or excuse his laches, and also, what is quite as important, without disclosing the nature or character of the answer which he desired to make. That the mercy of the court had so long permitted the defendant to go unpunished for his contempt we do not think should now be construed as establishing his innocence or entitling him to any favor at the hand of the court on that account. The record reads: "And now the defendant asks leave to file his answer herein, and it is by the court ordered that the said request be granted upon the condition that said defendant comply with the former order of the court requiring said defendant to pay temporary alimony and attorney's fees within five days from this date," which was afterwards extended to April 13th.

This is the record complained of, and as to which plaintiff in error says, "Had plaintiff in error, however, been in contempt of court, a denial to him of any substantive right was error," and from thence proceeds to argue that it was not within the province or power of the court to refuse the leave to answer thus requested, or to attach any conditions to the granting of such request. Counsel then proceed to cite and quote at considerable length from the case of *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215. We have examined that case with care, and, because of the controlling authority of that tribunal over this court, we feel called upon to explain at some length why we think the holding in that case is not controlling in the case at bar. That was an action in equity growing out of the sale of some bonds; the object of the suit being to compel the defendants to account for the bonds or their value, upon the theory that defendants had acquired them with actual notice of pending litigation concerning them, and were bound by the result of the judgment rendered in the other action. This action had been put at issue by filing an answer, averring fraud and wrongdoing on the part of the plaintiffs in that suit; the answer alleging facts which, if found to be true, would have defeated a recovery by the complainants. After replication, testimony was taken at various times during the years 1875 and 1876. In June, 1877, the complainants obtained an order from the Supreme Court of the District of Columbia, requiring the defendants to pay over to the registry of the court the sum of \$42,207.50, which had been paid to defendants by the receiver. This order was disobeyed, and thereupon the complainants, in September, 1877, moved the defendants to show cause why they and each of them should not be punished for disobedience of the order as for a contempt. On December 8, 1877, the Supreme Court of the District of

Columbia made a decree that "the rule upon the defendants to show cause why they should not be decreed to be in, and punished as for, a contempt of court, etc., be made absolute, and that the said McDonald & White be taken and deemed to be in contempt of the aforesaid order." The decree then proceeds: "Unless McDonald & White, within six days from the entry of this order, and the service of a copy thereof upon their solicitors, shall in all respects comply with the said order of June 19, 1877, and pay into the said registry of this court the sum of \$49,297.50, the answer filed by them in the cause shall be stricken out, and that this cause proceed as if no answer had been interposed." The defendants not having complied with the order, the answer of the defendants was stricken out and removed from the files of the court, and thereafter the cause was proceeded with as if no answer had been filed in the case. The bill was thereupon taken as confessed, and decree rendered against defendants, and thereafter came to the Supreme Court of the United States by writ of error. Upon this state of facts the Supreme Court in passing upon the case uses this language: "In the view we take of the case, even conceding that the statute does not limit their authority, and hence that the courts of the District of Columbia are vested with those general powers to punish for contempt which have been usually exercised by courts of equity without express statutory grant, a more fundamental question yet remains to be determined; that is, whether a court possessing plenary powers to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer to strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

To much the same effect is the case of *McVeigh v. United States*, 11 Wall. 259, 20 L. Ed. 80, wherein the court says: "In our judgment the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that

subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right of administration of justice."

Referring to the above case, in *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914, speaking through Mr. Justice Field, the court said: "The principle stated in this terse language is the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or property there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, is not entitled to respect in any other tribunal." This case of *Windsor v. McVeigh* was an action of ejectment for a tract of land situated in the city of Alexandria, Va. Under the Act of Congress of June 17, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," the property had been seized by the marshal of the district, and a libel thereafter filed by direction of the Attorney General, setting forth "that the owner of the property had, since the passage of the act, held an office of honor and trust under the government of the so-called Confederate States, and had given aid and comfort to the rebellion." Upon this libel the district judge ordered process of monition to issue as prayed, and that notice of the same be given by publication in a newspaper. Publication was made as directed, and the owner of the property appeared by counsel, and filed a claim to the property and an answer to the libel. Subsequently the district attorney moved that the claim and answer, and the appearance of the respondent by counsel, be stricken from the files, on the ground that it appeared from his answer that he was at the time of filing the same "a resident within the city of Richmond, within the Confederate lines, and a rebel." This motion was granted, and the claim and answer ordered to be stricken from the files, and the court thereupon immediately entered a decree condemning the property as forfeited to the United States. This was the state of facts upon which the court was passing in using the language above quoted.

It will be observed that in each and all these cases the defendant had appeared in due and proper time, and filed his answer therein. He was not in default, and he was

not before the court asking for any favor at the hands of the court. He was then properly in court, and standing strictly upon his legal rights in reference to the action then pending and in which he had been summoned to appear. He had submitted himself and his cause to the jurisdiction of the court, and was bound by any action it might take in regard thereto. In the leading case of *Hovey v. Elliott* the case had been at issue for nearly two years, and considerable testimony in the case had been taken by deposition, before the order was made for the payment of money into the registry of the court; the non-compliance with the order being the sole cause and only excuse for the court striking out his answer and the evidence taken in his behalf, declaring the case in default and ordering all proceedings on the part of defendants in the case to be perpetually stayed. In concluding its decision in that case the court, after pointing out the salient features of the case, concludes its opinion in these suggestive words, "and our opinion is therefore exclusively confined to the case before us."

It is most apparent that the facts in that case were widely and radically different from those in the case at bar. In that case a good and sufficient answer had been filed in due and proper time. In this case no answer had been filed or tendered, and no intimation given the court that the answer desired to be filed would have constituted any defense to the action if it had been admitted. In that case a large amount of testimony on the part of defendant had been taken by depositions and was on file with the court, and after all this had been done the order for the payment of money into the registry of the court was made. In this case no testimony had been taken, the order for the payment of alimony was made at the time of filing the petition, and defendant has never appeared in the case except to ask leave to file an answer without any explanation or excuse for his disregard of the order, and without alleging or ever pretending that he had any meritorious defense to the action. It must be readily seen that in *Hovey v. Elliott* the defendant was not only rightfully in court, but he had certain existing and established rights there, and these rights were not merely denied, but they were swept away by the arbitrary order of the court, on the theory of thereby punishing him for contempt. In this case defendant had never been in court, but had willfully refused to appear therein, or to give the slightest heed to the proceedings therein. In that case the defendant was asking no favor or indulgence of the court. In this case he is in default, and moving the court to grant him both favor and indulgence, to wit, leave to appear and answer out of time, because of his willful refusal to appear when summoned. In that case the order was to punish the contempt. In this case the order is a condition

to granting the favor. No doubt there is language in the case which by analogy may be applied to the case before us, but, when it is remembered the court expressly limits the decision to the case then before it, it is, to say the least extremely doubtful whether the case furnishes any authority in a case such as is presented by this record. Most certainly the case was not presented upon the same state of facts as those presented in this case, and is therefore not an authority in point in this case, either upon the facts or the subject-matter of the action. We cannot better at once express our approval of the decision in that case, and our dissent from its application to the case before us, than by quoting the remarks of Lord Halsbury under somewhat similar circumstances, in the case of *Quinn v. Leatham* (1901) A. C. 495, wherein he said: "Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found"—and again, "that a case is only an authority for what it actually decides."

In the cases of *McVeigh v. United States*, 11 Wall. 259, 20 L. Ed. 80, and *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914, which were cases arising under the act of Congress for the confiscation of the estates of "rebels," the property of the defendants had been attached by the sheriff, and a monition issued to the owners to show cause why the estates should not be confiscated by the government, and to this order the defendants appeared and answered, setting up title to the property, and denying the right of the government to seize the same. The motion to strike out the answers alleged that defendants were rebels and alien enemies, and therefore had no right to be heard in defense of the action. This motion was sustained, and the answers stricken out, and all rights to defend the actions denied them. To this argument the Supreme Court, in delivering its opinion, replied: "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and could have no locus standi in that forum. If assailed there he could defend there. The liability and the right are inseparable." And later on in the decision the court adds: "It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence." This comprehensive language finds justification in the extraordinary circumstances of the cases then before it, and must be read as applicable to the facts then being considered. In neither is there any fact or circumstance common to the case now under consideration. In each of these instances the party appeared in proper time and filed his answer. He came into court at a time when

he had a legal right to come, and therefore had a legal right in the court at the time he was summarily dismissed therefrom.

The case of *Foley v. Foley* (Cal.) 52 Pac. 122, 65 Am. St. Rep. 147, is also relied upon by plaintiff in error as an authority against the judgment entered in this case. That was an action for divorce, and in that respect in point in this case. But the statement of facts reads: "The defendant Foley interposed a demurrer to the complaint; but the court, on motion of plaintiff, struck out his demurrer, and gave judgment against him, as by default, for his failure to pay certain alimony ordered by the court, and for neglect and refusal to subscribe his deposition taken in the action." It will thus be seen the defendant in that case was not in default, but was in court in proper time and standing on his legal right, asking no favor of the court beyond what the law gave him, and that these were arbitrarily brushed aside on the theory of thereby punishing him for the contempt. In the case at bar defendant was never in court, save to ask leave of the court to file an answer out of time, and this request was granted, and he was given seven days in which to file his answer, on condition that he now comply with the former order of the court. It is not claimed that the condition which the court attached to granting him the favor asked was onerous, unreasonable, or impossible of performance by defendant, and therefore an abuse of discretion; neither was any answer tendered in the case, nor any claim presented to the court in any form demanding the right which is now for the first time presented by the defendant. Had the claim which is now presented in this court and urged with so much tenacity been presented to the court below, it may well be that the trial court would have modified the conditions attached to leave to answer, or have granted the leave without condition. Only in extraordinary cases will this court reverse the order or ruling of a trial court, where the question upon which the reversal is sought was never submitted or suggested to that court. It must not be forgotten that defendant's answer was not stricken out; it was not refused, and the only cause or ground of complaint now is that the condition attached to the favor of the court in granting leave to answer was beyond the limits of its power.

The powers and authority of the various courts of this territory are specifically designated in section 9 of the organic act, wherein it is provided, *inter alia*: "And said Supreme and District Courts shall possess chancery as well as common-law jurisdiction, and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the territory affecting persons or property." This is undoubtedly a delegation of chancery power and authority to the Supreme and District Courts of this territory, as broad and comprehensive as that possessed by the chancery courts of England,

and beyond all question confers power in those courts over the process, orders, or judgments by them entered, and authorizes the exercise by them of a sound discretion in the manner and form of proceedings therein.

In view of the financial condition of the defendant, we do not think that the terms imposed by the court upon the plaintiff in error as prerequisite to filing his answer were unreasonable or burdensome for the defendant to have complied with. Plaintiff in error made no effort to show or even complain that the amount was excessive, or that he was unable to pay, nor did he ever claim that he had any defense to the merits of the action. Under the facts in this case we do not think there was any abuse of discretion on the part of the trial court in imposing the terms it did as a condition to defendant filing his answer in the case. It is impossible to read this record and not be convinced that the plaintiff in error willfully and intentionally set the trial court at defiance, and both intended and attempted to evade and disregard any order or decree the court might make in the case. See *Maharry v. Maharry*, 5 Okl. 371, 47 Pac. 1051.

We find no error in the record, and the decree of the court below will be affirmed. All the Justices concurring, except BURFORD, C. J., who tried the cause below, not sitting.

(30 Utah, 22)

STATE v. OVERSON.

(Supreme Court of Utah. Jan. 4, 1906.)

CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS—DUTY TO CHARGE.

Where, in a prosecution for cattle theft, defendant admitted that he had the cattle in his possession, and it was proved that the owners never sold or disposed of them, but that defendant drove them away and sold them to butchers, and he testified that he purchased the cattle from a stranger and made an attempt to flee from arrest, it was not error to refuse to charge specifically on circumstantial evidence; the court having charged that, if the jury believed beyond a reasonable doubt that defendant purchased the cattle, they should find him not guilty.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1883.]

Straup, J., dissenting.

Appeal from District Court, Fifth District; John F. Chidester, Judge.

James Overson was convicted of grand larceny, and he appeals. Affirmed.

A. J. Weber, for appellant. M. A. Breeden, Atty. Gen., for the State.

BARTCH, C. J. The defendant was prosecuted for and convicted of grand larceny. Upon being sentenced to a term of imprisonment in the penitentiary, he appealed to this court, and has assigned various errors.

It appears from the information that he was charged with having stolen two heifers on July 16, 1904. The evidence shows that one of the heifers was the property of

Charles A. Memmott and the other of Samuel Memmott, and that no disposition of them was ever made or authorized by the owners. On July 17, 1904, the defendant, assisted by another man, drove the heifers with other cattle to Eureka, and on the next day sold them to butchers. The hides of the stolen cattle were produced in court, at the trial, and identified by the owners. The defendant testified that, on July 12, 1904, he purchased the heifers of a stranger; and Charles A. Memmott testified that he last saw one of them between July 12 and 14, 1904. There is also testimony tending to show that the defendant attempted to flee from arrest, and that, after his arrest, he admitted that he made such attempt. Counsel for the appellant does not claim that the evidence is insufficient to sustain the conviction, but insists that there is no direct proof of a felonious taking and appropriation of the property; that there is simply proof of circumstances tending to show such a taking and appropriation; and that, therefore, the court erred in refusing to instruct the jury specifically upon circumstantial evidence.

This is the appellant's principal contention, and we are of the opinion that, under the facts and circumstances in evidence, it is not well founded. It is doubtless true that, in a criminal case, where a conviction is sought alone upon proof of circumstances, it becomes the duty of the court to instruct the jury upon the question of circumstantial evidence, and that a refusal to do so may constitute reversible error. And this is true, as to many cases, even where there is some direct evidence, but where the prosecution relies upon circumstances for a conviction. In all such cases the court should charge the jury as to the law applicable to the circumstances in evidence, but no particular form of words is necessary. If the law is applied to the facts and circumstances shown by the proof, in language intelligible to the jury, it is sufficient. The case at bar is not such a one, as to render an instruction upon the question of circumstantial evidence, in the usual form, or in the form requested by the appellant, indispensable. Here the defendant admits that he had the property, the subject of the larceny, in his possession, and that he came into possession of it on a certain day, while the proof shows that the owners never sold or disposed of it, and that the defendant drove the heifers away and sold them to butchers. Then, in explanation of his possession and appropriation of the stolen property, the defendant testified that he purchased it of a stranger. This raised the decisive question in the case, for, if in fact he had purchased the property in good faith, his taking and possession would not have been felonious. His evidence of purchase tended to negative any intent to steal, and constituted an important and controlling circumstance. This was specifically submitted to the jury, as follows: "Gentlemen of the jury, there

is some evidence in this case that tends to show that the defendant, James Oversou, bought the two heifers referred to by the witnesses in this case, the same being the two heifers that were sold by the defendant at Eureka in July, 1904, of a man by the name of Jackson. You are therefore instructed that, if you believe, or have a reasonable doubt as to whether or not the defendant bought the said heifers of Jackson, then, and in that event, you should find the defendant not guilty." The question of purchase was thus submitted to the jury in plain language, and the court had previously in its charge pointed out to them the material allegations in the information, and had charged them that, if the state had failed "to prove any one or more of the material allegations" to their "satisfaction beyond a reasonable doubt," they must acquit the defendant. The court also charged the jury as to the presumption of innocence, and upon the question of reasonable doubt. In fact the charge appears to cover every material element in the case, and is as favorable to the prisoner as he had a right to request. The charge as a whole submitted the case plainly and fairly to the jury, and therefore the mere fact that the court refused to charge upon the question of circumstantial evidence, in the manner or form requested by the defense, cannot, under the facts and circumstances shown by the record, avail the prisoner upon appeal; his rights not appearing to have been prejudiced by the court's refusal. The duty of the court in this regard was performed by instructing the jury upon the law applicable to this particular case in plain and intelligible language. Other courts, in similar cases, have ruled likewise. *Brady v. Commonwealth*, 74 Ky. 282; *Solander v. People*, 2 Colo. 48; *Jones v. State*, 61 Ark. 88, 32 S. W. 81; *State v. Seymour*, 94 Iowa, 699, 63 N. W. 661.

There are other assignments of error, but, upon careful examination, we are of the opinion that none of them are well taken, and that separate discussion of them is not important. We find no reversible error in the record.

The judgment is affirmed.

MCCARTY, J., concurs.

STRAUP, J. (dissenting). It is admitted that there is no direct evidence of taking by the defendant. To establish a felonious taking by him the prosecution depended entirely upon circumstances—recent possession, an unsatisfactory explanation, and an attempted flight. Though requested so to do, the court declined to charge on the subject of circumstantial evidence. The prevailing opinion concedes that the court should do so, when circumstances are relied upon for a conviction; but it is said it was here rendered unnecessary because of the defendant's admitting possession of the alleged property by his claim that he purchased it from Jackson, and

therefore the decisive question in the case was whether the defendant purchased the property in good faith. The point of inquiry is not as to sufficiency of evidence to convict, but as to whether the trial court should have charged the jury on the subject or law of circumstantial evidence. The decisive question in the case was not whether the defendant purchased the cattle as claimed by him, but whether he feloniously stole, took, and drove them away. Though the jury may have believed, as they evidently did, that the defendant's explanation of purchase was untrue or unsatisfactory, still, to convict him, they were required to find him guilty of a felonious taking. The defendant's recent possession of the property, his untruthful or unsatisfactory explanation thereof, are but circumstances from which may be inferred the felonious taking by him. They may be sufficient to convict him of the larceny, but to be so the jury must not only find the truth of the circumstances, but also that they established the felonious taking by the defendant beyond a reasonable doubt.

Before it can be said that circumstances prove anything, they must agree with and support the hypothesis which they are adduced to prove; and in a criminal case they must not only concur to show the defendant's guilt, but they must be inconsistent with any other reasonable conclusion; they must not only be consistent with and point to his guilt, but they must be inconsistent with his innocence. When a conviction is dependent upon circumstantial evidence, it is important that the jury should properly be guided on the principles or rules applicable to this character of evidence, or, as it is sometimes called, the law of circumstantial evidence; and in most jurisdictions it is held that it is the duty of the court to charge thereon when requested so to do. Such has been the holding of this court. *People v. Scott*, 10 Utah, 217, 37 Pac. 335; *York v. State* (Tex. Cr. App.) 61 S. W. 128; *Arimendis v. State* (Tex. Cr. App.) 54 S. W. 601; *Wallace v. State* (Tex. Cr. App.) 66 S. W. 1102; *State v. Andrews* (Kan. Sup.) 61 Pac. 808; *State v. Hunter*, 50 Kan. 302, 32 Pac. 37; *People v. Murray*, 72 Mich. 10, 40 N. W. 29; *Fuller v. State* (Tex. App.) 7 S. W. 330; *Boyd v. State* (Tex. App.) 6 S. W. 354. In *Wallace v. State*, supra, it was said: "Possession alone is relied upon to prove inferentially the original fraudulent taking. This being true, the court should have charged on the law of circumstantial evidence." In *York v. State*, supra: "Where the original taking is to be inferred from the fact of subsequent possession of alleged stolen property, it is a case of circumstantial evidence. Appellant excepted to the failure of the court to give this in charge to the jury. This error alone demands a reversal of the judgment." In *Fuller v. State*, supra: "This conviction is founded wholly upon circumstantial evidence, and the trial judge omitted to instruct the jury in relation to that

character of evidence. This is error for which the conviction must be set aside." In *State v. Andrews*, supra, it was held error for which the judgment was reversed to refuse the following request: "In order to convict on circumstantial evidence, not only the circumstances must all concur to show that the defendant committed the crime, but they must be inconsistent with any other rational conclusion."

Here one of the requests was in the language of that in *State v. Andrews*. Another embodied that feature, as well as the one that the jury, to convict the defendant on circumstantial evidence, must not only find the truth of the circumstances, but also that they, when alone relied upon for a conviction, must establish the guilt of the defendant beyond a reasonable doubt. The requests were in accordance with the law as announced in *People v. Scott*, supra, and in *State v. Hayes*, 14 Utah, 118, 46 Pac. 752. In the cited case from the Kentucky court it is held that the court should not at all charge on circumstantial evidence, because to do so is charging on the weight of a particular species of evidence. That holding is not in harmony with the prevailing opinion, nor with the holding of the prior decisions of this court, nor with many courts of other jurisdictions. The cited cases from Arkansas and Iowa are cases where the court in substance charged, as was requested, on the question of circumstantial evidence. Here the court did not in substance or at all charge on the subject, but wholly refused to do so. It will not suffice to say such an instruction was rendered unnecessary because of the defendant's explanation or attempted account of his possession. By so doing he did not admit a felonious or otherwise wrongful taking, or any taking from the alleged owner. Notwithstanding such explanation, the felonious taking still rested upon the inference to be drawn from the circumstances of possession as explained. By reason of the explanation, the character of circumstantial evidence was not converted into that of direct evidence. Nor can it be said, because the court charged if the jury had a reasonable doubt as to the fact of the defendant's purchase they should acquit him, such was charging them as to the character or law of circumstantial evidence. At most it was merely charging as to that particular circumstance, but not as to the principles of circumstantial evidence. As to the rules applicable to this character of evidence, the jury was left unaided. Nor was the error occasioned by this omission cured by charging on the reasonable doubt, presumption of innocence, alibi, the essential ingredients of larceny, and the like. Instructing on these matters was not in substance instructing the jury with respect to the rules applicable to the principles or character of circumstantial evidence. The court having failed to so instruct the jury, they may have fallen into the error that the question of the defendant's

purchase was decisive of the case; that is to say, if he purchased the cattle, he was innocent, if he did not, he was guilty. This well illustrates the rule that to convict on circumstantial evidence the circumstances must not only be found to be true, but that they must also establish the guilt of the accused beyond a reasonable doubt. Applying it here, the jury was not only required to find that the defendant did not purchase the cattle, but also that such circumstance (together with all other circumstances in the case) established beyond a reasonable doubt the felonious taking by the defendant.

What this court said in *People v. Scott*, supra, in speaking of circumstantial evidence, equally well applies here: "A jury of inexperienced laymen could hardly be expected to apply the rules applicable to this class of testimony without some assistance from the court." The unlearned, and even sometimes the learned, are prone to draw inferences from presumptions, and, generally, if not warned, will most likely draw a certain conclusion from facts and circumstances if they but agree with and support the hypothesis which they are adduced to prove, without also taking into consideration whether any other conclusion can reasonably be drawn therefrom. In a criminal case the jury should therefore, in effect, be told that the chain of circumstances must be complete and unbroken; that the circumstances must be plainly and certainly proved; that they must not only be consistent with the hypothesis of guilt, but that they must also be inconsistent with the hypothesis of innocence; or, as it is sometimes expressed, every fact or circumstance from which an inference of guilt is drawn must be not only consistent with the hypothesis of guilt, but must also be inconsistent with the hypothesis of innocence. Unless so warned there is danger, as expressed by Mr. Colby (2 Colby, Crim. L. 175), "of incorrect inferences and illogical conclusions from jurors not accustomed to close habits of reasoning, where the processes of inference and deduction are exercised, either upon several circumstances or even a single one, remote from the main fact sought to be established."

The defendant also requested a charge to the effect that he could not be convicted of larceny, if the jury believed him guilty only of having received stolen property. The court not only refused the request, but wholly failed to charge on the subject. There was evidence in the case to which such a charge was applicable. It is readily conceivable that, among the inferences drawn or claims made, there might be the one that Jackson committed the larceny. The defendant having accounted for his possession through a purchase from him, in the absence of instructions, the jury may have believed, though the defendant had no connection with or complicity in the taking, that he, having received the property knowing it to have been stolen and accepting

the fruits of the fraudulent taking, was therefore equally guilty with Jackson of larceny. It was therefore the duty of the court to point out to the jury the distinction between the crime of larceny and that of receiving stolen property; for, in the language of the court in *Boyd v. State*, supra: "Without a very clear and positive understanding of this principle of law, it is manifest that an ordinary jury would be misled as to the character and weight to be attached to the subsequent inculpatory acts of the defendant, though not connected with the original taking."

For these reasons I think the conviction should be set aside and a new trial granted.

ANDERSON v. HALTHUSEN MERCANTILE CO.

(Supreme Court of Utah. Jan. 10, 1906.)

1. APPEAL—EXTENSION OF TIME BY STIPULATION—VALIDITY.

Under Rev. St. 1898, § 3301, providing that an appeal may be taken within six months from the entry of a judgment or order appealed from, and section 3329, providing that the time for doing certain acts allowed by this Code, not specifying the taking of appeals, may be extended by the court in which the action is pending, on good cause shown, etc., parties cannot by stipulation extend the time in which to appeal.*

2. SAME—JURISDICTION.

The filing and service of a notice of appeal within the time required by law is essential to clothe the Supreme Court with jurisdiction to adjudicate whatever questions are properly raised by the appeal.

3. SAME—CONFERRING JURISDICTION—CONSENT OF PARTIES.

Consent by way of stipulations of counsel made in behalf of the parties to an action or otherwise cannot confer jurisdiction when without it there would have been none.†

Appeal from District Court, Third District; C. W. Morse, Judge.

Action by Andrew P. Anderson against H. Halthusen Mercantile Company. From an order granting a motion for nonsuit and denying a motion for a new trial, plaintiff appeals. Appeal dismissed. Judgment affirmed.

At the time of hearing the arguments in the case, a verbal order was made and entered on the minutes of the court dismissing the appeal; but it was deemed proper, in order to settle the practice respecting ap-

* *Mount v. Simons*, 3 Utah, 220, 5 Pac. 563; *Henderson v. Barnes*, 27 Utah, 248, 75 Pac. 759; *Snow v. Rich*, 22 Utah, 123, 61 Pac. 336; *Stoll v. Mining Co.*, 19 Utah, 271, 57 Pac. 295; *Orchard Co. v. Hanley*, 15 Utah, 506, 50 Pac. 611; *Watson v. Mayberry*, 15 Utah, 265, 49 Pac. 479; *Blyth & Fargo v. Swenson*, 15 Utah, 345, 49 Pac. 1027; *Jones v. Insurance Co.*, 14 Utah, 215, 47 Pac. 74; *Voorhees v. Manti City*, 13 Utah, 435, 45 Pac. 564; *Hanks v. Matthews*, 8 Utah, 181, 30 Pac. 504; *Cattle Co. v. Murdock*, 8 Utah, 497, 33 Pac. 126; *Brough v. Mighell*, 6 Utah, 817, 23 Pac. 673.

† *Davidson v. Munsey*, 27 Utah, 87, 74 Pac. 431; *State v. Mortenson*, 26 Utah, 312, 73 Pac. 562, 533.

peals, to make a formal statement of the grounds therefor.

Zane & Stringfellow, for appellant. Powers & Marioneaux, for appellee.

HOWELL, District Judge. This case is before the court on an appeal from an order of the trial court granting a motion for a nonsuit herein, and dismissing the case, and from an order of said court denying a motion for a new trial. The motion for a nonsuit was granted, and the case dismissed on June 10, 1901. The motion for a new trial was denied May 18, 1903. The notice of appeal from the order granting the motion for a nonsuit and denying the motion for a new trial was served and filed January 6, 1905. It is not contended by counsel for the appellant that the appeal herein was taken within the statutory time, but they insist that the respondent has waived its right to take advantage of the expiration of the time by reason of the following stipulation, which was entered into between counsel for the respective parties and dated December 31, 1904, the same being appended to the transcript herein: "This proposed bill of exceptions has been in our possession since it was served upon us, to wit, July 14, 1903, to enable us to prepare amendments thereto, and then agreed with plaintiff's attorneys that they should not lose their right to have the bill settled while it was in our possession, and they may now have the bill settled, and no advantage taken by reason of it not having been settled whatever, and plaintiff may prosecute his appeal thereafter if he desires."

Opposing counsel are not agreed as to the proper interpretation to be given this instrument, counsel for appellant claiming that it should be construed as a waiver of the right to insist on the appeal being taken within six months, as required by the statute, and counsel for respondent insisting that it simply goes to the extent of preventing them taking any advantage of the fact that the bill of exceptions was not settled within the time allowed by law. Although the contention of counsel for the respondent, as to the meaning of the stipulation, seems the most reasonable, we do not consider it necessary to determine its precise effect, for the reason that, conceding it goes to the entire extent claimed by counsel for the appellant, it can, in our opinion, avail him nothing. Section 3301, Rev. St. 1898, provides, as follows: "An appeal may be taken within six months from the entry of judgment or order appealed from." Section 3329, Rev. St. 1898, provides as follows: "When an act to be done, as provided in this Code, relates to the pleadings in the action, or the undertaking to be filed, or the justification of sureties, or the preparation of bills of exceptions or of amendments thereto, or to the service of notices other than of appeal, the time allowed by this Code may be ex-

tended, upon good cause shown, by the court in which the action is pending, or a judge thereof." It was expressly held by this court in *Mount v. Simons*, 3 Utah, 230, 5 Pac. 563, that an appeal taken after the statutory time had expired was invalid, and should be dismissed. To the same effect is the case of *Henderson v. Barnes*, 27 Utah, 348, 75 Pac. 759. This court has also repeatedly decided that an appeal taken and perfected within six months from the date of overruling a motion for a new trial is in time, and thus by implication held that if more than six months had elapsed it would not be in time. *Snow v. Rich*, 22 Utah, 128, 61 Pac. 336; *Stoll v. Mining Co.*, 19 Utah, 271, 57 Pac. 295. See, also, *Orchard Co. v. Hanley*, 15 Utah, 506, 50 Pac. 611; *Watson v. Mayberry*, 15 Utah, 265, 49 Pac. 479; *Blyth & Fargo v. Swenson*, 15 Utah, 345, 49 Pac. 1027; *Jones v. Insurance Co.*, 14 Utah, 215, 47 Pac. 74; *Voorhees v. Mantle City*, 13 Utah, 435, 45 Pac. 504; *Hanks v. Matthews*, 8 Utah, 181, 30 Pac. 504; *Cattle Co. v. Murdock*, 8 Utah, 497, 33 Pac. 136; *Brough v. Mighell*, 6 Utah, 317, 23 Pac. 673. It was also decided in *Brough v. Mighell*, supra, that the court could not extend the time limited by statute for taking appeals, and this decision was approved in *Cattle Co. v. Murdock*, 8 Utah, 497, 33 Pac. 136. See, also, *Butter v. Lamson* (Utah) 82 Pac. 473. It is difficult indeed to conceive how the decision could have been otherwise under our statutes, for section 3711, Comp. Laws Utah 1888, was in force when *Brough v. Mighell* was before the court, and that paragraph, so far as the question herein involved is concerned, is the same as section 3329 of the Revised Statutes of 1898.

Although the precise question in this case, that is, whether or not a stipulation of the parties can extend the time in which to appeal, has never been before the court, yet it naturally follows that inasmuch as the Legislature has fixed the time, and withheld the power from the courts to enlarge it, the parties themselves cannot do so. The filing and service of the notice of appeal within the time required by law is essential to clothe this court with jurisdiction to adjudicate whatever questions are properly raised by the appeal. Such is the overwhelming weight of authority. See 2 Cyc. pp. 802, 803, note 86. See, also, Cent. Dig. Tit. "Appeal & Error," § 1293. Inasmuch as the court below had jurisdiction of the parties and of the subject-matter of the action, this court would have had also, if the notice of appeal had been served and filed in time, but it has no jurisdiction to determine matters herein on appeal after the period fixed by statute has elapsed, and of course consent, by way of stipulation of counsel, made in behalf of the parties, or otherwise, cannot confer jurisdiction when, otherwise, there would have been none. *Davidson v. Munsey*, 27 Utah, 87, 74 Pac. 431; *State v. Morten-*

sen, 26 Utah, 812, 73 Pac. 562, 633. The notice of appeal herein, then, not having been served and filed within the period allowed by law, this court has at this time no jurisdiction either of the parties or the subject-matter of the action.

The appeal must therefore be dismissed, at plaintiff's costs, and the judgment affirmed. It is so ordered.

BARTCH, C. J., and McCARTY, J., concur.

LEE v. SALT LAKE CITY.

(Supreme Court of Utah. Dec. 30, 1905.)

1. EVIDENCE—OPINION—MATTERS OF ORDINARY INFORMATION.

In an action for injuries to a bicycle rider while riding over a depression in a sidewalk, the effect of a woman, weighing 132 pounds riding a bicycle over a depression 2½ inches deep, where the edges sloped down in dish fashion, was not a proper subject of expert testimony.

2. WITNESSES—QUESTIONS—ARGUMENTATIVE ANSWERS.

Where a witness was asked as to the effect of a woman, weighing 132 pounds riding a bicycle over a depression 2½ inches deep, where the edges sloped down in dish fashion, and answered: "It was not very much of a thing, if not going fast; that it was not bad; that a person could ride over it in pretty fair shape by going between 4 and 5 miles an hour"—the answer was improper, as argumentative, and not in the nature of opinion evidence.

3. APPEAL—EVIDENCE—PREJUDICE.

Where plaintiff was injured while riding a bicycle over a depression in a sidewalk, and the evidence as to whether the walk was unsafe was conflicting, error in admitting an alleged opinion of an expert that a woman could ride safely over a depression described at a speed of 4 or 5 miles an hour was prejudicial.

Bartch, C. J., dissenting.

Appeal from District Court, Third District; M. L. Ritchie, Judge.

Action by Hattie Lee against Salt Lake City. From a judgment for plaintiff, defendant appeals. Reversed.

C. C. Dey and W. H. Bramel, for appellant. Christopher Reed, for respondent.

STRAUP, J. 1. This action was brought by the plaintiff against the defendant to recover damages for an injury sustained by her through a defective sidewalk while she was riding a bicycle. The defect, as described on behalf of plaintiff, was an irrigating ditch across the walk, 8 to 18 inches deep, 15 to 18 inches wide, and mostly filled with leaves. The ditch, as described on behalf of the defendant, was saucer-like in its construction, 2½ inches deep, and 12 to 15 inches wide. The jury rendered a verdict in favor of plaintiff, and the defendant appeals.

2. The assigned errors relate only to the

admission of evidence. At the conclusion of the defendant's case the plaintiff in rebuttal called a witness, and upon qualifying him as an experienced bicycle rider, and showing his experience in riding over depressions and excavations with a bicycle, asked him what difficulty there would be for a person, such as plaintiff, a lady weighing 132 pounds, in riding a bicycle over a depression 2½ inches deep, where the edges sloped down dish fashion. To this an objection was made, because it was not rebuttal, was incompetent, and immaterial. Thereupon counsel for plaintiff stated the purpose of the proffered testimony to be to rebut the probability of plaintiff falling off in riding over a saucer-like depression but 2½ inches deep, and as tending to show that the ditch was deeper. The objection being overruled, the witness answered that it was not very much of a thing, if not going fast; that it was not bad; that a person could ride over it in pretty fair shape by going between 4 and 5 miles an hour. The ruling is erroneous. The testimony is claimed admissible on the theory of opinion evidence. The claim is unfounded, because the subject-matter of inquiry was not of such character that it may be presumed not to lie within the common experience of all men of common education, moving in the ordinary walks of life. It simply involved ordinary happenings and events of life, concerning which any man of reasonable intelligence, from his own observations and experience, would be able to speak and be capable of forming a correct judgment thereon. It did not involve matters of fact that could not be detailed and described to the jury, or where it was not practicable to put them in possession of all the primary facts upon which the opinion of the witness was grounded. By this inquiry it was sought to obtain the so-called opinion of the witness to establish the fact that the ditch was more than 2½ inches deep. The ditch was capable of being described, even with exactness, and it was practicable and capable to put the jury in possession of all the primary facts pertaining to its character and condition. The case does not fall within the rule permitting opinion evidence.

Again, the question could not be answered without embracing in the answer, and as was necessarily implied, though not expressed, in it, the opinion of the witness as to the degree of care on the part of the plaintiff in riding over the depression. To say that she could have ridden over it without difficulty of necessity involved some care and attention on her part, and what she could safely do in riding upon such a walk and over such a depression. Putting in the question what would be necessarily embraced in answering it would, in effect, be to ask the witness whether, in his opinion, the plaintiff, in the exercise of ordinary care, would have been thrown off her wheel in riding over such a depression as described to him. The judgment of these matters was within the prov-

*Black v. Rocky M. B. T. Co., 26 Utah, 451, 73 Pac. 514; Meyers v. Highland B. G. M. Co., 28 Utah, 96, 77 Pac. 347.

ince of the jury. The following authorities fully support the views herein expressed, and well demonstrate the inadmissibility of this testimony: *Edwards v. Worcester*, 172 Mass. 104, 51 N. E. 447; *Buxton v. Somerset P. Wks.*, 121 Mass. 446; *Little Rock T. & E. Co. v. Nelson*, 66 Ark. 494, 52 S. W. 7; *Gavisk v. Pacific R. R. Co.*, 49 Mo. 274; *Brunker v. Cummins*, 133 Ind. 443, 32 N. E. 732; *Musick v. Latrobe Borough*, 184 Pa. 375, 39 Atl. 226; *Limberg v. Glenwood L. Co.*, 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33; *City of Chicago v. McGiven*, 78 Ill. 347; *Georgia R. R. Co. v. Hicks*, 95 Ga. 302, 22 S. E. 613; *Central, etc., R. R. Co. v. Goodwin (Ga.)* 47 S. E. 642; *New England Glass Co. v. Lovell*, 7 Cush. 319; *Black v. Rocky M. B. T. Co.*, 26 Utah, 451, 73 Pac. 514; *Meyers v. Highland B. G. M. Co.*, 28 Utah, 96, 77 Pac. 347; 17 Cyc. 25; 3 Wig. Ev. §§ 1917, 1951; 1 and 2 Elliott Ev. §§ 672, 946.

Furthermore, this testimony was not even of the nature of opinion evidence. It was merely argumentative. The witness was permitted to advance a matter of mere argument why the evidence of the defendant as to the character of the ditch was not probable. Even as an argument, it was fallacious. The fact of appellant's falling or not did not support the hypothesis adduced to be proved by it, the character of the ditch. Such an act no more tended to prove its character than it did want of care or attention on her part, or matter of mere accident, or a variety of other things.

We also are of the opinion that the error was prejudicial to the defendant. From the evidence on behalf of plaintiff as to the character of the ditch, a jury may find that the walk was unsafe; from the evidence on behalf of the defendant, that it was reasonably safe. On conflicting evidence they found for the plaintiff. We cannot say this so-called opinion evidence did not influence the jury in their finding. The purpose of its admission was to negative defendant's evidence as to the depth of the ditch, and to corroborate plaintiff's. It may have had such effect, and may have been the very thing that induced the jury to find the depth of the ditch as claimed by plaintiff, and thus to find the defendant guilty of negligence in maintaining a walk with such character of defect. *Railroad Co. v. Wilson*, 12 Colo. 20, 20 Pac. 340; *Smuggler Union M. Co. v. Broderick*, 25 Colo. 16, 53 Pac. 169, 71 Am. St. Rep. 106; *Boston & Alb. R. R. Co. v. O'Reilly*, 158 U. S. 334, 15 Sup. Ct. 830, 39 L. Ed. 1006; *Vicksburg & M. R. R. v. O'Brien*, 119 U. S. 90, 7 Sup. Ct. 118, 30 L. Ed. 290.

The judgment of the court below is reversed, with costs, and a new trial granted.

McCARTY, J., concurs. BARTCH, C. J., dissents.

PAUL v. SALT LAKE CITY R. CO.

(Supreme Court of Utah. Nov. 27, 1905.)

1. CARRIERS—STREET RAILROADS—INJURIES TO PASSENGERS—ALIGHTING FROM MOVING CAR—INSTRUCTIONS.

In an action for injuries to a passenger in alighting from a street car, the court charged that if plaintiff, in the exercise of due care and prudence on her part and while the car was standing still, was in the act of getting off, and the car was started before she had a reasonable opportunity to do so, etc., she was entitled to recover. Another instruction charged that, though the conductor failed to stop the car when requested while in its usual stopping place, such failure did not justify plaintiff in attempting to leave the car while in motion, and if she did so she assumed the risk, and her injury by reason of such attempt was contributory negligence barring a recovery; also, that if plaintiff, "without waiting for the car to come to a full stop, undertook to and did step from the car while in motion, and as a natural result thereof was injured, she could not recover." Held, that such instructions were erroneous as in effect charging that plaintiff was guilty of contributory negligence as a matter of law if she attempted to alight from a moving car.

2. SAME—FAILURE TO STOP.

Where the operatives of a street car, after having diminished its speed in response to a passenger's notice of her desire to alight, suddenly increased the speed while she was making an effort to alight, by which she was thrown and injured, the carrier was liable for the injuries so sustained.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1228, 1228½.]

3. SAME—CARE REQUIRED.

A street railway company engaged in the carriage of passengers is bound to the exercise of the highest degree of care, prudence, and foresight consistent with the practical operation of its road, or the utmost skill, diligence, and care consistent with the business in view of the instrumentalities employed and the dangers naturally to be apprehended.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1087, 1089.]

4. SAME—RES IPSA LOQUITUR.

Where a street car passenger was injured by being thrown from the car by the sudden acceleration of the speed thereof, after its speed had been slackened in response to her notice that she desired to alight, the happening of the accident was sufficient to raise a presumption of negligence on the part of the carrier.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1283, 1286.]

Appeal from District Court, Salt Lake County; S. W. Stewart, Judge.

Action by Louisa B. Paul against the Salt Lake City Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

S. P. Armstrong, for appellant. Young & Moyle, for respondent.

STRAUP, J. 1. This was an action brought by appellant against respondent to recover damages for an injury alleged to have been sustained by her while she was a passenger on a street car operated by respondent. On the part of the appellant it

was shown that she had notified the conductor when he collected her fare that she desired to leave the car on the north side of a certain street, a usual stopping place; that the car stopped at said place, and whilst she was in the act of getting off the car was suddenly and without warning started, whereby she was thrown to the ground and injured. The respondent admitted that the appellant had given timely notice to have the car stopped at said place; it claimed, however, the conductor gave the signal to the motorman to stop, when the front end of the car (20 to 30 feet in length) was at the north side of the street, but because of the downgrade, wet rails, and the trolley off, the motorman was unable to stop the car until it had reached the south side of the street, and claimed that the plaintiff attempted to alight from the car while it was in motion.

Among other things the court charged the jury:

"(5) It is the duty of a common carrier of passengers to give such passengers a reasonable opportunity to alight from its car, before starting the car; and if you find from the evidence that plaintiff, in the exercise of due care and prudence on her part, and while the car was standing still at a place where passengers might reasonably get off, was in the act of getting off from said car, and that the defendant, by its servants, started the car while plaintiff was so getting off, and before she had a reasonable time to do so, and without notice to her that the car was about to start, and thereby plaintiff was injured, then the defendant would be liable for the injury thus sustained by plaintiff.

"(6) You are instructed that even if you believe from the evidence in this case that the conductor failed or neglected to stop the car where requested by the plaintiff, or at its usual stopping place, still such failure or neglect would not justify the plaintiff in attempting to leave the car while it was in motion; and if you believe from the evidence that the plaintiff did attempt to leave the car while it was in motion, she did so at her own risk, and if she was injured by reason of such attempt, then she was guilty of contributory negligence, and cannot recover.

"(7) If you believe from the evidence that the plaintiff had notified the conductor to stop on the upper side of Fourth street, and that the conductor rang the bell for that purpose, and that the car immediately began to slow down, but that the plaintiff, without waiting for the car to come to a full stop, undertook to and did step from the car while in motion, and as a natural result thereof was injured, then your verdict must be for the defendant."

A verdict resulted in favor of the company, and the plaintiff appeals. Error is assigned with respect to the last two instructions.

2. We think them erroneous because of

their effect in charging that one is guilty of negligence as matter of law in attempting to alight from a moving street car. The law has become well settled to the contrary. "If a passenger attempts to leave a moving car running at a high rate of speed, the attempt will be so obviously dangerous that he cannot recover for injury occasioned thereby. It cannot be said, however, as matter of law, that it is negligent to alight from a moving car or to board it while in motion. The circumstances attending the act and the speed of the car make it a question of fact for the jury." *Nellis St. Rd. Acc't L. p. 190*, citing numerous cases from courts of many states. Respondent in its brief conceded this to be the law, but contends that the instructions did not so charge. It is clear the effect of the charge is, that if the plaintiff attempted to leave the car while it was in motion, or if she stepped from it before it came to a full stop, she was guilty of negligence, and to leave to the jury only to determine whether such act was a proximate cause of her injury. Such effect was charged in express terms by paragraphs 6 and 7. It was emphasized in paragraph 5 where the liability of the defendant was confined to its starting the car without notice while the plaintiff was alighting from the car standing still. Appellant cannot complain of paragraph 5 as far as it went, but it did not go far enough. The defendant would not only be liable under the facts therein stated, but likewise would be liable if, the car having slowed down in response to her notice of a desire to leave the same, plaintiff attempted to alight, and the speed and the surrounding conditions were such that the jury found it was not negligence to do so, and while making such effort to alight, the speed of the car was suddenly increased, by reason whereof she was thrown, and injured. Under the facts in the case it was not only the province of the jury to determine whether the act of the plaintiff in attempting to alight was a proximate cause of injury, but also to determine whether it was an act of negligence.

3. Appellant requested the court to charge: "That it is the duty of a street railway company engaged in operating street cars for the carrying of passengers to exercise a high degree of care and diligence to prevent accident to its passengers; that is, it must use the highest degree of care and diligence which is reasonably practicable under the circumstances of the case," etc. The court declined to give the request, and wholly failed to charge that such degree of care and diligence is owing by a common carrier to his passengers. The degree of care charged was only that of ordinary care; that is, "negligence consists in the doing of some act, or the omission to do some act or perform some duty which a reasonable and prudent person ought or ought not to do," and that "reasonable care and precaution, as mentioned in these instructions,

means that degree of care and caution which might reasonably be expected from an ordinarily prudent person," etc. So far as the degree of care required of a common carrier of passengers, the jury was not given to understand that it was any greater than that required to be exercised by the defendant towards persons not passengers, or any greater than ordinary care. Street railway companies are common carriers of passengers, and, as such, are bound to exercise for the safety of their passengers more than ordinary care. The many different forms of expression used in the text-books, and by the courts, in stating the rule as to the degree of care required of a carrier in conveying passengers, all recognize substantially the same test; that is the highest degree of care, prudence, and foresight consistent with the practical operation of its road; or, as it is sometimes expressed, the utmost skill, diligence, care, and foresight consistent with the business, in view of the instrumentalities employed, and the dangers naturally to be apprehended, and that the carrier is held responsible for the slightest neglect against which such skill, diligence, care, and foresight might have guarded. 3 Thomp. Com. L. of Neg. §§ 2722 to 2729; 2 Shear. & Redf. § 495; 5 Am. & Eng. Enc. L. 558; Nellis St. Rd. Acc't L. § 6; Booth St. Rys. § 328. Appellant was entitled to have the law given to the jury substantially as in the request stated.

4. Complaint is also made because of the court's giving the following charge: "No presumption arises against the defendant from the mere happening of the accident to the plaintiff. The happening of the accident to the plaintiff and the injuries resulting therefrom are not any evidence of negligence on the part of the defendant." Such a charge may properly be given in many cases of negligence, especially those involving only ordinary care, and when the circumstances of the accident as described do not raise any presumption of negligence. But this is a case where the relation of carrier and passenger is shown to exist, and where the former owes the latter the highest degree of care, and where it is held responsible for slight negligence. "The happening of the accident to the plaintiff," as described by her; that is, an injury visited upon her by a sudden start or jerk of the car while she, as a passenger, was alighting therefrom, after it had stopped, in obedience to her request, to enable her to do so, constituted *prima facie* evidence of negligence under the rule "*res ipsa loquitur*," and cast upon the defendant the burden of showing that the accident took place either without its fault, or through the contributory negligence of the plaintiff. In speaking of presumptions as to negligence, and of the application of this rule, Mr. Nellis says: "A *prima facie* case of negligence is made out by testimony of the plaintiff, that being a passenger on defendant's street car, she in-

dictated her desire to leave it, which stopped to enable her to do so, and that while she was in the act of leaving, and before she could place herself safely on the ground, it started, and threw her." Nellis, St. Rd., etc., 576; 3 Thompson Com. Neg. § 2830; United Rys. & Elec. Co. v. Beidelman, 95 Md. 480, 52 Atl. 913; Consol. Tract. Co. v. Thalheimer, 59 N. J. Law, 474, 37 Atl. 132; Whalen v. Consol. T. Co. (N. J. Err. & App.) 40 Atl. 645, 41 L. R. A. 836, 68 Am. St. Rep. 723; Lincoln St. Ry. v. McClellan, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736; N. Y. C., etc., R. R. v. Blumenthal, 160 Ill. 40, 43 N. E. 809; Leeds v. Camden & Atl. R. Co., 53 N. J. Law, 233, 23 Atl. 169; Pres., etc., Balto. & Yorktown T. R. v. Leonhardt, 66 Md. 70, 5 Atl. 346; Phila., Wilm. & Balto. R. R. v. Anderson, 72 Md. 519, 20 Atl. 2, 8 L. R. A. 673, 20 Am. St. Rep. 483; B. & O. R. R. v. State; 21 Am. & Eng. Ry. Cas. 202; Doolittle v. So. Ry., 62 S. C. 130, 40 S. E. 133; Cooper v. Ga., etc., Ry., 61 S. C. 345, 39 S. E. 543; Ky. & Ind., etc., Co. v. Quinkert (Ind. Sup.) 28 N. E. 338; Tex. & P. Ry. Co. v. Nunn, 98 Fed. 963, 39 C. C. A. 364; Bosqui v. Sutro R. R. Co., 131 Cal. 390, 63 Pac. 682; In Bridges v. North London Ry. Co., L. R. 6 Q. B. 377; Patterson, Ry. Acc't. 438.

Of course a mere fall of a passenger from a street car, or from the platform or steps of a car, without any evidence to show how it was occasioned, raises no presumption of negligence on the part of the street car company. But that was not the "happening of the accident to the plaintiff" as described by her. She gave evidence to show how her fall was occasioned, a sudden start or jerk of the car while she was alighting therefrom. In case of a carrier and passenger the rule of "*res ipsa loquitur*" applies not only to cases of collision, derailing, and upsetting of coaches, breaking of machinery, appliances, and the like, but also to the doing of acts by the servants operating the machinery, and to the management of instrumentalities over which the carrier has control, and for the management of which he is responsible. This rule was recognized by the court in paragraph 5 where its principles to some extent on the facts were charged, but were too narrowly confined. If the two charges be not inconsistent with each other, they certainly are misleading and confusing to the jury; for in the one instance the jury are told no presumption of negligence on the part of the defendant arises, while in the other they are told actual negligence appears from substantially the same things. In other words, in stating the case abstractly, the court said there was no presumption of negligence, while, in stating it concretely, there was not only a presumption of negligence, but actual negligence. Upon the plaintiff's theory of the case, the happening of the accident as described by her raised a presumption of negligence on the part of the defendant, and

the court erred in instructing the jury otherwise.

For these reasons, the judgment of the court below is reversed, and a new trial granted; costs to be taxed against the respondent.

BARTCH, C. J., and McCARTY, J., concur.

CRANE v. JUDGE.

(Supreme Court of Utah. Dec. 2, 1905.)

1. APPEAL—THEORY OF CASE.

Where, in an action involving a disputed boundary line, defendant expressly alleged that the strip was in conflict with and outside of her general ownership, and that she had acquired title thereto by adverse possession, the Supreme Court, on appeal from a judgment in favor of plaintiff, was confined to the theory of the defense so presented.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1033-1055.]

2. ADVERSE POSSESSION—PAYMENT OF TAXES.

Rev. St. 1898, § 2866, declares that in no case shall adverse possession be considered established, unless it shall be shown that the land has been occupied and claimed for a period of seven years continuously, and that the party claiming adversely shall have paid all taxes levied thereon. *Held*, that where, in a suit to determine a disputed boundary line defendant claimed the strip in conflict by adverse possession, but admitted that plaintiff had paid the taxes thereon, defendant's adverse claim was unsustainable.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 504, 505, 517.]

3. BOUNDARIES—CONTRACTS—EASEMENTS.

A contract by which defendant's predecessor in title conveyed to plaintiff a perpetual right to use and enjoy the north half of the north wall of a building located over the line for building purposes, which agreement also contained a mistaken description of the location of the wall, did not constitute an agreement that the wall of such building should be considered as the boundary line.

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by Charles Crane against Mary Judge. From a judgment for plaintiff, defendant appeals. Affirmed.

Henderson, Pierce, Critchlow & Barrette, for appellant. A. L. Hoppaugh, for respondent.

STRAUP, J. 1. Plaintiff, Crane, is the owner of a parcel of land 25 feet by 165 feet fronting on Main street in Salt Lake City. Defendant, Judge, is the owner of a parcel of land 29.5 feet by 165 feet adjoining on the south thereof. There are substantial business buildings on the east portion of the parcels, on Crane's called the "Crane Building," on Judge's called the "Karrick Building," both fronting on Main Street; on the west portion of the parcels there is on each a one-story building. The north wall of the Karrick building, owned by Judge, at its east end, projects on the Crane land .35 feet, and at the west end .54 feet. The north wall

of the one-story building on the Judge land projects on the Crane land .21 feet at the east end of the building, and 1.4 feet at the west end. Crane brought an action against Judge to quiet title to the parcel owned by him, described as being 25 feet by 165 feet. Judge filed a general denial and a cross-complaint, alleging her ownership of the 29.5 feet by 165 feet; that there is a conflict between the record description of the north boundary of her land and the north wall of the Karrick building, on the east .35 feet, on the west .67 feet, but alleging that she held such area in conflict, and acquired title thereto by adverse possession; that there was an agreement between the parties in writing whereby the north wall of the Karrick building, continued in its own direction westerly to the west boundary of the lot, was agreed upon as the true boundary line between said properties; that the lasting and permanent improvements placed on said strip in conflict cannot be removed without irreparable injury, and that plaintiff stood by and saw the Karrick building built upon the lines aforesaid without objection; and praying to have the title to said strip in conflict quieted in her. There was a general denial to the cross-complaint, except an admission that said area in conflict between defendant's record title and said north wall was not only of record, but in fact; and it was further alleged, by way of reply, that, through mistake and without intention to encroach, a portion of the wall of the Karrick building was placed on plaintiff's land, and that neither at the time of its construction nor at any other time, until shortly before the commencement of the action, did the plaintiff or the defendant or her predecessors know that the said building encroached thereon. The Karrick building was erected in 1887 or 1888, and the one-story building on the Judge land was erected in the summer of 1895. The suit was commenced in February, 1902. The parties stipulated below in open court that Judge paid the taxes on her land, as described in her deed (29.5 feet), and that Crane paid the taxes on the land described in his complaint, that is, on the 25 feet. In August, 1889, Karrick, Judge's predecessor, by a writing, conveyed to Crane an alleyway at the rear of the premises, and also a perpetual right to the use and the enjoyment of the north half of the north wall of the Karrick building, for building purposes. The instrument of conveyance, in this particular, recites: "Said second party [Crane] owning the lands adjoining said wall on the north, and intending to build thereon; said wall begins on the east side of lot 8, in said block at a point about 57 feet north from the southeast corner of said lot 8, and runs west 100 feet." The distance north from the southeast corner of lot 8 to the north line of defendant's land is 57.5 feet, and to the north line of the said wall, 57.85 feet. The court found all the material issues in favor of the plaintiff, and quieted the title to the 25 feet by 165 feet

in him, which included the area in conflict, subject, however, to the right of the parties to have the north wall of the Karrick building remain upon that portion of the said premises where the same now rests, during the existence of the wall. This was done, as found by the court, because of the value and permanency of the wall and of the agreement entered into between the parties as to its use. The defendant appeals.

2. While counsel for appellant say in their brief the appeal presents but one question, "where is the true boundary line of the properties of the plaintiff and the defendant?" and that "this is the only question in the case," the claim is made that the north wall of the Karrick building is such line, only because, as stated by them, "for the reasons, adverse possession and, second, by written agreement." The appeal therefore confines us to a consideration of only these things. Except as to them, neither by pleadings nor by evidence has the defendant presented a case where the north line of the wall was or became the boundary line of her parcel of land as described in her cross-complaint. She specifically pleaded the area or strip in question, and as inclosed or occupied by the wall, to be in conflict with her record title, and, in effect, as being outside of her deed of conveyance, and alleged title to such strip by adverse possession. She well could have pleaded ownership and right of possession in and to her parcel of land as described, and, when its boundary was drawn in question, by evidence would have been permitted to show that its north boundary line was the north line of the said wall; and she could in addition thereto also have alleged and shown an adverse holding. But instead of making such allegations, the defendant expressly alleged the strip to be in conflict with and outside of her general ownership, and as having been acquired by adverse possession. The defendant having tried and presented her case alone upon the theories that the strip of land occupied by the wall was acquired by adverse possession, and that the wall became the boundary line because of a certain agreement, our review and consideration of the case must necessarily be confined thereto. The statute provides: "In no case shall adverse possession be considered established under the provisions of any section of this Code, unless it shall be shown that the land has been occupied and claimed for a period of seven years continuously, and that the party or persons, their predecessors and grantors, have paid all taxes which have been levied and assessed upon such land according to law." Section 2866, Rev. St. 1898. Nothing can be claimed by way of adverse possession because of the erection of the one-story building, for it was built less than seven years prior to the commencement of the action. The stipulation and the evidence show not only that the defendant did not pay the taxes on the strip of ground in

question, but also shows affirmatively that the plaintiff did so. While it may seem a harsh rule to apply the requirement of the statute to pay taxes to this kind of a case, the statute in most positive terms makes such requirement an essential in all cases. Under such a statute, and under facts similar to those in the case at bar, the courts of California have given the statute application, and held the claim of adverse possession unestablished because of the nonpayment of taxes by the party claiming to hold the strip adversely. *Eberhardt v. Coyne*, 114 Cal. 283, 46 Pac. 84; *McDonald v. Drew*, 97 Cal. 267, 32 Pac. 173; *Brown v. Clark*, 89 Cal. 196, 26 Pac. 801; *McNoble v. Justiniano*, 70 Cal. 395, 11 Pac. 742; *Ross v. Evans*, 65 Cal. 439, 4 Pac. 443. Whatever presumption, if any, could have been indulged, that the taxes on the strip in question were paid by the defendant because of her having paid the taxes on the parcel of land owned by her, has been destroyed by the effect of the stipulation that she did not pay the taxes on the strip, but that the plaintiff did; that is, if one who pays taxes on a parcel of land described as 29.5 feet, but which in reality is 29.85 feet, as it is inclosed and claimed, may be said to have made payment of taxes on the land as inclosed, and that the description is but identification of the parcel, such assertion can no longer be successfully made when he admits that he paid the taxes on only 29.5 feet, and that another paid the taxes on the remaining .35 feet, or on a parcel which included it. However, on the theory that the land as inclosed or occupied by the wall was the parcel as described in defendant's deed, the question of adverse possession becomes of no importance in the case.

There remains, then, only the other question, was the writing heretofore referred to an agreement between the parties that the wall should be considered the boundary line, not only as to the length of the building, but also as to the extension of such line, in its own direction westerly to the west or rear end of the premises? We think this must be answered in the negative. From the reading of the instrument it is apparent that the parties were bargaining of and concerning, and contracting with respect to, the subject-matter of granting an easement, whereby the plaintiff was privileged to use the wall for building purposes, and that they did not contract with respect to or bargain of and concerning any boundary, or that the wall should be treated or considered as such. What was said with respect to the location of the wall pertained to its description and identity, not to its fixing or establishing a boundary, nor was it treated as serving such purpose. The recital as to the plaintiff owning the lands adjoining said wall on the north was neither an assertion that he owned no other lands, nor that he owned no part of the land upon which the wall rested, nor was it with respect to defining the boundary of his land, but was

mere matter of inducement leading to the granting of the easement. But were the writing given the force and effect contended for by appellant, the line could not be extended farther than the 100 feet, the length of the wall. To extend it westerly in its own direction to the west boundary, as contended for by appellant, is to read something into the grant not found there, nor reasonably implied. There is no claim here made that an agreement to make said wall the boundary line exists, or may be inferred from acts and conduct, or from acquiescence in its use as such, or that on principles of an equitable estoppel plaintiff is precluded from claiming beyond the north line of the wall, or that the wall is the boundary line of the defendant's parcel as described in her deed or record title.

Entertaining the views we do upon the matters presented, it necessarily follows that the judgment of the court below must be affirmed, with costs. It is so ordered.

BARTCH, C. J., and McCARTY, J., concur.

CAIN v. REEVE et al.

(Supreme Court of Utah. Dec. 20, 1905.)

BUILDING AND LOAN ASSOCIATION—SETTLEMENT WITH BORROWING MEMBER.

A building association advanced \$500 to a member, receiving a note for \$2,000, with 12 per cent. interest, secured by a mortgage on real estate. It assumed to pay a note previously executed by the member to a third person for \$1,500, with 7 per cent. interest, secured by a mortgage on the same property, but stipulated that if the member should fail to make the payments provided for the association should be under no obligation to pay such note at its election, and the note executed to it should stand as a note for \$500, plus dues, interest, and fines unpaid at the date of the election. The member paid the membership fee, monthly stock payments, and interest and fines amounting to \$884.52. He failed to make further payments, and the association elected to declare its assumption of the \$1,500 note void. *Held*, that a judgment adjudging that the association was only entitled to charge the member with the \$500 advanced by it, together with 12 per cent. interest, together with payments made by it under the agreement, and adjudging that the member was entitled to have each monthly payment applied in reduction of the amount due at the time of such payment, gave the association all it was entitled to.

Appeal from District Court, Third District; C. W. Morse, Judge.

Action by Addison Cain against William J. Reeve and another, in which the Colorado Investment Loan Company filed a cross-complaint. From a judgment directing the application of the proceeds of the sale of defendants' premises, the Colorado Investment Loan Company appeals. Affirmed.

Smith & Putnam and E. L. Williams, for appellant. Patterson & Moyer, for respondents.

STRAUP, J. Cain brought this action against the Reeves to foreclose a mortgage,

The appellant cross-complained on a junior mortgage. The appeal is on the judgment roll.

The findings of the court show that on October 5, 1901, the appellant, a building and loan association, issued to the respondent Wm. J. Reeve 22 shares of its class I protected installment stock, of the par value of \$100, to be paid for in monthly installments of 50 cents per share, or \$11 per month. Later this certificate was canceled and another issued in lieu thereof, to be paid for in installments of 30 cents per share, or \$6.00 per month. On October 21, 1901, the said Reeve made application to the appellant for a loan of \$2,000 upon certain real estate situate in Salt Lake City. On November 21, 1901, the appellant procured the respondent Cain to make the said Reeve a loan of \$1,500, with interest at 7 per cent. per annum. The Reeves thereupon, on said date, executed to Cain their note and mortgage on said real estate, payable three years thereafter, with interest at 7 per cent. per annum, payable quarterly. Among other things the terms of the mortgage required the Reeves to keep the premises insured, and provided that a breach thereof gave the holder of the mortgage the right to declare the whole note due and payable. On December 13, 1901, the appellant advanced and paid to the Reeves an additional \$500, making in all the sum of \$2,000 received by them from both Cain and appellant. Thereupon the Reeves executed to appellant another and additional note and mortgage on the same premises in the sum of \$2,000, payable after 18 months and on or about 120 months after date, with interest at 12 per cent. per annum, together with stock payments and fines, all payable monthly. In this note it was specified that part of its consideration was the \$500 loaned by appellant to the Reeves, and partly appellant "agrees to assume and pay or discharge for the makers hereof, on or about the maturity hereof," the promissory note executed by the Reeves to Cain. Appellant's note further provided: "It is understood and agreed that the payee herein may, at its option, at any time, pay off the said prior promissory note, secure an extension or renewal thereof, or procure a new loan upon said property to take the place of the loan evidenced by said prior promissory note; provided, that no extension or renewal shall be obtained or new loan secured for a period beyond the date of the maturity hereof. It is understood and agreed that if the makers hereof shall fail, neglect or refuse to keep and perform each and all of the covenants and agreements herein contained, or shall fail, neglect or refuse to make any payment herein provided for, in the amount and at the time and in the manner herein provided, then the payee herein shall be under no further legal obligation to assume or pay the said prior promissory note, or the interest thereon, or any new note, or the interest thereon, executed to

secure the payment of a new loan as aforesaid, and the assumption thereof shall at the option of the payee herein, be null and void and of no effect whatever; provided, that if by reason of the default of the makers hereof the payee herein shall elect to exercise its option to declare the said assumption of the said prior promissory note null and void, then this note shall stand as a note for the sum of five hundred (\$500) dollars, plus all amounts for dues, interest and fines, due and unpaid at the date of such election, together with any sum that may have been paid by the payee herein, on the principal of said prior promissory note, or for taxes or insurance, with interest thereon, from the date of its election to declare said assumption null and void, at the rate of twelve (12) per cent. per annum, and the payments of interest theretofore made hereon by the maker hereof, shall only be considered as a liquidation of the interest on this note, and as full consideration for the conditional assumption of said prior note, and the payment of interest thereon by the payee herein, to the date of the beginning of said default." On the 11th day of October, 1901, appellant procured an insurance company to issue to it a life insurance policy for \$2,200 on the life of Wm. J. Reeve, at a monthly premium of \$2.62, which said premiums were paid by the appellant as they became due. The value of the property at the time of said loans was about \$2,200.

The court further found that the said Reeve paid to appellant, between October 1, 1901, and the commencement of the action, the sum of \$884.52, as follows: Membership fee, \$22; stock payments or dues, \$222.20; interest, \$635; fines, \$5.32—and that he was entitled to credit therefor upon his note and mortgage. That appellant paid to Cain all the interest on his note and mortgage up to September 1, 1904, as the same became due, amounting to \$297.50, but paid no part of the principal. That the last payment made by the Reeves to appellant was July 28, 1904. That appellant exercised the option given it by its said note and mortgage to declare the principal thereof due and payable on account of said default, and also exercised the option given it by the terms of said note to declare its assumption of the Cain note null and void.

It was further found: "(21) That in determining the amount due from said Wm. J. Reeve and Vinnie E. Reeve to the Colorado company [appellant] upon its note and mortgage, said Colorado company is not entitled to charge them [Reeves] with interest on \$2,000 at 12 per cent. per annum, up to December 1, 1904, as called for by its note and mortgage, but is only entitled to charge them with the \$500 advanced by it, together with 12 per cent. interest per annum on said sum, and with the amounts paid by it for premiums on the life insurance policy of Wm. J. Reeve, and the interest paid by it upon the

Cain note, and that said Reeves are entitled to have each monthly payment made by them applied in reduction of the total amount due at the time of such payment, consisting of principal, together with the interest accrued up to the time of payment; the remainder, after deducting the payment, forming a new principal, upon which interest is to be added until the next payment is made. In other words, that the account is to be treated as a loan of \$500 at 12 per cent. interest, with partial payments of \$28.60, each made monthly. That on this basis of computation there is due said Colorado company on its note and mortgage to July 17, 1905, the sum of \$100.05." The court found due on the Cain mortgage the sum of \$1,526.25, allowed \$150 attorney's fee and costs of suit, and upon appellant's note, the sum of \$100.05, and allowed it \$100 attorney's fee. The decree adjudged the sale of the premises, and directed the proceeds thereof to be applied, first, on Cain's indebtedness, then on appellant's, and the surplus to be yielded to the Reeves.

The only material question presented on this appeal arises with respect to finding 21. The appellant claims that the finding was not in accordance with the terms of its contract. It is claimed the sums paid as stock payments and dues ought not to have been applied in payment of the principal and interest, and that appellant was entitled to have interest on \$2,000 at 12 per cent. per annum, instead of 12 per cent. interest on \$500, the amount actually loaned by it to the Reeves. With such computation and allowance, the Reeves would still be indebted on their loan (\$1,500 from Cain, \$500 from appellant) somewhat in excess of \$2,000, notwithstanding they, between October, 1901, and the commencement of the action in 1904, had paid thereon the sum of \$884.52. Appellant makes this claim because of its assumption to pay the Cain mortgage, and the risk it assumed in advancing \$500 on a property worth only \$2,200 already covered by the Cain mortgage. Its assumption to pay either the interest or the principal of the Cain mortgage was so qualified and conditioned as to render its obligation ineffectual, and to involve no risk. The effect of the agreement obligated the appellant to pay the 7 per cent. interest on the Cain mortgage only in the event that the Reeves paid to it 12 per cent. on \$2,000. Whenever they failed so to pay, appellant's assumption was abrogated. Neither did it promise to pay the principal of the Cain note when it became due, but only promised to pay it on or before the maturity of the \$2,000 note, and upon the condition that the Reeves paid to it the \$2,000 note. The Reeves paying to appellant 12 per cent. on \$2,000, and it paying Cain 7 per cent. on \$1,500, as a straight interest proposition, gave it 27 per cent. per annum on its loan of \$500. In the event the Reeves discontinued to pay this unconscionable rate, the appellant

was given the power to declare its assumption of the Cain mortgage of no force, to collect interest at the rate of 12 per cent. on the full amount of \$2,000, notwithstanding it loaned to them but \$500, besides to charge them with unpaid dues, interest, and fines, and payments made by it on the Cain mortgage, together with 12 per cent. interest. When the court treated the \$500 paid by appellant to the Reeves as a loan to them, and allowed it 12 per cent. interest thereon, gave it credit for the interest payments made by it on the Cain note, and for the premiums of life insurance paid by it, we think the appellant was granted all the equity to which it was entitled.

The judgment of the lower court is affirmed, with costs.

BARTCH, C. J., and McCARTY, J., concur.

WETZEL v. DESERET NAT. BANK et al.
(AJAX, Intervener).

(Supreme Court of Utah. Nov. 27, 1905.)

BAILMENT—LEASE OF SHEEP—RIGHT OF MORTGAGEE.

A contract or lease of a certain number of sheep for a certain time, providing for payment of a certain amount of wool per head and a fixed increase per 100 head, stipulating for the payment of taxes and branding, and requiring their return at the expiration of the lease, unless it is renewed, is a bailment and not a sale; and hence a mortgage by the lessee, without the lessor's knowledge, was invalid, and conferred no right of disposition by the mortgagee.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 55; vol. 43, Cent. Dig. Sales, § 12.]

Appeal from District Court, Second District; H. H. Rolapp, Judge.

Action of replevin by W. A. Wetzel against the Deseret National Bank and others. Emil Ajax intervened. From a judgment for plaintiff and intervener, defendants appeal. Affirmed.

Young & Moyle, for appellants. Harrington & Sanford, for respondent.

BARTCH, O. J. This was an action of replevin to obtain possession of a certain number of sheep or judgment for their value in case delivery could not be had. It appears from the evidence that the plaintiff, his wife, Robert Cowan, and Mrs. Mary E. F. Hayes, owners of a herd of sheep, leased the same to the defendant Robert Kirk in September, 1900, for the term of one year. At the expiration of the year, on September 27, 1901, the owners, Wetzel and wife and Mrs. Hayes, again leased their sheep, in all about 2,722 head, on similar terms, to Robert Kirk for another year. This lease, so far as material to this decision, reads: "The second party agrees to pay 1½ pounds of wool if said wool sells for 8 cents per pound, and

1¾ pounds if said wool sells for 10 cents per pound, and 2 pounds per head if the said wool sells for 12 cents per pound, and 10 lambs to the 100 sheep let wool sell at any of the above prices. The party of the second part also agrees to pay the taxes and all other assessments pertaining to said sheep, and will earmark and wool brand them at the proper time, and watch over them in a herdsmanslike manner, and keep said sheep as free from scab as possible. The party of the second party agrees that at the expiration of this lease, if the parties of the first part demand said sheep, through failure of said second party to keep the agreement, he will return to the first parties the proper amount of lambs, ewes and wethers to form a good stock herd of sheep, with the following earmarks: Crop and slit in right ear, and under bit in same, and upper slope off left ear, and swallow fork and round under bit in right ear, and crop off left ear. Swallow fork and round under bit in right ear, and crop and upper slope off left ear, and crop and slit and under bit in right ear, upper slope off and nick in left ear. The party of the second part agrees to pay the proceeds from sale of said wool as soon as possible after the sale of said wool at the residence of W. A. Wetzel. The party of the second part will have the right to sell some sheep, but not enough to impoverish or make a poor herd of sheep, and will improve the quality of said sheep as much as possible. Any violation of this lease makes it null and void, and the first parties can take the sheep into their possession, if they so desire. This lease can be renewed at the end of the term if all parties so desire. The second party shall give 30 days' notice if he desires to release or give up possession of said sheep. He will also keep the parties informed how he is getting along with said sheep." On August 2, 1902, and while this lease was yet in force, the lessee borrowed from the defendant bank the sum of \$2,500, and to secure the loan, executed, without the knowledge or consent of the lessors, a chattel mortgage on the herd of sheep, representing to the bank that he was the owner of them. At the expiration of this lease, on September 25, 1902, another lease was made to Kirk, for the term of one year, in which the lessee was not required to pay any increase. The note secured by the mortgage was due on July 2, 1905, but at that time, it appears, the lessee had left the herd in the charge of herders, and his whereabouts have since been unknown. In September, 1903, the mortgagee seized the sheep and sold them under the terms of the mortgage. Thereupon this suit was instituted. At the trial the plaintiff recovered judgment against the bank for \$2,562.92, and interest, the intervener for \$67.26, and interest, and the defendant bank recovered judgment against defendant Robert Kirk for \$2,500 and interest. Afterwards

the bank and defendant Ajax appealed from the judgment entered in favor of the plaintiff.

The decisive question on this appeal is whether the transactions between the lessors and lessee constituted a sale or a bailment. The appellants contend that they amounted to a sale, while the respondent insists there was but a bailment. Upon examination of the written lease in evidence, it will be noticed that neither of the instruments contains any words of sale—no language showing a transfer of title, nor any provision requiring payment for the property. On the contrary, the language employed in the instruments shows that the lessee was to keep the sheep branded and marked with marks designated in the leases, and at the expiration of each term to return the sheep so marked, unless the lease would be renewed for another year. This, of course, did not mean that the lessee was bound to return all of the identical sheep, but that he must return the proper number out of the herd leased, including the increase. The mere fact that the lessee, under the terms of the instrument in force at the time of the execution of the mortgage, was to pay wool and increase of lambs, does not make the transaction a sale, nor does the fact that the lessee was authorized to "sell some sheep, but not enough to impoverish" the herd, effect such result. In each of the instruments the evident intention of the parties was to effect a lease of the sheep and not a sale. This is apparent not only from the context, but also from the acts of the parties as shown in evidence. Both parties treated each transaction as a lease, except in the single instance when the lessee falsely treated it otherwise, and wrongfully executed the mortgage. That he, at that time, was fully aware that he was acting unlawfully and without authority, is evident by his subsequent conduct, in leaving the sheep, contrary to the requirements of his contract with the owners, in the hands of herders, without continuing to give them his personal attention. Instead of complying with his agreement in this regard, he abandoned the herd and left the country without notice to his lessors, and without attempting to maintain any right to the sheep. Leases of this character have been before this court on several occasions, and have uniformly been held to be contracts of bailment and not of sale. *Woodward v. Edmunds*, 20 Utah, 118, 57 Pac. 848; *Turnbow v. Beckstead*, 25 Utah, 468, 71 Pac. 1062. It follows that the contract under which the defendant Kirk had possession of the sheep at the time of the execution of the mortgage being but a lease, he had no legal right to dispose of the herd either by mortgage or otherwise, and that the mortgage, upon which the appellants rely, was, under the facts and circumstances disclosed in evidence, invalid, and conferred no right of disposition of the sheep by sale upon the mortgagee. Such being the case, the

decree and judgment must be sustained. Having arrived at this conclusion, it is not deemed important to discuss any other question presented.

The judgment appealed from is affirmed, with costs.

McCARTY and STRAUP, JJ., concur.

FRANCIS v. GISBORN.

(Supreme Court of Utah. Nov. 25, 1905.)

1. TRUSTS—EXPRESS TRUST—NATURE.

Plaintiff alleged that on a certain date he delivered to defendant \$4,800 for the special purpose of paying some of the money to satisfy plaintiff's debts and to keep the remainder and return the same to plaintiff on demand, and that defendant failed and neglected to pay any of plaintiff's debts, but mingled the money with his own and used the same until nearly 20 years thereafter, when plaintiff demanded a return of the fund, which defendant refused, except for the repayment of a small sum. *Held*, that the complaint alleged a cause of action for conversion only, and did not show that defendant received the money by virtue of an express trust.

2. PLEADING—CONCLUSIONS.

An allegation, in a complaint to recover certain money, that defendant received the money from plaintiff in trust for certain purposes, was not an allegation of fact, but a mere conclusion of the pleader.

3. LIMITATION OF ACTIONS—ACCOUNTING—EQUITY JURISDICTION.

Where plaintiff deposited certain money with defendant, who agreed to pay certain of plaintiff's debts and return the balance on demand, but plaintiff made no demand for the return of such balance for nearly 20 years, plaintiff's right to recover such balance was not within the exclusive jurisdiction of a court of equity, and was subject to limitations, whether his action was brought in equity or at law.

4. SAME—PAYMENT—STATUTES.

Rev. St. 1898, § 2898, provides that in actions founded on contract, when any part of the principal or interest shall have been paid, an action may be brought within the period prescribed for the same after such payment; and section 2900 declares that the chapter containing the former section does not extend to actions already commenced nor to cases where the time prescribed in any existing statute for acquiring a right or barring a remedy has fully run. *Held* that, where plaintiff's right to recover certain money deposited with defendant had been barred for more than 12 years by limitations imposed by Code Civ. Proc. c. 3 (2 Comp. Laws 1888, p. 224, tit. 2), at the time section 2898 was adopted, the subsequent payment of a small sum by defendant did not revive plaintiff's right to sue.

Bartch, C. J., dissenting.

Appeal from District Court, Salt Lake County; George G. Armstrong, Judge.

Suit by Jewet B. Francis against Mathew T. Gisborn. From a judgment sustaining a demurrer to the complaint and dismissing the suit, plaintiff appeals. Affirmed.

Plaintiff brought this action to recover from defendant the sum of \$4,800, and interest thereon from August 21, 1881. The complaint in substance alleges: (1) That on the 2d day of August, 1881, the plaintiff was the

owner of and possessed of \$4,800, lawful money of the United States. (2) That on said date, at Salt Lake City, Utah, the defendant received from plaintiff, in trust for the plaintiff, the said money for the special purpose of paying some of said money to satisfy the debts of the plaintiff, and for the purpose of safely keeping the remainder of said money and returning same to plaintiff upon demand. (3) That said defendant has failed to pay any part of said money to satisfy the debts of the plaintiff. (4) That defendant during all the times mentioned in said complaint has mingled said money with his own, and during all of said time since receiving the same used said money in his own private business. (5) That on the 20th day of December, 1900, at Salt Lake City, Utah, the plaintiff demanded of defendant an accounting and return of said money, and the defendant then and there refused to account to plaintiff and ever since has and now refuses to account to plaintiff, except the sum of \$25, which said sum has been paid in small payments at various times; the last payment being made on the — day of June, 1904. (6) A prayer for an accounting and judgment. Defendant filed a demurrer to plaintiff's complaint and alleged as grounds of demurrer, first, that said complaint does not state facts sufficient to constitute a cause of action; second, "that said cause of action is barred by subdivision 3, § 2877, and by section 2883, of the Revised Statutes of Utah, 1898"; third, a want of equity in plaintiff's complaint; fourth, a bar by subdivision 3, § 3144, and section 3150, of the Compiled Laws of Utah, 1888; and, fifth, that plaintiff's complaint is ambiguous, unintelligible, and uncertain, in that it seeks for equitable relief without stating facts as a basis for such relief, and that the action is barred by reason of laches. The demurrer was sustained and a judgment entered in favor of the defendant, and the case dismissed. To reverse this judgment, plaintiff has appealed to this court.

Warner & Davis, for appellant. E. D. Hoge and J. M. Hamilton, for respondent.

MCCARTY, J., after making the foregoing statement of the case, delivered the opinion of the court.

As stated by counsel for appellant in their brief, the important question presented by this appeal is, "has the statute of limitation run, or is appellant guilty of laches," and did the court err in sustaining respondent's demurrer on these grounds? Appellant contends that the facts alleged in the complaint, which, for the purpose of determining the sufficiency of the complaint, the demurrer admits to be true, show that the money alleged to have been delivered by him to defendant constituted a trust fund of an express and continuing trust, and that the relation of trustee and cestui que trust was thereby created between them, and he now seeks to invoke the rule that takes such cases out of the opera-

tion of the statute of limitations. We are of the opinion, however, that the facts alleged in the complaint entirely fail to show any such relation. The gist of the complaint, when stripped of all redundant matter, is that on the 2d day of August, 1881, at Salt Lake City, Utah, plaintiff delivered to defendant \$4,800 "for the special purpose of paying some of said money to satisfy the debts of plaintiff and for the purpose of keeping the remainder and returning the same to plaintiff on demand"; that defendant failed and neglected to pay any of plaintiff's debts, but mingled said money with his own and used it in his own private business; that nearly 20 years thereafter (December 20, 1900) plaintiff demanded a return of said fund, and that defendant refused to return it or any part thereof, except the sum of \$25, which was paid in small payments, the last payment being made in June, 1904. This complaint, in effect, alleges conversion of the money by defendant, and the facts therein stated utterly fail to bring the case within the domain of equity, as the elements necessary to create the relation of trustee and cestui que trust are not shown to exist. True plaintiff in his complaint designates the money he seeks to recover as a trust fund, but this, however, is only the conclusion of the pleader. The relations of the parties to each other, because of and which grew out of the transaction in question, must be determined by the facts, what they did in the premises, and not by what plaintiff chooses to label or call it in his pleading. "The mere delivery of property or money to one to be held until the performance of an act by another, whereupon it is to be paid over to such person, otherwise to be returned, does not, independent of the equitable circumstances, necessarily create a trust of which equity has jurisdiction, but, on the contrary, the remedy is by action at law." 22 Enc. Pl. & Pr. 16. And on page 15 of this same volume it is said: "Courts of equity will not assume jurisdiction to establish or enforce trusts in every case where confidence has been reposed or confidence given." Even though we should treat this as a suit in equity, it would not take the case out of the operation of the statute of limitations; for the authorities uniformly hold that in cases where law and equity have concurrent jurisdiction lapse of time covering the period of the statute of limitations is a complete bar to a recovery in such cases, and that the only cases not affected by the statute are those over which equity has exclusive jurisdiction. "It is obvious that a person cannot by declaring a trust change the character of his obligation so as to affect the operation of the statute of limitations." Buswell, Lim. & Adv. Poss. 327; 2 Beach on Trusts & Trustees, 668; Wood on Limitations (3d Ed.) 58, and numerous cases cited in note; 18 Am. & Eng. Enc. L. (2d Ed.) 155, 156; cases cited in note. Further discussion or citation of authorities on this branch of the case

seems unnecessary, as it is plain the case does not belong to that class over which equity exercises exclusive jurisdiction.

Appellant contends, however, that the payment alleged to have been made by respondent in June, 1904, takes the case entirely out of the statute of limitations, and, in support of this contention, cites section 2898, Rev. St. Utah, 1898, which, so far as material in this case, provides that "In any case founded on contract, when any part of the principal or interest shall have been paid * * * an action may be brought in such case within the period prescribed for the same after such payment." When the foregoing provisions of the statute went into effect, the claim sued on had been barred for a period of more than 12 years by the provisions of chapter 3, Code Civ. Proc. (2 Comp. Laws 1888, p. 224, tit. 2), referred to and relied on as a bar by defendant in his demurrer. And section 2900, Rev. St. 1898, which is a part of the same chapter as section 2898, supra, provides as follows: "This chapter does not extend to actions already commenced nor to cases where the time prescribed in any existing statute for acquiring a right or barring a remedy has fully run." It will be seen that this section of the statutes expressly exempts causes of action against which the statute of limitations has "fully run" from the operation of section 2898, relied on by appellant, and by virtue of which he claims his cause of action was revived when the alleged partial payments referred to were made. It therefore follows the plea in bar of the statute of limitations must prevail.

The judgment of the district court is affirmed, with costs.

STRAUP, J., concurs; BARTCH, C. J., dissents.

NICHOLS v. DAILY REPORTER CO.

(Supreme Court of Utah. Nov. 25, 1905.)

LIBEL—PUBLICATION—LIBEL PER SE.

Plaintiff was a typographer and a candidate for delegate to the annual convention of the National Typographical Union, when defendant published a card on one side of which were the words, "Vote for Honest Jake Bosch for Delegate," and on the other: "Explanatory. Mr. C. A. Nichols owes the Daily Reporter Co. a balance of \$34.25 for printing done in 1894. Draw your own conclusions and vote for Mr. Nichols, if you think he is not able to pay this debt." Held, that such publication was not libelous per se, and the plaintiff was not entitled to recover, in the absence of proof that the publication was actuated by malice and that he had suffered actual damage.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 5, 87.]

Bartch, C. J., dissenting.

Appeal from District Court, Salt Lake County; S. W. Stewart, Judge.

Action by C. A. Nichols against the Daily Reporter Company. From a judgment for plaintiff for nominal damages, he appeals. Affirmed.

D. S. Truman and Farnsworth & Lund, for appellant. Henderson, Pierce, Critchlow & Barelte, for respondent.

STRAUP, J. 1. The appellant, plaintiff below, brought this action against the respondent to recover damages for libel. It is alleged in the complaint that while the plaintiff was a candidate for election to an office in the Typographical Union at Salt Lake City, and also a candidate for delegate to the annual convention of the National Typographical Union to be held at Washington, D. C., the defendant printed and published a card, on one side of which were the words, "Vote for Honest Jake Bosch for Delegate," and on the other: "Explanatory. Mr. C. A. Nichols owes the Daily Reporter Co. a balance of \$34.25 for printing done in 1894. Draw your own conclusions and vote for Mr. Nichols, if you think he is not able to pay this debt." It is further alleged, "meaning thereby that the plaintiff herein, although able to pay his debts and obligations, was dishonest, and was making accounts which he never paid nor intended to pay, and was wholly unfit and unworthy of credit or to be trusted to fill the position" sought by him, and to bring him "into contempt and ridicule;" that said publication was false and defamatory, and for the purpose of defeating his election; and that he was damaged "in his reputation, good repute, and credit." It is not alleged in the complaint that the publication caused his defeat or aided in so doing. No special damages are alleged or proven. The evidence shows the defendant printed and circulated about 100 of said cards at Salt Lake City among members of the said union, and electors at said election. As to whether the plaintiff owed the debt there was some conflict in the evidence. He denied owing it. The court, among other things, in substance, instructed the jury that the "card does not contain matter that is libelous per se;" that "no damage can be inferred from the mere fact that the card was published and that it was false," that before a verdict could be returned for plaintiff "it must be shown by evidence, outside of the publication, that the defendant was actuated by malice or ill will toward the plaintiff, and that he has suffered actual damage thereby." The jury returned a verdict for plaintiff for \$1. He appeals.

2. It is conceded by appellant that no special damages were alleged in the complaint, and none proven at the trial. The principal point urged by him is that the alleged words were libelous per se, that the court erred in telling the jury otherwise, and in directing them that no damage could be inferred from the mere fact of the publication and that it was false.

3. We are of the opinion that the alleged article was not libelous per se; and as no special damages were averred in the complaint, and none proven at the trial, plain-

tiff was not entitled to a verdict. It, of course, is conceded that written derogatory or disparaging words which impute to a person the commission of a crime, or degradation of character, or which have a tendency to injuriously affect him in his office or trust, profession, trade, calling, or business, or which tend to degrade him in society, or expose him to public hatred, contempt, or ridicule, are libelous and actionable. It also is the well-recognized rule that when the words are libelous per se, it is not necessary to allege or prove special damages, for malice and damage are implied; but where they are not libelous per se, special damages must be averred and proven to warrant a recovery. The important question, therefore, is, when can it be said that the publication of an article is libelous per se, and does this one fall under such class? Some authorities say, whether a publication is libelous per se is to be determined wholly by the sense in which the same is usually understood. Others, that it is to be determined by whether the article is susceptible of but one construction, and that one of harmful meaning; that is to say, if the article is susceptible of two meanings, one innocent and the other harmful, it is not libelous per se. Again, expressions are found in the cases that, if a colloquium or innuendo is necessary to render the language libelous, it is not per se libelous. Still another test, and the one which we think is the correct one, and which is supported by the greater weight of authority, is, "when language is used concerning a person or his affairs which from its nature necessarily must, or presumably will, as its natural and proximate consequence, occasion him pecuniary loss, its publication" is libelous per se. *Townshend* (4th Ed.) §§ 146, 147; *Fry v. McCord Bros.*, 95 Tenn. 680, 33 S. W. 568. "The nature of the writing must be such that the court can legally presume" that the plaintiff has been damaged. 18 Am. & Eng. Enc. L. (2d Ed.) 918. "From some sorts of false report the law presumes conclusively that damage has followed, and the plaintiff need neither allege nor prove it. Here the language is styled libelous per se. * * * Except where this presumption exists, special damages to the plaintiff's reputation must be alleged and proved to have been the actual and natural result of the language used." *McLoughlin v. Am. Clr. Loom Co.*, 125 Fed. 204, 60 C. C. A. 87. This principle is also recognized and well stated in *Pratt v. Pioneer Press Co.*, 35 Minn. 251, 28 N. W. 708.

Tested by these principles, can it be said that the nature and character of the language here contained in the alleged article was such as not only as a natural and proximate, but as a necessary, consequence its publication occasioned plaintiff damages? We think the article does not warrant the indulgence in such presumption. To do so the court ought to be able to see that as a necessary conse-

quence plaintiff was damaged in some material manner. *Foster v. Boue*, 38 Ill. App. 613. It must, of course, be conceded that the article does not charge or impute the commission of any crime or moral degradation. Nor can it fairly be said it exposed plaintiff to public hatred, or ridicule, or tended to disgrace him. It is, however, said that the words "did impute to the plaintiff dishonesty in his vocation," from which it is argued that the article is libelous per se. We think the article is not open to such construction. The evidence shows that the plaintiff was a typographer. We see nothing in this article which in any manner reflects upon the plaintiff in such or any trade, or profession, or calling, or affects him in a position of office or trust. A complete answer, however, to such contention is that the plaintiff did not, by way of innuendo or otherwise, place such a meaning upon the article; and, furthermore, it does not upon its face charge or import such meaning. An entirely different meaning by way of innuendo was placed upon it. "Where plaintiff alleges a special meaning for the alleged libelous words sued on, that is the only meaning which the defendant need meet in pleading or on trial." *Wuest v. Brooklyn Citizen* (Sup.) 76 N. Y. Supp. 706. However, had the plaintiff charged such meaning to the article it would have been of no avail, for the article is not fairly or even at all susceptible of such construction and an innuendo cannot enlarge the meaning of words or attribute to them a meaning which they will not bear. 18 Am. & Eng. Enc. L. 182. Likewise, to say, as was said here, by way of innuendo, that the plaintiff was brought into contempt and ridicule or was unfit to fill the position sought by him, gives no strength to the complaint, and amounts to nothing unless the words themselves import such charges. *Divens v. Meredith* (Ind. Sup.) 47 N. E. 143.

We, therefore, have left in the article the statement, in effect, that the plaintiff was indebted to the defendant, that the obligation has not been paid and an inference that plaintiff was able to pay. Here again, by way of innuendo, it is charged, "thereby meaning that the plaintiff had incurred an indebtedness which he never intended to pay." It may be to write and publish of one that he incurred an obligation or debt with the intention not to pay it, involves fraudulent doings and wrongful conduct, and may be per se actionable; especially if written of or concerning a trader or a merchant. But the language of the article does not bear the construction that the plaintiff had fraudulently or at all wrongfully incurred the indebtedness, and so again, by way of innuendo merely enlarging the meaning of the words gives no strength to the complaint. We then have the question reduced to the following proposition: To write and publish of one not a trader or merchant and not of or concerning his business affairs that he is indebt-

ed to another, and, though able to pay, has neglected or refused to do so, is that such an impeachment of honesty, or does it import such degradation of morals or character, or expose him to public hatred or ridicule, or tend to disgrace him, as a court can say its publication necessarily must, in fact, or, by a presumption of evidence, occasion damage and pecuniary loss to him, and, therefore, he was relieved from otherwise alleging or proving any? We think not. We are not saying that such language may not, as a natural and proximate consequence, occasion loss and damage; but the plaintiff, in order to recover, must allege and prove them. "To publish of one that he has for several years owed for medical services; that his attention has been repeatedly called thereto to no purpose; that finally, being sued therefor, he, having no other defense, has cowardly slunk behind that of the statute of limitations; and that such a course is not in accordance with the writer's idea of strict integrity" was held not libelous per se. *Hollenbeck v. Hall*, 103 Iowa, 214, 72 N. W. 518, 39 L. R. A. 734, 64 Am. St. Rep. 175.

So, to publish of one that he was indebted for a bill, but would not pay it, unless a certain sum was "knocked off," and that it was a "dirty Jew trick to try to beat the house," was held not libelous per se. *Hanaw v. Jackson Patriot Co.*, 98 Mich. 506, 57 N. W. 734. It was held not libelous per se to write and publish that J. D. U. should not be employed in the stock business or to transact any business with him at the stockyards until notified that he had settled with K. & S. for 20 head of cattle bought of them. *Ulery v. Chicago Live Stock Ex.*, 54 Ill. App. 233. It was also held that a publication in an abstract of unsettled accounts issued by a mercantile agency of a memorandum that a person, not a merchant or trader, was indebted in a certain sum, and that it had not been paid, was not libelous per se. *Ery v. McCord Bros.*, supra. A notice published in a newspaper warning all persons against trading for two notes alleging that the plaintiff had obtained them without consideration from a person whose mental condition at the time was such as incapacitated him for business is not libelous per se. *Trimble v. Anderson*, 79 Ala. 514. To publish in a newspaper: "Wanted, E. B. Zier, M. D., to pay a drug bill, his room rent, and not go deadheading his way," was held not libelous per se. *Zier v. Hofflin*, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9. The following cases also illustrate that this character of language is not per se libelous. *Homer v. Engelhardt*, 117 Mass. 539; *Wuest v. Brooklyn Citizen*, supra; *Donaghue v. Gaffy*, 53 Conn. 43, 2 Atl. 397; *Id.*, 34 Conn. 257, 7 Atl. 552; *Urban v. Helmick*, 15 Wash. 155, 45 Pac. 747.

We think it is quite generally recognized that to write and publish that a party owes

a debt, and has not paid it, is not of itself sufficient to make the publication libelous when such person is not engaged in business, or when it is not said of or concerning him in the conduct of his trade or business; but that such words may be made libelous by proof of extraneous circumstances if special damages are shown. It may be conceded that words charging nonpayment of debts, insolvency, or which tend to impute want of credit or integrity, are actionable without alleging special damage when they refer to merchants, tradesmen, and others in occupations where credit is essential to the successful prosecution; but, generally, these same words are not per se actionable when they do not refer to persons in their office, profession, trade, business, or calling. These matters are well illustrated by *Newell* (2d Ed.) pp. 192-197. To write and publish of a tradesman in his business that he is insolvent, or that he owes a debt of long standing which he has not paid must necessarily impair his credit, be harmful to his business, and result to his damage. But such presumption does not necessarily follow where such words refer merely to an individual, separate and distinct from any trade, business, or calling. Such words, however, may be rendered libelous by the place and circumstances of their publication, or by proof of extraneous matters, together with proof of damages other than those implied when shown to be the natural and proximate consequence of the publication. It is also claimed by appellant that by the expression, "Vote for Honest Jake Bosch," is implied that appellant, who was also a candidate, was dishonest. It does not bear such construction. To say of one candidate that he is honest does not carry the implication that the other candidates are dishonest. If these words by themselves were susceptible of such construction, it is certainly overcome by the explanation following where again we are brought to the statement of indebtedness. It may be well also here to note that these cards were circulated only among the members of the Typographical Union at Salt Lake City, which was occasioned by the candidacy of appellant, and Bosch for delegate to the convention of the National Typographical Union. The fact that one is a candidate for an office, affords, in many instances, a legal excuse for publishing language concerning him as such candidate, for which publication there would be no legal excuse if he did not occupy the position of such candidate. *Sweeney v. Baker et al.*, 13 W. Va. 158, 31 Am. Rep. 757; *Greenwood v. Cobbe*, 26 Neb. 449, 42 N. W. 413.

From what has been said, it necessarily follows that the judgment ought to be, and it therefore is affirmed, with costs.

McCARTY, J., concurs; BARTCH, C. J., dissents.

(30 Utah, 82)

MORGAN v. OREGON SHORT LINE R. CO.

(Supreme Court of Utah. Nov. 14, 1905.)

CARRIERS—TRESPASSERS—EJECTION—DEATH.

Where, in an action for the death of a trespasser who had been stealing a ride on a passenger train, it appeared that deceased was instantaneously killed, and his body was found some distance from the place of his ejection and on the opposite side of the track, his death was not shown to be the proximate result of his ejection.

Appeal from District Court, Cache County; C. H. Hart, Judge.

Action by William Morgan, as administrator of John Morgan, deceased, against the Oregon Short Line Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

P. L. Williams and Geo. H. Smith, for appellant. C. C. Richards and J. D. Call, for respondent.

BARTCH, C. J. This case was before us on a former occasion, and is reported in 27 Utah, 92, 74 Pac. 523. We then arrived at the conclusion that under the proof, as it then appeared in the record, the plaintiff had shown no right of recovery, and reversed the judgment, and remanded the cause for a new trial. Afterwards another trial was had, which also resulted in a verdict and judgment for the plaintiff, and in this appeal. An examination of this record shows that the proof is substantially the same as that at the former trial, except that upon this trial the plaintiff attempted to fix the several places, where the train was stopped to expel the trespassers, by reference to the telegraph poles, and thereby to locate the point, where the Olsen and Morgan boys were pulled off from the train, nearer the place where the body of the deceased was found. With this exception we refer to the statement of facts accompanying our former opinion, as a sufficient statement for the purposes of this decision.

In reference to the change in the testimony of several of plaintiff's witnesses, it may be observed that, notwithstanding the counsel for the plaintiff insist that it now appears from the proof that the two boys were ejected from the train on the west side, at a point opposite the point where the body was found, the evidence still leaves the place where the unfortunate boy was ejected, from 300 to 600 feet south of where the body lay the next morning. This appears from the testimony of the plaintiff's witness Clarence Hunsacker, where he says: "As soon as this man went on top of the train, I ran up to the second car from the engine on the east side of the train, and then I crawled over on to the west side, and stood over by the side of the train, five or six feet away. The night was light, and the moon was shining. From where I was, on the west side, I saw two fellows standing holding on to the side of the train.

One of them was on the rear end of the third car, and the other on the front end of the second car. Then I saw a man run up from the rear end of the train along the side. He came up along the side of the car and pulled off two fellows that were riding there, one on the rear end of the second car, and the other on the rear end of the rear car.

* * * The last I saw of this man carrying a lantern was after he got on the rear end of the train, after pulling these two boys off. The train was then moving. I got on to the train at the place where these boys had been. I got on the second car from the rear." In addition to this testimony, the evidence shows that the train consisted of eight or nine cars, besides the engine and tender; that each car was about 60 feet long; that the train, at the time the two boys were pulled off, stopped south of Yates' crossing; and that the body was found 7 to 20 feet north of that crossing, on the east side of the track.

Considering the testimony of the witness Clarence Hunsacker in connection with these facts, it will be seen that the point where the witness stood and watched the transaction of ejecting the two boys from the train must have been about 200 feet south from the point where the body was afterwards found, and the point where they were ejected was a considerable distance farther south, for that occurred at the north end of the rear car, and when that car came along the witness got onto it at the same place which had been occupied by those boys. It is, therefore, utterly useless for counsel to insist that the boys were ejected at a point opposite from the point where the body was found. And whether that transaction occurred 200 or 300 feet, or a mile or two, away from the point where the deceased was found is wholly immaterial, since the evidence fails to connect the act of ejecting the boy with the injury. That there is a total failure to connect such act with the injury is true, even if we assume that the boys were pulled off the train opposite where the body lay; for in such event there would be nothing to indicate how the body got on the east side of the track, and that death was instantaneous is not only alleged in the complaint, but is shown by the character of the injury. We are, therefore, clearly of the opinion that on this trial, the same as on the previous one, the plaintiff has shown no right of recovery, and that both the motion for a nonsuit, and the request for a peremptory instruction made by the appellant, were well founded. For a more extended discussion of the evidence and questions presented, we refer to our opinion delivered upon the former appeal.

The judgment must be reversed, with costs, and the case remanded, with instructions to the court below to dispose of it according to law.

It is so ordered.

McCARTY, J., concurs.

STRAUP, J. I concur in the result, reversing the judgment. I think the order should be to grant a new trial.

(3 Cal. A. 468)

MURPHY v. BOARD OF POLICE PENSION FUND COM'RS.

(Court of Appeal, First District, California. Dec. 14, 1905.)

1. EVIDENCE—RES GESTÆ.

Where in mandamus to compel the granting of a pension to the applicant as the widow of a deceased police officer, alleged to have been killed while in the performance of his duties, a witness who testified that he heard the call of a police whistle and walked a distance of over 300 feet, where he saw the deceased officer supported by two men, could not testify as to what the deceased officer stated as to what was the matter with him; the statement not being a part of the *res gestæ*.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 351.]

2. WITNESSES — INFORMATION ACQUIRED BY PHYSICIAN—COMMUNICATIONS IN PRESENCE OF OTHERS.

Under Code Civ. Proc. § 1881, subd. 4, providing that a physician cannot be examined as a witness in a civil action without the consent of his patient as to any information acquired in attending the patient, an objection to a question asked a physician, testifying as a witness after the patient's death, as to what statements the patient made to him during the period of treatment, was properly sustained, because not confining the question to statements made in the hearing of a third person, who was present at one of the physician's visits.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 768-777.]

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Application for writ of mandate by Mary Murphy against the board of police pension fund commissioners of the city and county of San Francisco to compel defendant to grant a pension to the applicant. From a judgment for defendant, plaintiff appeals. Affirmed.

A. P. Black, for appellant. Franklin K. Lane, City Atty., for respondent.

COOPER, J. Application for writ of mandate to compel the defendant, board of police pension fund commissioners, to order and direct that a monthly pension of \$50 per month be paid to plaintiff from the date of the death of her deceased husband, Joseph F. Murphy, as long as she shall remain unmarried. The case was tried in the court below upon issues raised by the answer, and findings were filed, upon which judgment was ordered and entered in favor of defendant. Plaintiff made a motion for a new trial, which was denied, and this appeal is from the order denying the plaintiff's motion.

Error is claimed in respect to the rulings of the court in sustaining two objections to questions asked by plaintiff of her own witnesses during the trial. The theory and claim of plaintiff was that her deceased husband was killed while in the actual per-

formance of his duties as a member of the police department, by receiving severe internal injuries while arresting an offender against the laws. Harry Seguin, a witness called by plaintiff, testified that he was standing near Ninth street when he heard the call of a police whistle; that he walked down Harrison street, past Eighth street, past Chesley street, until he came near to Langdon street, a distance of over 300 feet, when he saw Murphy, plaintiff's husband, bending over, holding his side, and supported by two men; that while walking down Harrison street from Ninth street he saw three men run down Harrison street from Ninth street; that when he arrived at the point on Harrison street where Murphy was standing the three men he saw running had passed out of sight. The witness was then asked to state what Murphy said to him at that time as to what was the matter with him. The question was objected to upon the ground that it was hearsay and no part of the *res gestæ*, and the court sustained the objection. The ruling was not erroneous. The evidence sought to be elicited was purely hearsay. It could not, under well-settled principles of evidence, be binding upon defendant. If Murphy had received injuries from the men who were seen running away, it would seem that plaintiff could have proven it without the evidence of Murphy's statement of a transaction that had ended and been completed. Murphy was not under oath. The defendant was not present. The statement was made, if made at all, after Murphy had been injured, if he had been injured. *People v. Ah Lee*, 60 Cal. 85; *People v. Wong Ark*, 96 Cal. 125, 30 Pac. 1115.

It is next claimed that the court erred in sustaining defendant's objection to a question asked of the witness Dr. Buckley, for the purpose of showing statements or information given by deceased to the physician at the time he attended deceased after his alleged injury. It seems to be conceded in the briefs that the object of the question was to obtain information acquired by Dr. Buckley in attending Murphy, which was necessary to enable him to prescribe or act for the patient. The Code expressly provides that a physician cannot be examined in such cases (Code Civ. Proc. subd. 4, § 1881), and the court has so held. In *re Flint*, 100 Cal. 391, 34 Pac. 863; *Estate of Nelson*, 132 Cal. 182, 64 Pac. 204. Appellant insists that this information and statements were given in the presence and hearing of plaintiff, and hence that they were not privileged because made in the presence of a third person. The question was not confined to what was said at the first visit of the physician and in the presence of plaintiff at and during that visit. Dr. Buckley attended deceased from September 10, 1899, to the end of October, 1899, and made in all about 20 visits. No one was present at any of the visits after the first one, except the doctor and the deceased. The question asked includ-

ed all the time during which deceased was under the care of the doctor, and hence the question does not come within the exception claimed by appellant. This disposes of all the questions argued in the briefs.

The order is affirmed.

We concur: HARRISON, P. J.; HALL, J.

2 Cal. App. 451

GURWELL v. MORRIS.

(Court of Appeal, Second District, California.
Dec. 13, 1905.)

1. FRAUDS, STATUTE OF—CONTRACT NOT TO BE PERFORMED WITHIN A YEAR.

Where defendant agreed on May 1, 1902, that if plaintiff would purchase certain stock in a corporation, and was dissatisfied with the investment, defendant at the end of a year would repurchase the stock at the price paid, etc., and plaintiff, relying on the promise, purchased five shares on June 16, 1902, for which he paid \$500, the latter date was the date of the contract, which was therefore not within the statute of frauds as a contract not to be performed within a year.

2. SAME—PURCHASE OF GOODS, WARES, AND MERCHANDISE.

The consideration of defendant's promise being, not the sale of the stock, but its purchase by plaintiff, which was executed, the transfer of the stock contemplated became a mere condition incidental to defendant's promise, and hence the contract was not within the statute of frauds as a contract for the purchase of goods, wares, and merchandise of greater value than \$200, etc.

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by S. Gurwell against A. J. Morris. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Patterson Sprigg, for appellant. Mills & Hizar, for respondent.

SMITH, J. The case as presented by the complaint is as follows: The defendant, on or about May 1, 1902, was president and general manager of the San Diego Packing Company, a corporation, and "as an inducement and as the consideration for plaintiff to take five shares of the stock of said company, defendant promised and agreed to and with the plaintiff that if he would subscribe for and purchase from said company five shares of said stock at its par value, * * * and was not satisfied with said investment at the end of a year, that he (defendant) would repurchase said five shares of stock from plaintiff and pay him on demand, one year from said date of purchase of said stock, the full sum of money paid out and expended by him for and on account of the purchase of said stock, and any and all moneys paid by plaintiff on account of assessments," etc. The plaintiff, relying upon the promise of the defendant, on June 16, 1902, purchased five shares of stock of the company, and paid therefor the sum of \$500, and afterwards, about March 23, 1903, paid the further sum of \$50 for assessments, and thereafter, on June 16, 1903, he tendered to

the defendant said five shares of stock, and demanded of him the said sum of \$550, etc. These and other allegations were denied, and the case went to trial, but on objection of the defendant, oral evidence in proof of the alleged agreement was excluded by the court and a nonsuit granted. In support of this ruling, it is contended by the respondent that the contract was void under the statute of frauds, for the reasons: (1) That it was "not to be performed within a year from the making thereof"; and (2) that the contract was to purchase goods, wares, and merchandise of greater value than \$200. And in support of these positions section 1973 of the Code of Civil Procedure, and section 1739 of the Civil Code, are cited.

But as to the first contention, it is clear that it cannot be sustained. The time for the performance of defendant's promise was within a year from the 16th day of June, 1903, which is to be taken as the date of the contract. Prior to that time there was no contract, but a solicitation only from the defendant. Holland's Jur. 196. The second point we think is also untenable. The consideration of the defendant's promise was not the sale of the stock, but its purchase by the plaintiff, which was carried into execution; and the transfer of the stock contemplated was a mere condition of the defendant's promise, and therefore merely incidental. The case is therefore in principle the same as that of Kilbride v. Moss, 113 Cal. 432, 45 Pac. 812, 54 Am. St. Rep. 361, and no substantial distinction can be made between the two cases. This conclusion is also supported by the decision in Green v. Brookins, 23 Mich. 48, 9 Am. Rep. 74, which seems to be directly in point, and with the reasoning of which we are entirely satisfied.

The judgment is reversed, and the cause remanded for further proceedings.

We concur: GRAY, P. J.; ALLEN, J.

2 Cal. App. 283

PEOPLE v. FRANK.

(Court of Appeal, Third District, California.
Nov. 27, 1905.)

1. CRIMINAL LAW—RECORD—BILL OF EXCEPTIONS—NECESSITY—COURT RULES.

A motion for a new trial in a criminal case, the denial thereof by the court, and the exception to the ruling, are not sufficiently authenticated within court rule 29 (73 Pac. xii), providing that in cases of appeals from orders the papers and evidence used on the hearing must be authenticated by incorporating the same in a bill of exceptions, where the facts appear only in the minutes of the court.

2. CRIMINAL LAW—CONFESSIONS—EFFECT—CORROBORATION.

A person cannot be convicted of murder on his extrajudicial admissions alone; but the corpus delicti, the death as the result, and the criminal agency of another, must be proved by evidence independent of such admissions.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1225.]

8. HOMICIDE — EVIDENCE — SUFFICIENCY — CORPUS DELICTI.

Evidence on a trial for murder examined, and held insufficient to prove the corpus delicti, independent of accused's extrajudicial admissions essential to a conviction.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

George C. Frank was convicted of murder in the first degree, and he appeals. Reversed.

R. B. Stalder and E. D. McCabe, for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted of murder in the first degree and sentenced to imprisonment for life. He appeals from the judgment of conviction, and from the order denying his motion for a new trial.

The Attorney General makes the point that the appeal from the order is ineffectual, because the bill of exceptions does not show that the motion for a new trial was made, nor does it show what action, if any, was taken by the court thereon. The record shows that at the time the defendant was called for sentence he moved for a new trial upon the statutory grounds, the motion was denied, and defendant excepted. These facts appear only in the minutes of the court and do not appear in the bill of exceptions. Under the decision in *People v. Ruiz*, 144 Cal. 251, 77 Pac. 907, the above matters were not sufficiently authenticated, as required by rule 29 of the Supreme Court (78 Pac. xii). See *People v. Durand* (Cal.) 81 Pac. 672. The objection, however, has been cured under rule 14 (78 Pac. x).

It is the settled law in this state that no person can be convicted of a crime upon his extrajudicial admissions alone. The corpus delicti must be proved by evidence independent of the extrajudicial confessions or admissions. *People v. Jones*, 31 Cal. 563; *People v. Thrall*, 50 Cal. 416; *People v. Simonson*, 107 Cal. 345, 40 Pac. 440; *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *People v. Tapia*, 131 Cal. 647, 63 Pac. 1001; *People v. Ward* (Cal.) 79 Pac. 448. See, also, *State v. Williams*, 78 Am. Dec. 254, 258; *Daniels v. State*, 6 Am. St. Rep. 251. It was said in *People v. Simonsen*, supra: "The term corpus delicti means exactly what it says. It involves the element of crime. Upon a charge of homicide, producing the dead body does not establish the corpus delicti. It would simply establish the corpus; and proof of the dead body alone, joined with a confession by the defendant of his guilt, would not be sufficient to convict. For there must be some evidence tending to show the commission of a homicide, before a defendant's confession would be admissible for any purpose." The corpus delicti in murder has two components: Death as the result, and the criminal agency of another as the means. *Ruloff v. People*, 18 N. Y. 179, 182. The extrajudicial confession or admission alone is not sufficient proof to establish the crime.

It would be difficult to find a case in the books where the rule has been applied with stronger reason than is its application demanded in the present case. Murder is defined to be: "The unlawful killing of a human being with malice aforethought." Pen. Code, § 187. "Such malice may be expressed or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

Apart from the admission of the defendant that he shot the deceased in self-defense (which will be noticed later), there is not a single fact nor a single circumstance disclosed by the evidence that in any way, even remotely, connects the defendant with the death of the deceased, and defendant's confession was far from an admission that he murdered the deceased. They lived a mile or more apart in a sparsely settled region, they had but a passing acquaintance, no business, social, or other relations between them appeared, no disagreement of any kind existed, no motive whatever for committing the crime was shown, and nothing connected with the appearance of the body when found pointed to murder by any one. So far as the evidence showed, the deceased may have come to his death from the accidental shot of some one hunting in the vicinity. The body of deceased was found on Tuesday, May 31, 1904, at what is called Heinhold's place, 1½ miles from defendant's home, between which and Heinhold's deceased lived, a half a mile from the latter place. There was evidence that slight decomposition of the body had ensued, and that the bullet which caused his death entered under the left shoulder blade and came out at the left breast of deceased. The only examination of the body or of the wound was by neighbors who assisted at the inquest or funeral. No expert testimony was offered as to length of time he had been dead, and the witnesses were uncertain in their opinions on the subject. There was evidence that he was last seen alive on the afternoon of Sunday, May 29, 1904, and it was the opinion of witnesses that he met his death on that day.

There was testimony of defendant's whereabouts on Sunday and Monday, given by his mother and sister and brother and other persons. No one saw him in the vicinity of the Heinhold place on Sunday or Monday. The uncontradicted testimony was that he was hunting cattle with his brother and a neighbor all day Monday; that he remained at home on Sunday until half past 1 in the afternoon, when he and his sister and brother left home on horseback, having started for Mariposa. About half past 2 they parted company, defendant going towards Whitlock, in an opposite direction from deceased's cabin. Defendant was next seen at Whitlock; some of the witnesses fixing the time between 3

and 4 p. m. of Sunday, where he remained until evening, and reached home about 7 p. m. that day. He left home unarmed. Defendant assisted at the burial of deceased, and nothing unusual was observed in his manner. Several witnesses testified that the general reputation of defendant for peace and quietness in the community was good. About the 10th of June, 1904, defendant went to San Francisco, having sold some or all of his cattle, and went to work there. In September, Deputy Sheriff Walters, of Mariposa county, having for some reason suspected that defendant was connected with the death of the deceased, went to San Francisco and, without difficulty, found defendant and made appointment to meet him, at a place named, that evening. Defendant met him and was brought into conversation with detective Thomas Gibson, who made an appointment with defendant to meet him next morning at the Hall of Justice. Sheriff Walters called for him the next morning and they went to the Hall of Justice. Gibson testified that he took him into a room and asked him some questions about his family, where he was stopping, etc. "Then I told him that there was a deputy sheriff down here wanted him for the murder of a man by the name of Dewey. Now, I says, 'I don't want you to convict yourself with your own words from your mouth, but' I says, 'if you have killed this man in self-defense, why' I says, 'you can tell me about it. But,' I says, 'if you have not, why I don't wish you to say anything to me in regards to the matter at all unless you would see your attorney.' So then he stated that he had had some words with this man, and this man came at him with a hoe, and he shot him with a rifle. So I didn't question him any further." Gibson brought him back into the main office, and defendant repeated in the presence of Capt. Martin and the deputy sheriff what he had told Gibson. None of the circumstances attending the killing were explained or called out at this time. At the trial, defendant testified that he did not kill Dewey, and was not cross-examined by the district attorney. It seems to us that there was absolutely no evidence, aside from this confession, pointing to defendant's guilt, and there was no evidence establishing the corpus delicti.

The judgment and order are reversed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

2 Cal. App. 458

COFFEY v. SUPERIOR COURT OF SACRAMENTO COUNTY et al.

(Court of Appeal, Third District, California.
Dec. 13, 1905.)

1. ACTION—NATURE AND FORM—CIVIL OR CRIMINAL—ACCUSATIONS AGAINST OFFICERS.

A proceeding under Pen. Code, § 758, providing that an accusation against a municipal officer for misconduct in office may be present-

ed by the grand jury; section 760, requiring the foreman to deliver the accusation to the district attorney, who must serve a copy on accused, together with a notice requiring him to appear and answer; sections 762, 763, authorizing the accused to file objections or answer; section 767, giving him a trial by jury; section 769, requiring the court on his conviction to remove him from office; and section 770, authorizing an appeal to the Supreme Court—is criminal in its nature, and in presenting the accusation the grand jury acts as in finding an indictment.

2. INDICTMENT—FINDING OF GRAND JURY—NUMBER CONCERNING IN CHARGE.

Accusation against a municipal officer authorized by Pen. Code, § 758, providing that accusations against municipal officers for misconduct may be presented by the grand jury, may be presented by 12 members of the jury, for the common law governs; the statute being silent as to the number that may present the accusation.

Petition for writ of review by M. Coffey against the superior court of the county of Sacramento and another. Writ denied.

J. B. Devine and Devlin & Devlin, for petitioner. A. M. Seymour, Dist. Atty., for respondents.

CHIPMAN, P. J. It appears from the petition that petitioner is chief of police of the city of Sacramento, and has been such officer since January 27, 1904, and that his term of office will expire January 27, 1906; that the grand jury in and for the county of Sacramento, claiming to act under sections 758 to 771, both inclusive, of the Penal Code, did on August 27, 1904, "purport to present an accusation in writing against the said petitioner for alleged willful misconduct in office as such chief of police," the alleged misconduct being willful neglect and refusal to prosecute persons, who, with his knowledge, were engaged in conducting illegal games; that on the ——— day of September, 1905, petitioner duly made and filed in the superior court of said county written objections to the legal sufficiency of the said accusation, alleging as grounds therefor that it was not presented by all of the 19 members composing said grand jury, but that only 14 members thereof "participated in the hearing of the said matter before the said grand jury, and in the presentation and filing of said document purporting to be an accusation," and therefore the said court "has no jurisdiction of the defendant or of the subject-matter"; that petitioner on September 16, 1905, presented the said objections to said court, and moved to quash and set aside said accusation, and on that day said motion was argued and submitted and was taken under advisement by his honor, Judge E. C. Hart, judge of said court, respondent herein, and said motion was, on November 25, 1905, denied. The district attorney interposed a general demurrer to the petition, and also demurred on the ground of uncertainty. It was conceded at the argument that the petition is sufficient to present the principal question, and as we have reached the con-

clusion that the general demurrer must be sustained we will not consider the points made on the special demurrer.

It is admitted that the grand jury was duly impaneled and consisted of 19 members, the full number as provided by law (Code Civ. Proc. § 192), and that 14 of their number participated in the hearing of the matter and voted in favor of presenting the said accusation, the remaining number presumably present. The question presented and argued before us was this: Can a less number than the full panel of the grand jury authorize the presentation of an accusation under the sections of the Penal Code above cited? Section 758, Pen. Code, is as follows: "An accusation in writing against a district, county, township, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed." Subsequent sections require the foreman of the grand jury to deliver the accusation to the district attorney, who must serve a copy on the accused and also serve a notice requiring him to appear in the superior court and answer the accusation. Section 760. The accused may file objections or answer. Sections 762, 763. He is given a trial by jury. Section 767. Upon conviction the court must pronounce judgment removing him from office. Section 769. The accused may appeal to the Supreme Court from the judgment. Section 770. Section 772 provides for the removal of certain officers upon the accusation in writing "of any person" charging them with the matters mentioned in the section.

Counsel for the petitioner contend: That as the statute provides expressly that 12 members of the grand jury may present an indictment, while section 758 is silent as to the number that must vote for the accusation, any less than the entire panel cannot present a legal accusation. They argue that the provisions relating to accusations are distinct from the proceedings relating to indictments and presentments; that no just inference can be drawn from these latter that, because an indictment may be found by 12 members of the grand jury, a like number may present an accusation. On the contrary, it is claimed that because the Legislature has in the one case prescribed the number, and omitted to do so in the other, furnishes strong reason for giving section 758 the construction contended for; and, furthermore, apart from these considerations, that when the Legislature said that the accusation "may be presented by the grand jury" it meant the body in its entirety, and that the general rule by which a majority of the members of legislative, administrative, and other like bodies may express their will does not and should not apply to a body like a grand jury. We agree with petitioner that the proceedings under sections 758 et seq. seem to be complete in themselves, as far as they go, and are

separate from and independent of the proceedings provided in the Penal Code as to indictments. But that they are criminal in their nature cannot be doubted, and we think must be regarded as pertaining to crimes and offenses against the state. Speaking more particularly of section 772, the court in *Thurston v. Clark*, 107 Cal. 285, 40 Pac. 435, said: "The proceeding is a nondescript, but resembles somewhat a *qui tam* action. But whatever its garb it is in body and spirit, in its aim and object, a process for the punishment of crime." See *Wheeler v. Donnell*, 110 Cal. 655, 43 Pac. 1; Pen. Code, § 15, subd. 4; Id. § 692. In presenting the accusation the grand jury acts under legislative authority precisely as in finding an indictment, the only difference being that the law is silent in the former case as to the number that may present the accusation. It seems to us that the statute being silent we may look to the common law to discover what number may act rather than adopt a construction of section 758 which would violate the time-honored rule governing grand juries. There never has been a time since the grand jury was instituted in England when 12 might not present the indictment. The common law required that 24 should be summoned to attend on the grand jury; but not more than 23 were sworn, because of the inconvenience which might arise in case 12, who were sufficient to find a true bill, were opposed by the other 12, who should be against finding. *State v. Davis*, 24 N. O. 157, cited in *People v. Roberts*, 6 Cal. 214; *Anderson's Law Dictionary*; *State v. Miller*, 3 Ala. 344; *State v. Brainerd*, 56 Vt. 532, 48 Am. Rep. 818; *State v. Ostrander*, 18 Iowa, 435; 4 Black. Com. 302; 17 Am. & Eng. Ency. of Law, p. 1290. In nearly all of the states of the Union the Constitution or statute prescribes the number that shall constitute the grand jury, as well as the number that may find an indictment, and it is well settled that in such cases the common law is superseded. In the state of Virginia the law provides for no limitation. The precise question as related to an indictment arose in *Commonwealth v. Sayers*, 35 Va. 722. The question was, can less than 16 members of a grand jury make a presentment or find a bill of indictment in any case? The court said: "Our act of Assembly points out the mode of summoning grand juries, and declares that the 24 grand jurors, or any 16 of them, shall be a grand jury. But there is nothing said as to the number who must concur in finding a presentment or indictment, and the same reasoning which goes to prove that because the act declares that 24, or any 16, shall be a grand jury, the number of 16 should concur in a finding, would also establish that if more than 16 are sworn, they should all concur; for the whole number, at last, form the grand jury. In 2 Hale's P. C. 161, it is stated that 'if there be 13 or more of the grand inquest, a presentment by less than 12 ought not to be; but if there be 12

assenting, though some of the rest of their number dissent, it is a good presentment; for if 12 agree, it is not necessary for the rest to agree.' "

It is not to be presumed that our Legislature, in providing that 12 may find an indictment for the gravest felony known to the law, intended, by failing to name any number who should concur in finding an accusation, involving a misdemeanor, that all must concur. If any intention on the question can be surmised it would more probably be that the rule as to indictments would be followed. But aside from all presumed intention we think the common-law rule as to the number who may act in such a case should be applied. If our statute were entirely silent in all matters of presentment for crimes by the grand jury as to the number who must vote for the accusation, it is altogether probable that we would follow the rule of the common law as laid down in the Virginia case, *supra*. Fixing the number in the matter of indictments and omitting to do so as to accusations should not give rise to a rule at variance with the common law, as well as the generally accepted rule in this country. In support of their contention that when the Code speaks of "the grand jury" it means the entire body, counsel for petitioner cite cases holding that where the statute fixes the number composing the grand jury a less number is not a grand jury. That is, if the law requires 15 qualified persons (as was the case in *Doyle v. State*, 17 Ohio, 222) to compose the grand jury and one or more of those sworn are disqualified, it would not be a legal grand jury, and no valid indictment could be found by them. These cases do not hold, where the grand jury is once legally impaneled, that less than the full number may not find an indictment if the statute provides that a less number may do so; nor do they decide that all must vote to present the indictment where the law is silent as to the number who must do so.

Counsel cite, among other cases, *Rainey v. State*, 19 Tex. App. 479. The Texas Constitution provides that "grand and petit juries in the district courts shall be composed of twelve men; but nine members of a grand jury shall be a quorum to transact business and present bills." The grand jury was formed of 13 qualified members, but it was held an illegal body because not formed in compliance with the Constitution. Substantially the same view was taken in *People v. Thurston*, 5 Cal. 69; but while section 192, Code of Civil Procedure, declares that "a grand jury is a body of men, nineteen in number, returned in pursuance of law," in *People v. Simmons*, 119 Cal. 1, 50 Pac. 844, it was said: "If any 12 concur an indictment may be found, though the remainder of the jury vote against it," which would be equally true if the remainder did not vote at all. The cases cited by petitioner do not support his contention. They hold that the

grand jury must be formed in accordance with the Constitution or statute creating it and that it would not be a legal grand jury unless so formed. But as to the number that shall be required to make an accusation provision is sometimes made in the law and sometimes not. No case has been cited, and we have found none, holding that all the members of the grand jury must concur before an indictment can be found where the grand jury was composed of more than 12 and the law was silent as to the number necessary to make the accusation.

There is a further reason which is urged in support of the accusation. Section 7, subd. 17, of the Penal Code reads: "Words giving a joint authority to three or more public officers or other persons, are construed as giving such authority to a majority of them, unless it be otherwise expressed in the act giving the authority." See, also, Civ. Code, § 12, and Code Civ. Proc. § 15. See *People v. Hecht*, 105 Cal. 621, 38 Pac. 941, 27 L. R. A. 203, 45 Am. St. Rep. 96. It is the rule generally that a private trust or agency must be executed by all, as in the case of arbitrators chosen to settle a private controversy, but Mr. Mechem also says, in his work on Public Offices and Officers, § 572: "Where, however, a trust or agency is created by law, or is public in its nature and requires the exercise of deliberation, discretion, or judgment, whether it be judicial or quasi judicial in its character, the rule is otherwise, and while all of the trustees, agents, or officers, except where the law makes a less number a quorum, must be present to deliberate or, what is the same thing, must be duly notified and have an opportunity to be present, yet, except where the law clearly requires the joint action of them all, it is well settled that a majority of them, where the number is such as to admit of a majority, if present, may act and that their act will be deemed the act of the body."

The Supreme Court by the Constitution of 1849 was composed of a chief justice and two associate justices, and it was provided that any two should constitute a quorum; but there was no provision as to the number necessary to pronounce a judgment, as was done by the amendments of 1862, when the number was increased to five, and by the Constitution of 1879. Two justices, however, pronounced judgments, being a majority of the three. See discussions of the power of the court by a majority to pronounce judgments in certain matters in *Estate of Jessup*, 81 Cal. at page 459, 22 Pac. at page 1023, 6 L. R. A. 594. There have been many boards and commissions created by statute whose functions were judicial or quasi judicial. These bodies have uniformly acted through the vote of a majority. The board of railroad commissioners is a notable example. The Constitution created the board to be composed of three members. Its powers are judicial as well as administrative and executive. A majority has many times, in most

important matters, such as determining rates to be charged for freight and the like, expressed the will of the board. While this view of the law would seem to safely lead us to the conclusion that a majority of the grand jury may present an accusation under the provisions of Pen. Code, § 758 et seq., and hence the present accusation was legally presented, we prefer to place our decision on the ground first above stated, and that upon the concurrence of 12 or more of the grand jury legally formed a valid accusation may be presented.

The writ is denied.

We concur: McLAUGHLIN, J.; BUCKLES, J.

HEALY et al. v. SMITH et al.

(Supreme Court of Wyoming. Jan. 6, 1906.)

1. PUBLIC LANDS—PASTURAGE.

Plaintiffs, who had been accustomed to graze their cattle upon their home range, consisting largely of public lands, were not entitled to an injunction restraining defendants from driving their sheep upon such lands.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 23.]

2. ANIMALS—UNINCLOSED LANDS—TRESPASS.

One has no right to drive his sheep upon the private lands of another, although they are uninclosed and may contain the only available water supply in the neighborhood.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, §§ 327, 332.]

3. INJUNCTION — PRIVATE LANDS — DEPASTURAGE BY ANIMALS.

In an action for an injunction to restrain defendants from driving their sheep upon private lands of plaintiffs, it appeared that defendants had threatened to drive their sheep upon the range in which such lands lay, that the lands contained the only available water supply upon the range, and that after the commencement of the action, and notwithstanding a temporary restraining order, several herds of defendants' sheep were pastured upon the lands of plaintiff. It also appeared that there was only a single trespass, without any threats of continuance, and without any showing of permanent injury, and that shortly afterwards the sheep left the range. *Held*, that there was no ground for the issuance of an injunction.

4. SAME—MISJOINDER OF PLAINTIFFS.

Where several persons each owned lands and each permitted the stock of the others to feed and water at will upon his lands, but there was nothing to show a joint possession of any individual tract of land, and nothing to prevent any one owner from exercising exclusive control over his premises, in a suit by them to restrain defendants from pasturing their sheep upon the lands in question, there was a misjoinder of plaintiffs.

Error to District Court, Sheridan County; Joseph L. Stotts, Judge.

Action by Frank Smith and others against Patrick Healy, Sr., and others. Judgment for plaintiffs, and defendants bring error. Reversed.

E. E. Lonabaugh, for plaintiffs in error. W. S. Metz, M. B. Camplin, Spencer Smith, Joseph L. Stotts, and S. T. Corn, for defendants in error.

POTTER, C. J. The defendants in error, 13 in number, joined as plaintiffs in bringing this suit against the present plaintiffs in error and several other parties as defendants to enjoin alleged threatened trespasses with sheep upon lands alleged to constitute, and for many years to have constituted, the common or joint range and grazing or pasture ground for the cattle and horses owned by the several plaintiffs. As described in the original petition, the lands constituting such range consists of nine entire townships, according to the United States survey, viz., townships 45, 46, 47, and 48 of ranges 74 and 75, and township 44 in range 75, and several tracts, varying in area from 40 acres to a section, scattered here and there through a number of other adjoining or neighboring townships east, south, and west of said nine townships, which last-mentioned tracts are, respectively, either owned or held under lease by one or the other of the plaintiffs. But according to the second amended petition, upon which the cause was tried, the range comprises all the lands in every township mentioned in the petition; thus including a territory embracing twenty or more townships. In nearly every township within such territory there are a few scattering tracts of land held by private ownership, and belonging to one or the other of the individual plaintiffs, but no tract so held is owned by the plaintiffs or any number of them jointly. All the remaining lands, and they very largely predominate, are vacant unappropriated public lands of the United States. A few instances will serve to illustrate the proportion between the public and private lands and their comparative situation. In township 48, range 75, the only private lands are school sections 16 and 36, and 40 acres in section 22. In the township adjoining on the east, school sections 16 and 36, and 160 acres in section 23, are the only lands held by any sort of private ownership, while in the next eastern township the private lands are confined to section 36. In township 47, range 75, there are no private lands. In the adjoining township on the south, viz., 46, range 75, the private lands are section 16, 40 acres in section 5, 120 acres in section 7, the S. $\frac{1}{2}$ of section 19, and the N. W. $\frac{1}{4}$ of section 29. In the other townships, with perhaps two exceptions, the proportion of public lands is even greater. In one township, viz., 46, range 72, the private lands probably amount to three sections, mostly located in the two southern tiers of sections. All the lands in the entire territory referred to, public and private, are open and uninclosed, and none of them appear to have been cultivated. The plaintiffs below are severally, not jointly, owners of horses and cattle, and they are, and have been for many years, severally engaged in the live stock business, raising, feeding, grazing, and disposing of live stock in Weston county, wherein the lands aforesaid are situated, and are tax-

payers in such county. The cattle and horses of the several plaintiffs run at large, and it is alleged in the petition that the plaintiffs are, and for years have been, in possession of all the lands aforesaid, including the government lands, and are the owners and in possession of all the springs, streams, and waters thereon, and that the same are in actual use by the plaintiffs in the grazing, feeding, and watering of their cattle and horses, and that the only means for the subsistence of such animals from the commencement of the suit, November 24, 1902, until the spring of 1903, are the grasses and herbage upon said lands and the waters thereon. It is alleged in the petition that the defendants, and each of them, are possessed of large bands of sheep, and at the time of the commencement of the suit were in close proximity to the lands aforesaid, and had declared their intention of going upon said lands, and to usurp the same to their own exclusive use, and to graze and feed their sheep upon the herbage and grasses growing on said lands, and to water their sheep from the waters thereon, and had threatened, and were proceeding to carry the threat into execution, to enter upon said lands and waters for the purposes aforesaid, without the consent of plaintiffs, and in violation of their rights. It was alleged, and evidence was introduced to establish it as a fact, that the effect of taking several large bands of sheep upon the lands described, or upon any range, would be to take the same into the exclusive possession of the sheep owners, for the reason that the habits of sheep in grazing and traveling are such that cattle and horses cannot remain or graze upon the same range, or in the same immediate locality, and that sheep trod out the grass roots, eat the grass close to the ground, and that as they are closely herded in bands, approximately 2,500 or 3,000 head, attended by herders and dogs, cattle and horses are necessarily compelled to abandon any range upon which sheep are so brought. It was therefore alleged that the effect of the threatened acts of the several defendants would be to destroy the grasses upon the range, deprive the plaintiffs of the necessary means of subsistence for their cattle for the then ensuing winter, and the exercise by defendants of exclusive possession of the said range. It was also alleged that the defendants had ample range and pasture facilities and water for their sheep in ranges 76 and 77, west of the lands in controversy, which range had been formerly occupied by plaintiffs, but had been abandoned by them to the defendants, and that the use of the present range of plaintiffs was not necessary for the care or sustenance of the sheep of the defendants.

The original petition did not specify the particular ownership of the private lands, but in the amended petition those facts are set out by stating the name of the owner of

each tract of private land; and, from such allegations, which were admitted on the trial to be true, it appears that five only of the plaintiffs own or have any title to any land within the territory composing the range aforesaid, and that the majority of the lands held in private ownership are owned by one of the plaintiffs, viz., George A. Keeline, and he owns one or more tracts in nearly every township. Hence it appears that the various tracts owned by him are widely separated; some of them being in the neighborhood of 30 miles apart. Spencer K. Smith, also one of the plaintiffs, owns, or has a legal estate in, a single tract, viz., section 16 in township 48, range 74. Frank Smith, another plaintiff, owns or has leased the two school sections in township 44, range 75, 40 acres in section 13, and 120 acres in section 22, in the same township. The firm of George A. Keeline & Son, who are also plaintiffs, own, or have a legal estate in, a few tracts in three or four townships, not exceeding a section in acreage in either township; and each one of their separate tracts is located several miles from the others, there being at least 10 to 15 miles between some of them. Oscar Keeline is alleged to be the owner of a 40-acre tract on the extreme western edge of the region in question, 80 acres in the extreme southeastern part, and a single 40-acre tract in one of the nine townships aforesaid. None of the other plaintiffs, two of whom are corporations, one a partnership, and the others private individuals, are alleged or shown to own, or to have title to, any land in the described territory. In the amended petition, however, in connection with the allegation that one of the plaintiffs, naming him, owns a tract particularly described, it is alleged that such owner, and certain of the plaintiffs, naming them, are and were at all times mentioned in the petition in the possession and entitled to the possession of the same. The effect of such allegations is that, though a single plaintiff is the owner of the tract described, the others, who are named, are jointly with him in possession and entitled to the possession thereof. But some of the plaintiffs, at least three in most instances, are omitted from those allegations, and there is therefore no allegation that all of the plaintiffs are even jointly in possession or entitled to the possession of any tract of private land. The object of the suit, however, was evidently not so much to enjoin an invasion of the private lands by the sheep of the several defendants, as to prevent such sheep from being brought upon any of the lands public or private within the described territory. The allegations as to private ownership of scattering unclosed tracts would seem to have been inserted by the pleader upon the theory that they would more clearly show the right of plaintiffs to the range; the watering places for live stock being located upon such private lands. No distinctive threats or anticipated injuries are alleged in respect to the

private lands. In setting forth the acts threatened by defendants, the public and private lands are not distinguished, except so far, perhaps, as the defendants are charged with an intention or threat to water their sheep from the water belonging to the plaintiffs. The injury which it is alleged the plaintiffs will suffer, if the threatened acts of defendants be carried into execution, is the deprivation of their usual and customary range for the grazing of their cattle and horses.

Upon the filing of the petition, a temporary restraining order was issued by the district court commissioner, in the absence of the judge from Weston county, where the suit was instituted. With some immaterial modifications, that order continued in force until the trial of the cause and final judgment in 1904 in the district court in Sheridan county, to which county the cause had been transferred for trial. During the trial the cause was dismissed on motion as against some of the defendants, and the judgment rendered in the cause which is here complained of was rendered against the present plaintiffs in error only, viz., Patrick Healy, Sr., Adam Patterson, and Patrick Healy, Jr., partners as Healy, Patterson & Healy. The judgment made perpetual the temporary restraining order, forever enjoining the above-named parties, plaintiffs in error here, from in any manner trespassing, or driving, pasturing, or feeding their bands of sheep over or upon the private lands in the joint use and occupancy of the plaintiffs set forth in the petition, from in any manner using or polluting the waters upon such lands, and from in any manner molesting, disturbing, or driving with dogs, or in any way interfering with, the herds of horses and cattle belonging to plaintiffs while ranging upon the public government lands in the vicinity of said private lands or elsewhere upon the public domain, and judgment was also given against the plaintiffs in error for costs. It will be observed that the judgment ignores the question of trespassing or grazing upon the public lands. Though as to such lands there is no express dissolution of the temporary restraining order, the injunction is confined to the lands held by private ownership, so far as trespassing upon lands is concerned, and a dissolution as to the public lands was probably intended and is doubtless to be implied. The findings, however, are not entirely silent as to public lands. The court stated its conclusions of fact and law separately. It found that the plaintiffs were and had been in the joint use and occupancy of the private lands set out in the second amended petition; that they were jointly using and occupying the government lands adjoining and in the vicinity of said private lands in the feeding, grazing, ranging, and management of their horses and cattle; that said private and public lands constituted the home range of the plaintiffs for their cattle and horses; that the grass growing thereon was necessary for the sus-

tenance and maintenance of the horses and cattle during the winter of 1902 and 1903, and has continued to be necessary for that purpose; that the defendants, at the time of the commencement of the suit, were owners of large bands of sheep in the vicinity of such lands, and, if said sheep were allowed to pasture upon the private lands and the home range on the public domain, such use would destroy the pasturage of both the public and private lands, and render the same worthless for the use of plaintiffs during the winter aforesaid, and that irreparable injury would result to plaintiffs, and each of them, by such destruction of the grass and herbage on the private lands in their joint use and occupancy. It was further found that the particular defendants, who are plaintiffs in error here, were threatening and were about to drive and pasture their sheep upon the private lands, at the commencement of this suit, and that, after the commencement of the suit, they did so drive and pasture their sheep upon the private lands, in the joint use and occupancy of the plaintiffs, and threatened to continue and repeat such trespasses. The court also found that said defendants disturbed and molested, and unlawfully drove with dogs, the horses and cattle of plaintiffs while ranging on the public lands and said home range, and that they will continue to do so unless restrained by the order of the court, and that there was ample feed elsewhere than upon the said range of the plaintiffs for the sheep of defendants.

Upon the findings of fact thus briefly outlined, the court announced as conclusions of law (1) that the temporary restraining order was properly granted, and should be made perpetual, forever restraining these plaintiffs in error from trespassing with their bands of sheep and otherwise over or upon the private lands, and from the use and pollution of the waters thereon; (2) that they should be restrained from molesting, disturbing, or driving with dogs the cattle and horses in the joint control and management of the plaintiffs while ranging upon the public lands described in the petition; (3) that the plaintiffs have no speedy or adequate remedy at law, and that injunction is their proper remedy. Though the temporary restraining order was held to have been properly granted, it was made perpetual as to the private lands only, which constituted a very small fraction of the area embraced in the temporary order. If that order had indeed been rightfully granted, and there was any ground for its continuance, there would seem to be no apparent reason for confining its future application. Had the court found that it had been properly granted as to the private lands, but wrongfully as to the public lands, the findings would we think be more consistent, or at least better understood. From the fact that the court found that injury would be suf-

ferred by the plaintiffs in consequence of the pasturing of defendants' sheep on the public land, that the defendants had ample pasturage elsewhere, without invading the range of plaintiffs, and that the temporary order, which embraced the entire range, public, as well as private, lands, had been rightfully granted, it seems apparent that some effect was accorded the allegations and proofs as to the range inclusive of public lands, and it is not improper to be assumed that the allegations and proofs respecting the range and the public domain therein, in some measure at least, induced the final judgment perpetuating the injunction in part. Otherwise, the finding concerning the public lands, in the absence of a stated conclusion respecting them, is totally unexplained. The court may have recognized a want of equity in the case as to the public lands. If so, a finding to that effect would have been appropriate, and the injunction should have been dissolved as to those lands. But, upon the face of the findings, the theory is warranted, we think, that the threats and acts respecting the public lands, or the range as an entirety, were in some degree at least deemed to support the judgment that was entered.

But upon a careful consideration of the record, we are clearly of the opinion that the judgment cannot be sustained in any particular. It is manifest that since the judgment the theory of the case from the standpoint of the plaintiffs has greatly changed since the trial. Up to the time of trial, and during the trial, the plaintiffs were insisting upon their right to the range public lands, as well as private lands, to the exclusion of the defendants. Much of the testimony introduced on behalf of the plaintiffs is to be understood upon no other theory. The private lands were adverted to in the testimony only incidentally, and no tract held in private ownership, with a single notable exception, was referred to by description or identified by any witness. And though it is now contended by counsel for plaintiffs below that the injunction ought to be sustained as to private lands, because the defendants have no right to trespass thereon, and it is conceded that the plaintiffs have no exclusive right to the public lands, it is nevertheless argued, and we are at liberty to assume some purpose in the argument, that equity ought to enjoin one stock grower, who has plenty of feed on his own range, from going upon and depasturing the range occupied by another, though such range consists of public lands. But that argument ignores the elementary principle that equity will not lend the aid of its injunctive power to enforce mere moral obligations. *High, Inj.* § 20; *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177. No case has been cited holding that one stock grower may enjoin another from grazing or pasturing his live stock upon the public

domain. We believe that, whenever the question has been presented, the right to an injunction for such a purpose has been denied. *McGinnis v. Friedman* (Idaho) 17 Pac. 635; *Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618; s. c., 5 Utah, 591, 18 Pac. 633; *Martin et al. v. Platte Valley Sheep Co.*, 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093. In *McGinnis v. Friedman*, supra, the suit was very similar to the one at bar. It was brought to enjoin the pasturing of sheep upon public lands which had been used by the plaintiffs as a cattle range. The injunction was denied. The court said: "The appellants in this case do not pretend to connect themselves with the land by color of title, or to hold the same under any possessory claim or right, with a view of entering the same under any of the general laws of the United States. Hence we are unable to see that they have shown in themselves any clear legal or equitable right to the pastures grown upon the said lands." The claim was made there, as here, that the plaintiffs had a right by virtue of their former exclusive possession. But the learned court very pertinently remarked that a court of equity should not interfere to enforce such a claim by injunction, in view of the act of Congress forbidding the assertion of a right to the exclusive use and occupancy of any part of the public lands without claim, color of title made or acquired in good faith, with a view to entry under the land laws.

The settlers upon the public domain in the territory embraced within the public land states customarily, without hindrance or objection on the part of the government, enjoyed the vacant public lands as public commons for the free pasturing of domestic animals, which, according to their custom, were allowed to run at large. In consequence of such custom, and the uninclosed condition of the country in the early days of its settlement, the common-law rule that required a man to confine his cattle or else respond in damages for their trespasses upon the uninclosed premises of his neighbors was held not to prevail. On the contrary, the doctrine was established that actionable trespass was not committed by cattle lawfully running at large wandering upon and depasturing uninclosed lands even of a private owner. *State v. Johnson*, 7 Wyo. 512, 54 Pac. 302. But an owner is not permitted under that doctrine to willfully and knowingly drive his cattle or other live stock upon the premises of another, though they be uninclosed, against the consent of the owner of the premises. *Cosgriff v. Miller*, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977. The custom of making free use of the public lands for the purposes aforesaid, which had its inception in the region where arable lands were plentiful, culminated in the use, unrestricted save as to capacity, of the vast areas of unpeopled and uninclosed public lands on the arid prairies and mountain ranges of the

west for the raising of great herds of cattle, horses, and sheep, without other means of sustenance than that obtained by grazing upon the native grasses and herbage. And in this section of the country, largely depending upon the free grazing of the public domain, stock growing became a gigantic industry. The government made no attempt to interfere with this use of the public domain, so long as it remained open to everyone seeking to enjoy the privilege, and not until a comparatively recent period did Congress or any department of the government make any express provision or declaration upon the subject. Having for so long a time acquiesced in the use aforesaid of its unappropriated and unreserved lands, it became understood that it impliedly licensed such use, and the existence of such an implied license was judicially announced by the Supreme Court of the United States in the case of *Buford v. Houtz*, supra. Under that license the public lands were and are free to everyone who may seek to use them for grazing or pasturing live stock, so long as they are unappropriated and not expressly reserved or set apart for other public purposes.

No doubt, induced by the idea of self-protection, and even more laudable sentiments, there existed in the range country among neighboring stock growers a sort of moral recognition of a prior and better right in the first occupants of any range, at least if the same was stocked to its fair capacity, though the moral obligation supposed to rest upon one owner of live stock not to turn his cattle or other stock upon his neighbor's range did not prevent the territory of a prior occupant from being more or less frequently invaded, if not by former neighbors, then by strangers or newcomers, and the more frequent disputes that have arisen in recent years, usually in consequence of the taking of sheep into what had theretofore been regarded or claimed as strictly cattle territory, have attracted the attention of the government, so that now the question of suitable governmental control of the use of the public grazing lands is being agitated. But the government was never a party to any arrangement, tacit or otherwise, between stock growers in the matter of range rights, or the occupation of the public lands, and at no time has it recognized the right or claim of any person, or a limited number of persons, to the exclusive use of the unappropriated and open public lands for grazing or other purposes, on account of prior occupation or otherwise. So far as the government is concerned, the theory at all times prevailed that the vacant public lands were public commons, free to the use of all citizens alike. With the incoming of a constantly increasing number of settlers, and the rapid passing into private control, by entry under the land laws, of the available lands along the natural streams, as well as the gradual overstocking of the range in some localities, and the encroachments by

sheep owners with sheep in the charge of herders in others, men here and there began to claim and exercise exclusive control over the lands embraced within their customary ranges, and endeavored to prevent others from grazing thereon. This assumed control was, in numerous cases, indicated by surrounding the range or a part of it with a fence. Such abuses of the privilege of grazing upon the public lands were soon brought to the knowledge of the officers of the Land Department and other government officials, and doubtless caused the first official declarations on the subject. The Commissioner of the General Land Office, in his annual report for 1882, said: "The unimpeded progress of settlement will in due time bring the whole of the territory of the United States within the compass of private ownership. Meanwhile the unappropriated public lands suitable for grazing herds of cattle should be equally free to the enterprise of all citizens, unembarrassed by attempts at exclusive occupation." And he recommended the enactment of a statute imposing penalties for the unlawful inclosure of public lands, and preventing by force or intimidation legal settlement and entry. And, on April 5, 1883, the Commissioner, in a circular letter to registers, and receivers of land offices and special agents, said: "The fencing of large bodies of public lands beyond that allowed by law is illegal, and against the right of others who desire to settle or graze their cattle on the inclosed tracts. Until settlement is made, there is no objection to grazing cattle or cutting hay on government land, provided the lands are left open to all alike." And the Commissioner's annual report for that year again called attention to the necessity for national legislation to prevent the unlawful exclusive occupation of the public domain. One of the earliest decisions, if not, indeed, the first, respecting the right of the government to enjoin the maintenance of fences unlawfully inclosing parts of the public domain, was delivered by Judge Sener, then Chief Justice of Wyoming Territory, while presiding in the district court of Laramie county in 1883, in the hearing of the case of *United States v. Swan et al.* Among other things, the learned judge said, in explaining the result of the inclosure there complained of: "But it is an inclosure of that which belongs to or ought to be left free to the public, so that all the public may go thereon until some one lawfully segregates it and makes it his own." In that case it was held that injunction would lie at the suit of the government to restrain the maintenance of the unlawful inclosure. Finally, by an act of February 25, 1885, Congress expressly prohibited the inclosing of public land by any one without claim or color of title, made or acquired in good faith with a view to entry thereof at the proper land office under the general land laws of the United States, and also prohibited the assertion of a right to the exclusive use

and occupancy of any part of the public lands without claim, color of title, or asserted right as above specified as to inclosure. And penalties were provided to be imposed upon those violating the provisions of the act. 23 Stat. 321, c. 149, 6 Fed. Stat. Ann. 533-534 [2 U. S. Comp. St. 1901, p. 1524].

The second amended petition averred threats and a purpose on the part of the defendants to go upon the range in question and usurp the same to their exclusive use, and to drive the cattle and horses of the plaintiffs therefrom. But those allegations are not at all sustained by the evidence. There is absolutely no evidence of any act or threatened act on the part of the defendants, in respect to the public lands, than that of taking their several bands of sheep upon such lands in the usual manner of herding sheep and allowing them to graze there. There is some testimony to the effect that cattle will not voluntarily remain upon the same range with sheep, and that after the plaintiffs in error here had taken their sheep upon a part of the range, subsequent to the commencement of the suit, the cattle of plaintiffs moved to other neighboring lands, though that was more particularly the result, as we understand, of the fact that the sheep so taken on the land completely depastured that part of it covered by their grazing. There is also testimony showing that sheep herders and their dogs often drive cattle away from the immediate vicinity in which the sheep under their charge are feeding. But there is an entire absence of testimony to show that the defendants, their agents or employes, either with or without dogs, drove or threatened to drive the cattle or horses of plaintiffs or others from the range in controversy, or any part thereof, or molested them in any manner or attempted or threatened to do so. The finding on that point is not supported by the evidence. It cannot be held, we think, that by merely grazing a herd or herds of sheep, under the charge of a herder or herders, upon vacant public lands, the owner usurps the exclusive use or possession thereof, in the sense at least in which exclusive use or possession of the public domain is declared or held unlawful or opposed to public policy. In the absence of statutory provision, or other governmental regulation to that effect, there is no authority for confining the privilege of grazing upon the public lands to animals running at large, and denying that privilege to sheep under the control of herders. Upon any theory of the case, therefore, no ground is presented for equitable interference as to the use of the public lands by defendants, conceding that threats of driving or actual driving of another's cattle from the public range, or unlawfully molesting them, would furnish ground for injunction. The several tracts of private land, it will be remembered, are so widely separated that sheep or other live stock in charge of herders may easily

be grazed upon the public lands without crossing or touching the land of any private owner. The fact that nearly the entire available water supply for the watering of stock was situated upon the private lands certainly constitutes no ground for requiring the defendants or other sheep or live stock owners to keep off the vacant public lands in the territory in question. It is not to be presumed that the defendants would trespass upon the private lands as a necessary consequence or incident of enjoying the privilege of grazing the public lands. At any rate, the possibility of such trespass furnishes no proper ground for restraining the use of the public lands. Though the defendants in error are not entitled to exclude the plaintiffs in error from the public lands, nor to enjoin the grazing of their sheep thereon, the latter have no right to willfully and knowingly direct or drive their sheep upon the private lands, although they are uninclosed, and may contain the only available or most convenient water supply in a particular neighborhood. The rule that actionable trespass is not committed when domestic animals which are lawfully permitted to run at large go upon and depasture uninclosed premises of a private owner does not obtain in the case of live stock under the control of a herder, or whose movements are directed by the owner or others. The owner of uninclosed lands is presumed to know that certain kinds of live stock are allowed by law and custom to run at large, and that such animals will likely wander upon his ground, and he is therefore held to assume the risks of such trespasses by the act of leaving his premises open and unprotected by a lawful fence. But one may not avoid liability for willfully driving cattle or sheep upon the premises of another, though uninclosed, knowing the same to belong to a private owner; and especially is that true when it is known that the landowner has forbidden such acts. *Cosgriff v. Miller*, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977.

In view of the rule appertaining to animals roaming at large in a lawful manner, equity will not enjoin their owner or owners from allowing them to trespass upon or depasture uninclosed premises. *Martin v. Platte Valley Sheep Co.*, 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093. But there can be no doubt that in proper cases, where the other necessary elements of equity jurisdiction are present, injunction will lie to restrain a live stock owner from willfully and knowingly driving or turning his stock upon the uninclosed premises of a private owner. In such cases, however, as in all other cases where injunctive relief is sought, it is necessary to show a reasonable probability of the commission of the wrongful act and a well-grounded apprehension of resulting injury. Injunction is a strong and powerful remedy. For its violation parties may be punished as for contempt upon summary proceedings. It

should not, therefore, be granted merely to protect a right where no actual or threatened violation of that right appears. Mr. High says: "Nor will a court of equity lend its aid by injunction for the enforcement of right or the prevention of wrong in the abstract, and unconnected with any injury or damage to the person seeking relief." High on Inj. (3d Ed.) § 1. And, again: "An injunction, being the strong arm of equity, should never be granted, except in a clear case of irreparable injury, and with a full conviction on the part of the court of its urgent necessity. To justify the court in granting the relief, it must be reasonably satisfied that there is an actual intention on the part of defendant to do the act which it is sought to enjoin, or that there is probable ground for believing that, unless the relief is granted, the act will be done. And it is not a sufficient ground for interfering that, if there be no such intention on the part of defendant, the injunction can do no harm. Nor will the court interfere when the evidence shows that there is no probability of defendant doing the act which it is sought to restrain." Id. § 22. Mr. Pomeroy, in the late edition of his work on Equity Jurisdiction, states the doctrine with special reference to trespass, as follows: "In the subject of trespass, as elsewhere, the main function of an injunction is to preserve property from future injury. Courts will not, however, enjoin against a mere speculative or possible injury. Instead, a reasonable probability of the injury resulting must be shown. Hence, if defendant has neither done nor threatened any wrongful acts, and denies his intention to do the acts against which an injunction is sought, it will be refused. On the other hand, if plaintiff shows that defendant has threatened to do acts of the kind which equity enjoins, that is enough to rest his case upon." 5 Pomeroy's Eq. Jur. § 501. It is hardly necessary, therefore, to suggest that the solitary facts that plaintiff owns a tract of uninclosed land, and the defendant a herd, or it may be herds, of sheep, which might possibly be driven upon plaintiff's land, are not enough to justify the interposition of equity through its "strong arm" to prevent such possible trespass. If that ground should be held sufficient, then every landowner might apply for an injunction to restrain every stock grower in his more or less extensive neighborhood from willfully turning his stock upon the former's uninclosed land, though there may have been no acts of the kind either committed or threatened.

It appears by the evidence in this case that the plaintiffs in error own lands on Powder river, a stream running in a northerly direction, about 8 or 10 miles west of the western boundary of the alleged range of the plaintiffs; that the open range on the west side of said river has been used by the plaintiffs in error and other sheep owners for the purpose of grazing their herds; and that the

plaintiffs in error at least had also for a year or more enjoyed as grazing grounds the lands east of the river embraced within ranges 77 and 76, in the locality in question. It will be remembered that the petition alleged that the open country in those ranges had been abandoned to the defendants by the plaintiffs. It also appears by the evidence, the same being admitted by one or more of the witnesses for plaintiffs below, that these plaintiffs in error in 1901, apparently without objection, drove and grazed their sheep upon a part of the range claimed by the defendants in error, presumably the public lands, there being no statement or showing to the effect that they had at any time prior to the commencement of the suit gone upon any of the tracts owned by either of the plaintiffs. The evidence discloses that immediately before the commencement of this suit the plaintiffs in error, and the other defendants, were grazing their several bands of sheep on the east side of Powder river, and gradually working in the direction of the territory described in the petition, and that they had severally declared a purpose of going into that territory for the purpose of grazing their sheep upon the lands therein located. Nothing but the most general declarations of an intention to take their sheep into the territory or on the range aforesaid were shown. And those declarations were qualified as to time; the statements being that the sheep would be taken into the territory in question as soon as snow fell. No defendant was shown to have uttered any threat at any time to depasture or enter upon any private ground. It appears that upon nearly all the tracts of private lands signs had been posted forbidding trespass thereon, though, owing to the rolling character of the country, the sign on a particular tract might not be visible from every part thereof; and, further, that it was a matter of common knowledge in the neighborhood that the watering facilities within the territory aforesaid were located on private lands. Moreover, one of the plaintiffs in error testified that he knew the location of the private tracts, and had instructed his employees not to go upon them. To construe the declared intention of the defendants of going upon the range, which consisted so largely of public lands, as a threat to depasture or trespass upon the private lands, is unreasonable. In this case we have a scope of country covering 20 townships, with but occasional and widely separated sections containing private land; and the latter is designated by signs, and many of them are well known because containing water holes or other facilities for watering stock. We are of the opinion that a statement of an intention to go into that country with sheep for grazing purposes cannot be construed as a threat to wrongfully take the sheep upon any part of the private lands. It is not to be presumed that the defendants intended to commit a wrong. Having a right to go up-

on the greater part of the range, their expressed intention to go there must be taken as referring to such parts of the territory as it would be lawful for them to occupy. Upon the basis of previous threats, therefore, the evidence is clearly insufficient to justify an injunction restraining the plaintiffs in error from trespassing upon the private lands. And this is especially true from the fact that the threats were to go on the range after snow fell; the idea evidently being that the snow would render other watering facilities unnecessary.

But it appears that the plaintiffs in error, notwithstanding the temporary restraining order, did in fact, after the commencement of the suit, and some time in January, 1903, take several bands or herds of their sheep, each herd containing 2,500 to 3,000 head, into a part of the territory in question, and grazed them there for a period of six weeks at least, and that in March of the same year they took said sheep out of that territory, and, though the case was tried in 1904, there is nothing in the evidence to show that they returned to any part of that range, or threatened to return. During the period that they were on the range, they grazed in a district about 12 or 14 miles north and south, and 10 or 11 miles east and west, in townships 46, 47, and 48 in ranges 74 and 75; the said six townships being located in the northwestern part of the plaintiffs' alleged range. It does not appear that they invaded any other part of the territory, which consisted, as above stated, of 20 townships at least. In grazing their sheep, a herd would be kept in one locality while the pasturage was sufficient, and then moved along. Hence, so far as the evidence discloses, no tract of land was entered more than once, though a herd may have been kept thereon several days. While there are some general statements in the testimony of two or three witnesses to the effect that the plaintiffs in error, on the occasion aforesaid, depastured the private lands within the district above mentioned, we think the evidence insufficient to show that more than two of the private tracts were entered upon. Witnesses testify to seeing a herd of sheep belonging to plaintiffs in error, while under the control of a herder, upon section 36 in township 46, range 74, upon which tract there was no warning sign to indicate its private ownership, and the sheep remained some days upon that section, and then were moved away. Another witness testified that he saw a herd of sheep upon another school section, but he was not asked to locate it, and did not do so. If the sheep had gone upon or depastured other tracts of private land, we think it could have been shown by testimony more satisfactory than the general statements found in the testimony. But let it be conceded that the private lands embraced in the district grazed over were depastured by the sheep of plaintiffs in error. It would

then appear that but a single trespass was committed upon such lands, without any threat of continuance, and without any showing of permanent injury. On the contrary, it is established that the plaintiffs in error thereupon left the range, and presumably did not return. Further than that, the private lands within the particular district so grazed over constitute but a fraction of all the private lands; and there is no showing that plaintiffs in error went upon any of the other lands or threatened to do so. It does not appear that after the commencement of the suit, or at any other time, they were within several miles of many of the tracts of private land, nor upon any tract of some of the individual owners. For instance, the evidence does not show that the sheep of plaintiffs in error were within the township embracing the lands of Frank Smith, one of the plaintiffs below. There is no allegation or showing of insolvency on the part of plaintiffs in error. Again, it appears that the latter own cattle which run at large upon the range in question, and there is no reason apparent for requiring them to prevent such cattle from straying upon the uninclosed grounds of private owners, which we think the judgment attempts to do. Upon the facts aforesaid we fail to perceive any sound reason for the perpetual injunction even as to the lands held by private ownership. Within the well-settled principles of equity jurisdiction in restraining trespass to realty it seems to us that the showing made is clearly inadequate.

There exists, however, another, and, if possible, more vital, objection to the judgment in respect to the private lands; and that is the misjoinder of the plaintiffs below. Had there been a good cause of action on the theory of the petition to restrain the defendants from entering upon the open range jointly occupied by the plaintiffs, irrespective of the ownership of the lands, it seems probable that the joinder of the plaintiffs might have been held proper. But, when the relief sought is confined to the several widely separated tracts of land owned, respectively, by one or other of a few only of the plaintiffs, the case takes on quite a different aspect. We are aware that the rule allowing numerous separate claimants to join in equity against a single defendant, or a single plaintiff to sue several defendants, is broad and liberal. But there must be some sort of community of interest in something. Mr. Pomeroy says that the weight of authority is overwhelming permitting the exercise of jurisdiction in such cases, not only where there is a common title, or community of right or interest in the subject-matter among the individuals joined, but where, without such common title, or community of right or interest in the subject-matter, there is a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each indi-

vidual member of the numerous body. And, though generally in the cases so holding the community of interest in the questions at issue and in the kind of relief sought has originated from the fact that the separate claims of all the individuals composing the body joined arose by means of the same unauthorized, unlawful, or illegal act or proceeding, the learned author asserts that even that external feature of unity has not always existed, and is not deemed essential. Pomeroy's Eq. Jur. (3d Ed.) § 269. It is unnecessary for us to decide whether the plaintiffs could have properly joined to restrain trespasses by the same defendant upon different widely separated premises owned by them, respectively, within a more or less definite territory. Here five only of the plaintiffs are alleged or shown to own any land, and though there is an endeavor in the petition to show cause for the single suit as to the private property by alleging that certain of the plaintiffs together with the owner are jointly in possession, at least three of the plaintiffs are not connected with those allegations. The evidence, however, fails, in our opinion, to show the joint possession alleged. It appears that such allegations are based solely upon the fact that the various individual plaintiffs allow their separately owned cattle and horses to run at large and range upon and over the same territory, that such animals are rounded up together, and that the respective owners of private lands on the range permit the stock of the other plaintiffs to feed and water at will upon their uninclosed premises. And it may be that there is an arrangement of some character in reference to the last mentioned matter, but the evidence as to such an arrangement is most general and quite unsatisfactory; one witness merely responding in the affirmative when asked if there was an arrangement to that effect. Those facts do not in our opinion show a joint possession by the plaintiffs of any individual tract of land owned by some one of the plaintiffs. We observe nothing in the evidence that would prevent any private owner from fencing in or otherwise exercising exclusive control of his own premises at any time if he should choose to do so. We do not think any other plaintiff could legally call him to account for such action upon any fact disclosed by the testimony in this case. We are not convinced that the mere fact that a landowner allows his premises to remain open and accessible to cattle roaming at large, while he offers no objection to the cattle of his neighbors going thereon to graze, or perhaps tacitly acquiesces in such trespass, has the legal effect to place the owner or owners of the roving cattle in joint possession of the premises with the owner. The land of at least two of the five private owners was not trespassed upon, nor were there any threats of trespass thereon. It is not perceived how they are interested in a community sense in the settlement of the controversy growing out of a

trespass upon land of a different plaintiff or a threat to commit such trespass. And moreover the different tracts trespassed upon, if more than one, were trespassed upon at different times.

The question of misjoinder of plaintiffs was first raised by demurrer, which was overruled, and afterwards by answer. Treating the case as one to enjoin trespass upon the private lands, we are satisfied that the plaintiffs were improperly joined. There is an entire absence of testimony to show any actual or threatened pollution of the water upon any of the lands of any of the plaintiffs. The evidence is that the waters were not polluted. There is a conflict in the evidence as to whether a herd of sheep will pollute a watering place if allowed to water there. But, as there had been no threats on the part of plaintiffs in error to water their sheep on the land of plaintiffs, and no satisfactory proof that they did so, and they having departed from the vicinity of such lands and watering places in March, 1903, it is not material, we think, what may be the usual effect upon a body of water of allowing sheep to drink there.

The judgment will be reversed and vacated, and the cause remanded to the district court to enter judgment in favor of the plaintiffs in error for costs, and dissolving the temporary restraining order.

BEARD and VAN ORSDEL, JJ., concur.

DIEFENDERFER, Mayor, et al. v. STATE
ex rel. FIRST NAT. BANK OF
CHICAGO, ILL., et al.

(Supreme Court of Wyoming. Jan. 6, 1906.)

1. MUNICIPAL CORPORATIONS—BONDS—CERTIFICATE OF LEGALITY—BY WHOM SIGNED.

Rev. St. 1899, §§ 1719-1724, authorize the mayor and council of any incorporated city or town to issue refunding bonds, etc.; section 1724 providing that "the mayor and council of any city or town desiring to issue bonds in pursuance of this chapter shall provide by ordinance therefor, which said ordinance shall not conflict with the provisions or requirements of this chapter." *Held*, that prior to the passage of Laws 1905, p. 145, c. 94, requiring the city or town clerk to sign the certificate of legality required by constitutional provision to be indorsed on bonds issued by a county, township, etc., and to be signed by the county auditor "or other officer authorized by law," a city or town issuing bonds under authority of said sections 1719-1724 had power to provide by ordinance what officer of the municipality should sign such certificate of legality.

2. SAME—CONSTITUTIONAL LAW.

A municipal ordinance providing what officer of a municipality shall sign the certificate of legality to be indorsed on municipal bonds issued under authority of Rev. St. 1899, §§ 1719-1724, is a provision of "law," within the constitutional requirement that such certificate shall be indorsed on the bond of any county, etc., to be signed by the county auditor or other officer "authorized by law."

3. SAME—NOTICE OF REFUNDING—NECESSITY—SUFFICIENCY OR REGULARITY.

Under Rev. St. 1899, §§ 1719-1724, authorizing the issuance by any incorporated city or

town of refunding bonds, etc., and requiring notice of the redemption of outstanding bonds to be given as provided by law or the ordinances of such city or town, the legality of the new bonds does not depend on the sufficiency or regularity of the notice calling in the outstanding bonds.

4. APPEAL — JUDGMENT — MODIFICATION — MATTERS SUBSEQUENTLY OCCURRING.

While the question whether a judgment challenged on error is erroneous or not is to be determined on the facts disclosed by the record and as they existed at the time of the rendition of the judgment, an appellate court may, in the interest of justice, take notice of matters occurring since the judgment, and may vacate the same, though valid when rendered and free from error, considered in relation to the facts as then existing, and remand the cause.

5. COSTS — APPEAL — MODIFICATION OF JUDGMENT.

Where, on writ of error, the judgment is modified, not as the result of error therein, but because of changed conditions, plaintiffs in error are not entitled to recover costs in the appellate court.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 892-899.]

On rehearing. Judgment modified, and, as modified, affirmed.

For prior report, see 80 Pac. 667.

POTTER, C. J. This is a suit in mandamus to compel the issuance and delivery of certain refunding bonds of the town of Sheridan to the relator, the First National Bank of Chicago, in accordance with its accepted bid for their purchase, and pursuant to a town ordinance providing for such bonds. The suit was brought against the town, its mayor, clerk, and treasurer, and the individual members of the town council. The defenses interposed by the several defendants were practically the same, and are set out in the former opinion. 80 Pac. 667. They were not personal to the officers of the town, but were based upon the proposition that no duty or obligation rested upon the town toward the relator in respect to the bonds. The main issue presented by the answer was whether a valid contract had been entered into between the town and relator for the sale and purchase of the bonds. The trial court decided the cause in favor of the relator, and on November 15, 1904, entered judgment requiring the bonds to be issued and delivered to the relator and to bear date January 1, 1905. Shortly after the rendition of judgment the town council, over the veto of the mayor, adopted a resolution affirming the contract with the relator, and directing the issuance and delivery of the bonds to the relator bank in accordance with the contract and the judgment entered in this cause, and providing that the bonds be dated January 1, 1905, as required by the judgment. For the other particulars of that resolution we refer to the former opinion. Notwithstanding such resolution, the mayor, clerk, and one member of the council, on December 29, 1904, brought this proceeding in error to review and reverse said judgment, making the other defendants below parties here as de-

fendants in error, together with the original plaintiff below. Upon the ground that, in consequence of the resolution aforesaid adopted subsequent to the judgment, the matter in issue had been practically settled between the interested parties, and that there had ceased to be any controversy between them, we sustained a motion to dismiss the proceeding in error. In doing so we gave our reasons at length, and endeavored to show that neither the proposed bonds nor the contract for their sale to relator would be illegal, and therefore there was no ground for interfering with the judgment. Within the time allowed by the rules, a petition for rehearing was filed by the plaintiffs in error. By consent of parties, after the same had been argued, a rehearing was granted, in order that the motion to dismiss and the case itself might be submitted together. The motion and the cause upon the merits were thereupon submitted to the consideration of the court; the defendant in error the bank not waiving any point presented by its motion. Upon reconsideration we entertain no doubt of the conclusion, reached upon the previous hearing, that every matter in controversy brought into the case by the pleadings and determined by the judgment was put beyond further controversy, as against all the defendants below, by the resolution of the town council to abide by the judgment and directing its officers to perform the mandate of the court in the premises. In addition to the authorities cited in the former opinion we cite the following: *Commissioners v. Sellev, 99 U. S. 624, 25 L. Ed. 333; Little v. Bowers, 134 U. S. 547, 10 Sup. Ct. 620, 33 L. Ed. 1016; Washington & Idaho R. Co. v. Coeur D'Alene R. & N. Co., 160 U. S. 103, 16 Sup. Ct. 239, 40 L. Ed. 355; Thompson v. U. S., 103 U. S. 480, 26 L. Ed. 521.* We regard it unnecessary to again generally discuss the questions considered in the former opinion. But as to one or two statements contained in that opinion counsel have most courteously, but persistently, continued to urge their inaccuracy or incorrectness. We deem it advisable, therefore, to refer to them briefly at this time.

In the first place, it is contended that the provision of the town ordinance requiring the mayor to sign the certificate of legality upon the bonds was not a sufficient compliance with the constitutional provision that such a certificate shall be indorsed upon the bond of any county, or of any township, or other political subdivision, to be signed by the county auditor or other officer authorized by law. The point maintained is that the ordinance is not a "law" within the meaning of that constitutional requirement. There is no officer known as "county auditor"; and by act of the Legislature the officer to sign such certificate upon county and school district bonds had been designated; but, until February, 1903, no act of the Legislature named any officer to sign the certificate

upon bonds of a city or town. By an act of 1905 the city or town clerk is required to sign the same. Laws 1905, p. 145, c. 94. We said, in the other opinion, that the town was no doubt authorized to designate the officer to sign the certificate when the ordinance and resolution were adopted, and that statement was made in view of the absence of any specific regulation on the subject by the Legislature; and we also said that we knew of no reason why the town council might not have required the mayor to sign, in addition to the signature of any other officer required to sign by statute. We are not here called upon to decide whether the constitutional provision applies to cities and towns; but we are conceding, without deciding, that it does. The statute under which the bonds in question were to be issued provides that "the mayor and council of any incorporated city or town, for the purpose of redeeming, funding or refunding any indebtedness, bonded or otherwise, of such city or town, when the same can be done at a low rate of interest, or to the profit and benefit of the city or town, may issue the negotiable coupon bonds of such city or town." Then follow certain provisions respecting the denomination, the interest, date of maturity, place of payment, and other particulars with reference to said bonds; and the last section of the chapter, now known as section 1724, Rev. St. 1899, provides: "The mayor and council of any city or town desiring to issue bonds in pursuance of this chapter shall provide by ordinance therefor, which said ordinance shall not conflict with the provisions or requirements of this chapter." Now, the Legislature not having itself designated, in that chapter or otherwise, the officer to sign the certificate of legality upon the bonds authorized to be issued, and having expressly delegated to the corporate authorities of the town power to provide by ordinance for the issuance of such bonds, it is evident that the corporate authorities were possessed of full authority to adopt all proper and reasonable ordinances not in conflict with the statute to carry into effect the power granted, and to render the bonds which they were authorized to issue valid and obligatory, and that the provision of the ordinance requiring the mayor to sign the certificate of legality upon the bonds was not in conflict with any legislative provision or requirement. Can there be any question but that, if the act authorizing the issuance of such bonds had merely provided that a city or town might provide by ordinance therefor, without making specific provision in the act itself as to the denomination, place of payment, interest, or manner of execution, that the council might, by ordinance, make all provisions necessary to the proper execution and exercise of the power conferred? The ordinance upon the subject, having been adopted pursuant to legislative authority, was a "law" within the meaning of the constitutional pro-

vision. It has been generally held that a municipal ordinance is a "law," within the meaning of the federal Constitution declaring that no state shall pass any law impairing the obligation of contracts. *McQuillin*, Mun. Ord. § 233. In *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 8 Sup. Ct. 741, 31 L. Ed. 607, it was said by the court: "So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the Legislature to the corporation as a political subdivision of the state, having all the force of law, within the limits of the municipality, that it may properly be considered as a law within the meaning of this article of the Constitution of the United States." There can be no doubt, therefore, in our opinion, that until the enactment of the act of 1905 above referred to a city or town issuing bonds under authority of the provisions now contained in sections 1719-1724, Rev. St. 1899, had ample authority to provide by ordinance what officer of the municipality should sign the certificate of legality to be endorsed thereon; and that such provision is a provision of law within the sense of the section of the Constitution referred to.

It appears that our previous reference to the sufficiency of the November and December, 1904, resolutions of the town council to provide the method of notifying the holders of the outstanding bonds to present them for payment and cancellation was a misconception of the language of those resolutions. The treasurer was thereby required to give such notification as provided by ordinance, but no such provision had been made by ordinance; and the statute requires the notice to be given as provided by law or ordinance. It may be, therefore, that as against an unwilling holder of the outstanding bonds, their presentation for cancellation could not have been enforced without further action on the part of the council. But the question is immaterial. The legality of the new bonds would not depend upon the sufficiency or regularity of the notice calling in the outstanding bonds; and if such notice was irregular or insufficient it would not affect the right or obligation of the town to issue and deliver the new bonds to the relator, upon its providing the purchase price. Moreover, it is immaterial for a further reason. The relator has secured possession of all the outstanding bonds, and is willing and ready to deliver them to the town, upon receiving the new bonds to which it is entitled under its contract and judgment; and it is not questioning the sufficiency of the notice.

While we think that the conclusion arrived at in the former opinion is sustained upon principle and authority, and that this court might properly dismiss the proceeding in error for the reasons stated in that opinion, we are inclined to otherwise dispose of the case on account of events happening

since the judgment, the cause itself having been submitted for our consideration, as well as the motion to dismiss; and the grounds of that motion can be considered in making a disposition of the cause on its merits. We have been furnished authentic evidence of circumstances and events, since the judgment, official and otherwise, that make a modification of the judgment desirable to expedite and render convenient the carrying of the same into execution. It is, of course, true that the question whether a judgment challenged on error is erroneous or not is to be determined upon the facts disclosed by the record, and as they existed at the time of the rendition of the judgment. But it has frequently been held that in the interest of justice an appellate court may for various purposes take notice of matter occurring since the judgment. A judgment, not only valid when rendered, but free from error, considered in relation to the facts as they then existed, may even be vacated, and the cause remanded for proper proceedings, on account solely of something that transpired after it was rendered. *Ransom v. City of Pierre*, 101 Fed. 665, 41 C. C. A. 585. The rule is stated in *Ridge v. Manker*, 132 Fed. 599, 67 C. C. A. 596, as follows: "An appellate court may avail itself of authentic evidence outside of the record before it of matters occurring since the decree of the trial court, when such course is necessary to prevent a miscarriage of justice, to avoid a useless circuitry of proceeding, to preserve a jurisdiction lawfully acquired, or to protect itself from imposition or further prosecution of litigation, where the controversy between the parties has been settled, or for other reasons has ceased to exist." And several cases are there cited in support of that statement of the principle. And so it would seem that, if it had become impossible by reason of the delay occurring since the rendition of judgment to obey its mandate strictly, it might be properly vacated and remanded for modification. That seems to be the situation here; or, to be more accurate, a doubt has arisen, as a result of delay occasioned by this appeal and the refusal of the mayor and clerk to execute the bonds, as to whether they can now lawfully be executed as of the date prescribed in the judgment, owing to the fact that the terms of office of the then mayor and clerk have expired and others have succeeded them. This doubt has been increased by the passage of the act of 1905, after the judgment, requiring the town clerk to sign the certificate of legality; whereas neither the ordinance nor judgment placed that obligation upon him. In view of that doubt it might be necessary, in case of affirmance of the judgment as it stands, or the dismissal of the proceeding in error, for the institution of new actions to obtain a new writ modifying the previous mandate in some particulars.

Other circumstances have also arisen, not only since the judgment, but since the handing down of the previous opinion, that change

the situation in respect to some important details. We adverted, in the former opinion, to the deposit by the relator in a New York bank of the purchase price of the bonds at the request of the treasurer, which sum was so deposited to facilitate the payment and cancellation of the outstanding bonds that were all payable at such New York bank. Though the accuracy of our reference to such deposit is questioned, what we then said is substantially true. It appears that the amount of the purchase price of the bonds, viz., \$75,000, was deposited, on December 30, 1904, by the relator in the Chemical National Bank of New York City, together with the interest due on the outstanding bonds; the latter amount having been furnished the relator for that purpose by the town treasurer. It may be a matter of dispute whether the \$75,000 was deposited to the credit of the town. So far as the question now before us is concerned it is immaterial, and we need not determine the fact as to that matter. It is at least uncontroverted that instructions were given to the New York bank to take up the outstanding Sheridan water bonds, which were proposed to be refunded with the money so deposited, and that the deposit and directions aforesaid were made at the request of the town treasurer. It appears that the money, or the balance thereof from day to day, was allowed to remain in said bank, until March 4, 1905, up to which time bonds aggregating \$29,500 had been presented and taken up out of said deposit. On the date last mentioned the relator directed the transfer of the balance of the \$75,000 to its New York correspondent; and the manager of relator's bond department deposes that the Chemical Bank was notified that the relator would be ready at any time to take up any of the remaining bonds if presented, and it is further shown without contradiction that the relator did afterwards succeed in obtaining the remainder of the bonds, and it now holds the same.

It is contended, on behalf of plaintiffs in error, that the relator merely bought the outstanding bonds on its own account, and now holds them as the owner thereof. The relator maintains that it took them up as agent for the town, at the treasurer's request, and that they are now held in trust for the town. We do not propose to pass upon that disputed matter. It is unnecessary that we attempt to reconcile the several statements where they are conflicting, or that we determine the legal effect of the act of the relator in the premises, any further than it may affect the disposition of the present case. In this case, and for the purposes of this case, the relator is bound by its own evidence, the declarations of its officers, and its own conduct; and the town is likewise bound by the solemnly adopted resolutions of its council. Without, therefore, deciding whether or not the conduct of the relator in the premises would render it accountable as an agent or trustee of

the town in its possession of the former issue of bonds, or what the legal effect of the situation might be if properly brought into controversy, it is sufficient to say that in this case the bank acknowledges that it holds said bonds in trust for the town, and declares that it is ready to deliver them to the town upon receiving the new bonds according to its contract. And in that connection it appears that at a meeting of the town council October 2, 1905, by unanimous vote of the members of the council present, but without the approval of the mayor, a resolution was adopted reciting the resolutions of November 21, and December 19, 1904, and that the First National Bank of Chicago (the relator herein), has possession of the water bonds of the town amounting to \$75,000, issued August 1, 1893, for the taking up of which the refunding bonds in question were directed to be issued, and reciting, further, that Metz & Sackett, the attorneys for said bank, were present at said council meeting and represented to the council that said bank was ready to deliver all of the aforesaid outstanding water bonds upon the execution of the refunding bonds in accordance with the mandate of the district court and the decision of the Supreme Court, and that it made no difference to said bank what date the said bonds bore, so long as the date is January 1, 1905, or later, and that the bank obtains its interest according to contract. And it was thereupon resolved that the said refunding bonds be issued and delivered to said bank, in accordance with the ordinances and resolutions of the town and the mandate of the court; that they be dated according to the previous resolution of the council, "or as soon as may be"; that the mayor, clerk and treasurer be and are hereby directed to proceed to issue said bonds, and sign, seal, certify, and deliver the same to said bank, upon the surrender by said bank to the proper town officer of the outstanding water bonds now held by it, "in all respects in accordance with said resolution and the ordinances of the town of Sheridan, all of which resolution and ordinances are hereby affirmed and approved, and in accordance with the laws of Wyoming; and the said officers of said town are hereby directed to do any and all acts and things necessary to a complete issuance and delivery of said \$75,000 of refunding water bonds for the purposes aforesaid." It moreover appears, by uncontroverted showing, that at such council meeting the said attorneys for the relator bank made the statement and proposition as set forth in the resolution aforesaid.

Should the judgment be affirmed in all respects as it stands, a possibility exists that, contrary to the reasonable expectation of the parties at the time, resulting from the delay and a failure perhaps to regularly call in the old bonds for cancellation, the town might have two sets of bonds outstanding drawing 6 and 5 per cent. per annum respectively, if the view is correct that the bank holds the

old bonds as a purchaser, and not as trustee for the town, and the new bonds were to be dated January 1, 1905. But upon the representations of the parties, respectively, and the affidavits presented by them, the bank is not in a position here to insist upon receiving any greater interest than would have accrued upon the new bonds had they been issued, viz., 5 per cent. per annum; and it has filed a written consent herein that an order may be entered for its surrender of the old bonds, upon the delivery to it of the refunding bonds, and that the latter may be dated January 1, 1906, in which event it shall be paid interest on \$75,000 for one year—from January 1, 1905, to January 1, 1906—at the rate of 5 per cent. per annum by the town of Sheridan; and by the resolution of the council of October 2, 1905, it was in effect consented that the new bonds might be dated later than the date fixed by the judgment of the district court and the resolutions of November and December, 1904. Upon the whole case, therefore, we are of opinion that the plaintiffs in error are not in a position to complain of the judgment appealed from. Under ordinary circumstances the proceeding in error might be dismissed, or the judgment affirmed. We may also, we think, modify it to make it conform to existing conditions. And the cause was submitted upon rehearing with the understanding of all parties that the court might conclude to modify the judgment if it deemed itself to have jurisdiction. We think that, in view of the present situation, the bonds should be dated January 1, 1906; that the bank should receive the same interest for the past year that it would have received had the refunding bonds been issued and delivered; that it should surrender the old bonds, with the unpaid coupons thereon, for cancellation, upon receiving the refunding bonds duly executed and the interest as aforesaid; that the mayor and clerk should both sign the certificate of legality to conform to both the ordinance and statute; that the town and its officers who have any duty to perform in the premises should be ordered to proceed without delay to issue and deliver said refunding bonds, and upon such delivery and the payment of interest for one year on \$75,000 at 5 per cent. per annum as aforesaid the bank should surrender the old bonds.

The judgment will be modified to conform with the above suggestions, and in other respects it will be affirmed. The modification is not the result of error in the judgment, but of changed conditions, and therefore the plaintiffs in error are not entitled to recover their costs in this court. On the contrary, the modification arises in consequence of the delay caused by the appeal. So far as costs are concerned, the case stands as though the judgment had been affirmed, or the proceeding in error dismissed. The costs in this court will therefore be taxed against the plaintiffs in error.

FOREE v. STATE.

(Supreme Court of Wyoming. Jan. 6, 1906.)

1. CRIMINAL LAW—PROCEEDINGS IN ERROR—DISMISSAL.

A failure to serve the Attorney General with summons in error issuing out of the Supreme Court in a criminal case, as required by Sess. Laws 1901, p. 65, c. 63, within the time allowed for commencing the proceedings in error, is ground for dismissal.

2. SAME — WAIVER OF STATUTORY REQUIREMENTS.

An acceptance of service of a brief by the Attorney General did not amount to a waiver of the requirement of Sess. Laws 1901, p. 65, c. 63, that summons in error in criminal cases issued out of the Supreme Court must be served upon the Attorney General.

3. SAME—PROCEEDINGS IN ERROR—PRACTICE—SUMMONS—FAILURE TO SERVE—MODE OF OBJECTION.

Where a petition in error in a criminal case was filed in the proper time and its sufficiency was not attacked, but summons in error was not served on the Attorney General as required by Sess. Laws 1901, p. 65, c. 63, within the time limited for commencing the proceedings, objection because of such failure was properly raised by motion to dismiss, instead of by demurrer.

4. SAME—DISMISSAL—OBJECTIONS.

Sess. Laws 1901, p. 65, c. 63, provides that, in all criminal cases, within one year after judgment proceedings to vacate or modify it may be begun in the Supreme Court by "petition in error," and that summons in error shall be served upon the Attorney General. *Held*, that it was no objection, to a motion to dismiss proceedings commenced by petition in error because summons had not been served on the Attorney General within the time limited for commencing the proceedings, that defendant was entitled to a writ of error against which there was no limitation.

Error to District Court, Sheridan County; Joseph L. Stotts, Judge.

Earl Foree was convicted of arson, and he brings error. Motion to dismiss for the reason that summons in error had not been served upon the Attorney General within one year from the entry of final judgment. Motion sustained.

Metz & Sackett and S. T. Corn, for plaintiff in error. E. E. Lonabaugh and D. C. Wenzell, for the State.

BEARD, J. The plaintiff in error, Earl Foree, was convicted in the district court of Sheridan county, January 4, 1904, of the crime of arson, and sentenced to imprisonment in the penitentiary. On the same day a motion for a new trial was denied by said court. On January 3, 1905, a petition in error was filed by the plaintiff in error in this court, but no præcipe for summons in error was filed until January 10, 1905, when a præcipe was filed requesting the clerk of this court to issue a summons in error directed to the sheriff of Sheridan county. Summons in error was issued January 10, 1905, as directed, and service thereof was accepted by the county and prosecuting attorney of Sheridan county January 12, 1905. No service of summons in error was ever made upon the Attorney General of the state. On Feb-

ruary 4, 1905, the Attorney General accepted service of the brief of plaintiff in error, which acceptance of service was filed February 8, 1905. On April 8, 1905, the Attorney General, appearing specially for that purpose only, filed a motion to dismiss the action for the reasons that no summons in error had ever been served upon him, that he had not waived the service of summons, and that more than one year had elapsed since the entry of final judgment and the overruling of the motion for a new trial by the district court of Sheridan county.

Section 1, c. 63, p. 65, Sess. Laws 1901, provides: "In all criminal cases after final judgment and within one year after the rendition of the judgment, proceedings to vacate, modify or annul such judgment, may be begun in the Supreme Court by petition in error in the same manner as is provided for taking civil cases to the Supreme Court under the laws of this state." Section 2 of said chapter provides that "summons in error in criminal cases issuing out of the Supreme Court shall be served upon the Attorney General of the state and the prosecuting officer of the county in which the judgment is rendered." No præcipe for summons in error having been filed or summons issued or served upon the Attorney General within one year from the rendition of the judgment, and service of summons not having been waived by him, the proceeding in error was not, in law, commenced within the meaning of the statute, and it is now too late to do so, as the time for so doing has expired. It is contended, however, that the acceptance of service of the brief by the Attorney General amounted to a general appearance in the case. But we think it did not. The acceptance of service contains no waiver of any kind, and is simply an acknowledgment in writing by the Attorney General that the brief had been served upon him, and stands in the place of other evidence of service and nothing more. The failure to serve both the Attorney General and the prosecuting officer of the county in which the judgment is rendered (unless waived) within the time allowed for commencing proceedings in error is a sufficient ground for dismissal. *Caldwell v. State*, 12 Wyo. 206, 74 Pac. 496.

It is urged that the question presented by the motion should have been raised by demurrer, and not by motion. The petition in error was filed in time, and its sufficiency is not attacked. The reason for dismissal, as presented by the motion, is that the appeal (and we use the word "appeal" in the sense in which it is used in the case above cited) had not been perfected within the time allowed by the statute, and in such cases it has been the uniform practice in this state to raise the question by motion to dismiss. *Lannier v. Haase & Finn*, 1 Wyo. 25; *Selbel v. Bath*, 5 Wyo. 409, 40 Pac. 756; *Kuhn v. McKay*, 6 Wyo. 466, 46 Pac. 853; *Caldwell v. State*, supra.

It is also argued at length "that the defendant as a matter of right is entitled to a writ of error in this cause, and against which there is no limitation in this state." The argument is that the Legislature, by the act of 1901 (chapter 63, p. 65, Sess. Laws 1901), provided a new and additional method by which criminal cases could be taken from the district court to the Supreme Court on error, and did not, and could not under our Constitution, abolish writs of error, and that it was not the intention of the Legislature to simply change the method of applying for and securing a review of the judgment of the district court, but to provide another and additional method for review, namely, by petition in error. If we were to assume that this contention is correct, which we do not do, we do not see how it can benefit the plaintiff in error in this case. If there are two methods by which he can have his case reviewed upon error in this court, he has elected which one of the two he would pursue, and, having failed to bring his case within the time required for that method, the fact that, possibly, he may have another remedy, can hardly be regarded as a good reason for not dismissing the present case for such failure. The case before us is not an application for a writ of error, but a petition in error; and, not having been commenced within the time prescribed by the statute, the motion to dismiss must be sustained.

Motion to dismiss sustained.

POTTER, C. J., and SCOTT, District Judge, concur. VAN ORSDEL, J., having announced his disqualification by reason of having been Attorney General, Hon. Richard H. Scott was called in to sit in the case.

STATE ex rel. BANK v. TAYLOR, Justice of the Peace.

(Supreme Court of Montana. Jan. 9, 1906.)

APPEAL—RECORD—ENTRY OF JUDGMENT.

Appeal from final judgment will be dismissed, the rendition and entry of the judgment appearing only from a copy of the notice of the appeal in the record, so that the record does not show jurisdiction of the appeal, as Code Civ. Proc. § 1736, requires the record on appeal from a judgment to contain a copy of the judgment roll, which, under section 1176, must contain a copy of the judgment, and under section 1722, as amended by Laws 1890, p. 146, an appeal does not lie till the judgment has been entered.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2285, 2286.]

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

Application by the state, on relation of Simon Bank, for writ of prohibition to Cornelius Taylor, justice of the peace in and for South Butte township, in Silver Bow county. From an adverse judgment, defendant appeals. Dismissed.

Jas. H. Baldwin, for appellant. H. L. Maury and M. T. Canning, for respondent.

BRANTLY, C. J. Appeal from a final judgment rendered by the district court of Silver Bow county upon an application for a writ of prohibition to Cornelius Taylor, the justice of the peace of South Butte township in said county. That final judgment was in fact rendered and entered by the district court appears only from a copy of the notice of appeal found in the record.

On appeal from a judgment the record must contain a copy of the judgment roll. Code Civ. Proc. § 1736. There can be no judgment roll without a copy of the judgment. Code Civ. Proc. § 1176. Nor does an appeal lie until the judgment has been entered. Code Civ. Proc. § 1722, as amended by Laws 1890, p. 146. It therefore does not appear from the record that this court has jurisdiction to review and dispose of the cause on its merits, and the appeal must be dismissed. *Lisker v. O'Rourke*, 28 Mont. 129, 72 Pac. 416, 755, and cases cited.

The appeal is dismissed.

Dismissed.

MILBURN and HOLLOWAY, JJ., concur.

STATE ex rel. LOTT v. DISTRICT COURT OF FIFTH JUDICIAL DIST. FOR MADISON COUNTY et al.

(Supreme Court of Montana. Jan. 3, 1906.)

1. JUSTICES OF THE PEACE — EJECTMENT — JURISDICTION — CERTIFYING CASE TO DISTRICT COURT.

A complaint filed in a justice of the peace court, if stating a cause of action in ejectment, gives the justice jurisdiction for no purpose, so that he cannot confer jurisdiction on the district court by certifying the case to it.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 243.]

2. SAME.

Code Civ. Proc. § 1486, providing that, if in an action in a justice's court it appears from defendant's answer that the question of title to real estate is involved, the justice must certify the case to the district court, and when so certified defendant must file an undertaking to pay costs that may be awarded against him, being the only provision authorizing a case to be certified to the district court by a justice, a case may not be so certified where the bond provided for thereby is not given, or where the action is one in which the question of title to real estate may not be properly raised by the answer.

Application, on the relation of M. H. Lott, for writ of mandate to the district court of the Fifth judicial district in and for the county of Madison, and Hon. Lew L. Callaway, judge of said court. Dismissed.

E. B. Howell, for relator. Clark & Duncan, for respondents.

HOLLOWAY, J. On July 21, 1905, an action was commenced in a justice of the peace court of Madison county by this relator

against Mrs. D. A. Pease and another. The complaint alleges that at all times therein mentioned the plaintiff was the owner in fee simple of certain real estate, which is particularly described; that in November, 1903, plaintiff let the premises to D. A. Pease under a tenancy at will; that D. A. Pease afterwards died and defendants are his sole heirs; that D. A. Pease, and, after his death, the defendants, continued to occupy the premises under said tenancy; that on June 16, 1905, plaintiff terminated such tenancy by giving the notice required by law, and demanded that defendants vacate and surrender the premises; but this the defendants have failed and refused to do, to plaintiff's damage in the sum of \$200. The prayer is for the restitution of the property and for \$200 damages, which it is asked to have trebled in the judgment.

The defendants by answer deny that the relation of landlord and tenant ever existed between plaintiff and defendants; deny that plaintiff has any title or right of possession to the property; plead the bar of the statute of limitations; set up affirmatively title in themselves to the land in controversy; and ask that the cause be certified to the district court, as the determination of the title to real estate is necessarily involved. There was not any bond given as required by section 1486 of the Code of Civil Procedure. A change of venue was taken to another justice of the peace court, and by agreement of the parties the cause was certified to the district court, where the plaintiff paid the filing fee and moved the district court to strike out the defendants' answer, and for judgment. This motion was overruled, and the district court thereupon declined to proceed further with the case and remanded it to the justice of the peace court, there to be proceeded with according to law. The relator thereupon made application to this court for a writ of mandate to compel the district court to set aside its order and proceed to hear and determine the case. An alternative writ with an order to show cause was issued, and upon return the respondent court and judge moved to quash the alternative writ and to annul the order to show cause. Numerous questions were suggested upon oral argument, and are presented in the briefs of respective counsel, which need not be considered; for, upon any theory of the case represented, mandamus will not lie.

1. If the complaint filed in the justice of the peace court be considered as stating a cause of action in ejectment, as held by the Court of Appeal of California in *Hayden v. Collins*, 81 Pac. 1120, then the justice of the peace court never acquired jurisdiction for any purpose, and could not confer jurisdiction upon the district court by certifying the case to that court.

2. Assuming that the complaint states a cause of action in unlawful detainer, then (a) if the question of title to real estate may be

raised in such an action, it is sufficient to say that the bond required by section 1486 of the Code of Civil Procedure was not given, and without it the justice of the peace could not certify the case to the district court (12 Ency. Pl. & Pr. 687, and cases cited); or (b) if the question of title to real estate may not be raised in an action in unlawful detainer, then all these allegations respecting title, as set forth in the complaint and answer, are surplusage and the action is simply one in unlawful detainer, of which the justice of the peace court had jurisdiction, and, having jurisdiction, could not divest itself thereof by certifying the case to the district court; for the only provision of law authorizing a case to be certified to the district court is section 1486, and that refers only to a case where the title to real estate may properly be put in issue by the answer. In any view of the case, the district court did not owe any duty to hear or determine this case, and cannot be coerced by mandamus.

The order to show cause is annulled, the alternative writ is quashed, and the proceedings are dismissed.

Dismissed.

BRANTLY, C. J., and MILBURN, J., concur.

(11 Idaho, 642)

VILLAGE OF SAND POINT v. DOYLE.

(Supreme Court of Idaho. Dec. 30, 1905.)

1. NUISANCE — RELIEF IN EQUITY — COMPLAINT.

Where the complaint alleges the corporate capacity of plaintiff, and that by some threatened act defendant will create a nuisance, or threatens to or is about to commit some act that will endanger the health of the inhabitants of the village or city, or that will result in damage to the property of the city or village, or may be the means of causes of action for damage against the city or village, equity will grant relief.

2. PLEADING—DEMURRER.

Where a complaint states any cause of action that will put the defendant on his defense of the alleged wrongful act, it is not subject to demurrer.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; R. T. Morgan, Judge.

Action by the village of Sand Point against William Doyle. Judgment for plaintiff, defendant appeals. Reversed.

See 74 Pac. 861.

H. H. Taylor and Chas. L. Heltman, for appellant. R. E. McFarland, for respondent.

STOCKSLAGER, C. J. Plaintiff filed its complaint alleging that it is a corporation. It is shown a stream known as Sand creek runs through the village of Sand Point, and that there is a bridge across said stream connecting the streets at either end of the village. This bridge, it is alleged, is 450 feet long, 16 feet wide, inclusive, and 14½ feet in width within the railing, and from 15 to 20

feet high. It is built of wood, and is a principal highway connecting the east with the west side of said creek. It was constructed by Kootenai county years ago, and has along its entire length on both sides substantial wooden railings necessary for the safety of the traveling public. It is alleged that it is necessary that such railings should remain intact and in sound condition; that large numbers of women and children residing in said municipal corporation cross this bridge daily; that the street at each end of this bridge is 50 feet wide, and has been dedicated to the public and accepted by the municipal corporation; that the chairman and board of trustees of said municipal corporation did on or about March 2, 1903, enact an ordinance prohibiting the sale of intoxicating liquors within a distance of 100 feet on the north and south sides of said bridge. This ordinance was published and took effect April 10, 1903, and has never been repealed. The ordinance prohibits the sale of ardent, distilled, fermented, or liquors of any character within the prescribed limits. It is next shown that respondent claims to be the owner of land situated within the ravine through which said stream flows within the corporate limits of appellant, which lot of land touches the right of way upon which said bridge is situated, on the north, 110 feet from the west end of said bridge, and that respondent has constructed a wooden frame building on said lot and is building a platform or bridge from said building over and upon the right of way crossed by said bridge with the intention of connecting said wooden building by said bridge or platform with the floor of said bridge, and that he threatens to tear down and remove the railing upon said public bridge at a point where said platform is extended to connect with the floor of said public bridge, in order to use said public bridge as an outlet from said building; that defendant intends to use said building as a saloon for the purpose of retailing intoxicating liquors to the public therein in violation of the provisions of the municipal ordinance before mentioned; that defendant's said building is from 17 to 20 feet from the railing of said public bridge on the north side; that if defendant is allowed to connect said building with the floor of said public bridge, and remove the railing therefrom, in order to give him an outlet upon said bridge, by reason of the removal of said railing said bridge will become unsafe and insecure for the traveling public and for teams and vehicles; that, if defendant is allowed to conduct a saloon in said building, that portion of the public bridge in front of his saloon will become a loitering place for drunken and idle men, and will be annoying as well as unsafe for the public, especially women and children, to cross the public bridge at said point; that said bridge was erected at considerable cost, and is the principal highway across said creek for the public; that a wooden building will jeopard-

ize the existence of said bridge by reason of probable danger from fire from respondent's wooden building; that plaintiff, prior to the commencement of the construction of said wooden building by defendant, notified defendant that he would not be allowed to construct or maintain a building for saloon purposes, or for any other purpose, along the line of said bridge, but that defendant disregarded said notice and persisted in constructing said building, and still persists in connecting said building with the public bridge, with the intention of using his building for saloon purposes; that said building used as a saloon, with ingress and egress to and from said public bridge, will be a nuisance, especially to the women and children who are daily compelled to pass over said bridge; that on or about July 1, 1903, defendant opened said building and moved a stock of intoxicating liquors therein, and for several days thereafter openly violated said ordinance by retailing intoxicating liquors to the public; that on July 3, 1903, a complaint sworn to and filed was issued by a justice of the peace for said precinct and county charging defendant with violation of said ordinance, and thereupon a warrant of arrest was issued upon said complaint, and defendant pleaded guilty to the charge, and was sentenced to pay a fine of \$100, or be imprisoned in the village jail for the term of 50 days; that thereafter said fine was paid by defendant; that appellant has no adequate remedy at law, and that to allow respondent to maintain a saloon in said building will inflict irreparable injury upon the public, and that it will result in the establishment and maintenance of a nuisance, besides violating the local laws of said municipal corporation and jeopardize the safety of said bridge. This statement is taken from appellant's brief, and is conceded by counsel for respondent to be in the main correct. We think it correctly states the issue presented by appellant's complaint.

To this complaint a demurrer was interposed as follows: "(a) That said complaint does not state facts sufficient to constitute a cause of action in this: (1) That said complaint lacks equity; (2) that it appears from the facts stated therein, and shows on the face of the complaint, that complainant has a complete, speedy, and adequate remedy at law for all the acts complained of, and for all the threatened or apprehended acts complained of; (3) that it appears from said complaint that any injuries which may result from any act alleged to be threatened by defendant or apprehended by plaintiff are mere possibilities and exist only in imagination; (4) that the injuries alleged to be threatened or apprehended are too remote to justify any relief by injunction; (5) that an injunction granted under the circumstances set forth in said complaint would deprive defendant of his property without due process of law, and without compensation; (6) that

said injunction would deprive defendant of his legal right to the reasonable and proper use of a public highway. (b) That the complaint herein is ambiguous, unintelligible and uncertain in this: (7) That the said complaint does not show how the cutting of the rail mentioned in said complaint would in any way weaken or impair the bridge therein mentioned, or how the building of defendant would endanger said bridge from fire in any way, or any more than any other lawfully constructed building of similar character in the vicinity of said bridge, or how it would increase the travel on said bridge any more than if constructed at either end thereof."

On the 17th day of April, 1905, the demurrer having theretofore been submitted to the court, a judgment was entered first finding "that the said amended complaint does not state facts sufficient to constitute a cause of action or a cause of suit, and that the plaintiff has an adequate remedy at law," and judgment for respondent for his costs. It will only be necessary for us to ascertain whether a court of equity can grant appellant any of the relief prayed for in his complaint as shown by the record. If so, then the demurrer should not have been sustained. That municipalities of the character of appellant are given very large power in the control and management of their affairs is not and could not be disputed. They have the right to regulate and control the sale of liquors; to say where and under what conditions liquors may be sold within their corporate limits; to prescribe certain districts wherein buildings dangerous to the welfare of the people shall not be erected; to prohibit the conducting of any business dangerous to the morals and good order of the people of the municipality. The complaint must be taken as true in all its allegations. The demurrer admits this fact, but by its averments says that there is not enough stated in the complaint to warrant a court of equity to grant any relief: (1) That a cause of action is not stated; and (2) that appellant has a plain, speedy, and adequate remedy at law, and it is so found by the court. If we find that the village of Sand Point has full power and control over its streets, alleys, and bridges, and the right to declare by ordinance how and where certain classes of business shall be conducted, then appellant has the right to declare by ordinance that a saloon business shall not be conducted within 100 feet of either the north or south side of the bridge crossing Sand creek. Again, if the city is responsible in damages (and likely it is) for any accident that may occur on said bridge by reason of any defect in its construction or maintenance, then it becomes the duty of the village authorities to guard carefully the safety of the people who travel over and across this part of the highway. This being true, we think the village authorities have the power to

permit or reject the application of any one to construct any kind of a building connecting with this bridge. If it is by them considered dangerous to the travelling public, offensive to any class of people who may have occasion to pass over the bridge, or if it will in any manner weaken or reduce the safety of the bridge, then they may prohibit its construction.

It is urged by counsel for appellant that women and children pass and repass over and across this bridge; that if respondent is permitted to conduct a saloon in his building it will be offensive to women and children who have occasion to pass back and forth across the bridge; that drunken men will congregate in front of said building and consequently on or near the bridge, and thus create a nuisance. Counsel for respondent meets this argument by the statement in his brief that "it is a notorious fact that in every city and village in the state saloons open upon the sidewalks and pavements, and yet it is not anywhere claimed that the sidewalks or streets immediately in front of such saloons are loitering places for 'drunken and idle men.'" This statement does not quite meet the issues. It is shown that the streets at either end of this bridge and connecting therewith are 50 feet wide, whilst the bridge is only 14½ feet wide in the clear. Again, if women and children are passing along any of the streets of the village where a saloon is being conducted, if "idle and drunken men" are congregated in front thereof, they may pass to the opposite side of the street, or pursue their way on another street. In other words, they are not compelled to pass within the narrow limits of 14½ feet. This alone may not be sufficient to warrant a court of equity to grant relief by injunction, but it is certainly apparent that there is much more reason for the village authorities to prohibit the sale of intoxicating liquors in a building with its only outlet connected with the bridge, than there is to allow saloons to be conducted on the streets that have back entrances through which intoxicated persons may pass without encountering persons to whom they would be obnoxious, or the opposite side of the street, or other streets on which people may travel, and thus avoid close proximity with such persons.

Counsel for respondent insists that Kootenai county, and not the village of Sand Point, has the care, supervision, and control of the bridge in question under the provisions of section 81, p. 208, Sess. Laws 1899. This section provides: "The city council or board of trustees shall have the care, supervision and control of all public highways, bridges, streets, alleys, public squares and commons within the city or village, and shall cause the same to be kept open and in repair and free from nuisance. * * * All public bridges exceeding 60 feet in length over any stream crossing a state or county highway,

shall be constructed and kept in repair by the county." This act was approved February 10, 1899. In an act passed on the 14th day of February, 1899 (at page 270 of the same Session Laws), we find the following provision: "Each incorporated city, town or village in this state constitutes a separate road district under this title, and the city council of each city and the board of trustees of each town or village, as far as relates to their city, town or village, have the powers conferred, and must perform the duties imposed upon the board of county commissioners of their respective counties by this chapter. Each city council and board of trustees must appoint a road overseer who must within such city, town or village have the powers conferred and perform the duties imposed by this chapter" * * *. Subdivision 27, 28, and 29 of section 73, p. 205, Acts 1899, authorizes and empowers cities and villages to "prevent and remove all encroachments into and upon all sidewalks, streets, avenues and alleys," and to "open, widen or otherwise improve any street, avenue, lane or alley" and to "create, open and improve new streets," etc. All of the above provisions were construed by this court in the case of *Carson v. City of Genesee*, 74 Pac. 862. After reviewing the authorities and the various legislative acts pertaining to the organization of cities, towns, and villages, the powers, duties and responsibilities thereof, Mr. Justice Ailshie said: "It will be seen from the foregoing that the power of cities and villages in this state over the streets is exclusive and unlimited, and the question arises: Are their express or implied duties to the public and the individual commensurate with the powers granted them? It is conceded that there is no express statute in this state making municipal corporations liable in damages for negligence. The only remaining question is, can such liability be said to be implied?" After collecting and discussing a great many authorities bearing on this question, the opinion concludes thus: "It had all the authority required to have kept its streets in repair, and thereby avoid the liability to which it now finds itself subjected." The above case was an action for damages resulting from an injury received on one of the streets of the village of Genesee by reason of a defective sidewalk.

In this case it is not disputed that the bridge connecting the two streets of said Sand Point is a part of the public thoroughfare, and is within the corporate limits of said village; hence with the same construction given our laws governing cities and villages as is shown in *Carson v. City of Genesee*, we must conclude that the village of Sand Point has complete and exclusive control over the bridge crossing Sand creek with the duty imposed upon it by law of keeping it in repair and at all times safe and convenient for the accommodation of the travel-

ing public. Since we have reached this conclusion, the question arises as to who would be liable for any damage or injury resulting from an accident caused by the erection of the building of respondent in close proximity to said bridge and connecting therewith by a platform. In our view of the law the village is responsible for the condition of this bridge and any and everything connected therewith. In case an injury should occur to any one resulting from an accident occasioned by the construction of the platform connecting with the bridge, if it could be shown that the accident occurred on the right of way or street of appellant, under our holding in *Carson v. City of Genesee*, the city could be made to respond in damages, and we have no disposition to change the construction given our laws governing the questions involved in that case and this.

We think the demurrer should have been overruled. The judgment is reversed, and cause remanded to the lower court, for such further proceedings as is consistent with this opinion. Costs awarded to appellant.

AILSHIE and SULLIVAN, JJ., concur.

SHEPHARD et ux. v. COEUR D'ALENE LUMBER CO., Limited.

(Supreme Court of Idaho. Dec. 4, 1905.)

APPEAL—CORPORATION—MISTAKEN IDENTITY—MISTAKE IN FINDINGS—REMAND.

Where an action was commenced and prosecuted to judgment against a domestic corporation named the "Coeur d'Alene Lumber Company, Limited," but in the findings it is recited that the defendant is a Washington corporation, and throughout the findings and judgment, where the defendant is named, the word "Limited" is omitted, and an appeal is taken from such judgment by a foreign corporation organized under the laws of the state of Washington and named the "Coeur d'Alene Lumber Company," and at the hearing on appeal the plaintiff and respondent admits and shows that the interchange of names and finding that defendant was a foreign corporation was a mistake or clerical error, held, that the cause must be remanded to the trial court, with instructions to correct and modify the findings and judgment, so that the decree may run against the true defendant.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; R. T. Morgan, Judge.

Action by George A. Shephard and wife against the Coeur d'Alene Lumber Company, Limited. Judgment for plaintiffs, and defendant appeals. Modified.

McClear & Burgan, for appellant. Chas. L. Heitman, for respondents.

AILSHIE, J. This is a novel case of mistaken identity—novel because the bewildered refugees, two soulless corporations of diverse origin, in their flight from a decree in equity (a thing abhorred by corporations), became so completely lost in the labyrinth of

names that the plaintiff has been thence ever wont to turn the restraining clauses of her decree upon the twain with but a single name, so indiscriminately that they are driven hither to tell their story. Now the thing seems to have happened in this way: There exists by the Lake Coeur d'Alene, in the county of Kootenai, a corporation born of the laws of the state of Idaho and named the "Coeur d'Alene Lumber Company, Limited." This corporation in the year 1903, not content alone with its own, claimed and asserted that it owned the lands of Hulda Shephard, but to pay heed to such a claim she flatly refused. On the contrary, she drew her bill and prosecuted an action to quiet her title. It happened about this time there came into existence under the laws of the state of Washington another corporation, named the "Coeur d'Alene Lumber Company." The defendant failed to answer the plaintiff's complaint, and proofs were tendered and findings and decrees were made and entered. By the fourth finding defendant is declared to be a "corporation duly created, organized, and existing under and by virtue of the laws of the state of Washington." Throughout the findings and decree the defendant is named the "Coeur d'Alene Lumber Company." While the action was commenced against the Idaho corporation, this appeal is taken by the Washington corporation. This Washington progeny of statute law charges that it should not be visited by the transgression of a stranger, that it has never had its day in court, and that it has been mistaken for the real defendant. The Idaho corporation seems content, and does not appear in this court.

Respondent Hulda Shephard has moved to dismiss the appeal on the grounds that notice thereof was not served on the real defendant, the Idaho corporation. Respondent appears anxious to see both of these namesakes, unmask and reveal their identity in court. Appellant tells us, however, that it came into existence under the persuasive influence of the Washington statutes and that it has no longing to respond to any Idaho decrees. This reluctance undoubtedly comes from its residence in Spokane, where so many of its kind exist with much ease and plead nonresidence in Idaho courts without an effort. At the argument counsel for respondent admitted that the finding that defendant is a Washington corporation was a mistake. Possibly there was an attraction about the Washington corporation, "Coeur d'Alene Lumber Company," from the fact that it was not "limited." Appellant's brief and argument seem to have set respondent at ease on that score, and her counsel has filed a motion to have the findings and judgment so corrected as to make the decree run against the "Limited" corporation of Idaho, the real defendant. This we could not do, if we should sustain the motion to dismiss, which, indeed, we think was well taken. Since this

latter motion has been made, however, we have concluded that we might be able to reach a conclusion in the case satisfactory to both sides—a conclusion as unusual as this case is novel.

We will remand the case, with direction to the trial court to correct and modify the findings and judgment so that the same will run against the Coeur d'Alene Lumber Company, Limited, a corporation organized and existing under the laws of the state of Idaho. Appellant will be awarded costs of appeal, which shall only include 30 pages of transcript and brief.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

ABRAMS v. WHITE et al.

(Supreme Court of Idaho. Nov. 28, 1905.)

1. COURTS—EXCLUSIVE JURISDICTION—SETTLEMENT OF DECEDENT'S ESTATE—PROBATE COURTS.

The probate courts of this state have exclusive jurisdiction of the settlement of estates of deceased persons, subject to appeal to the district court for review of any proceeding had therein.

2. SAME—REMEDY IN EQUITY—FRAUD.

Equity will not lend its aid in an original proceeding in the district court, unless it is shown that fraud has been perpetrated in the probate court. The particular act and thing constituting the fraud must be definitely and positively alleged, and that the party is without remedy elsewhere than in a court of equity.

3. SAME—DEMURRER.

A demurrer will be sustained to a complaint in equity that fails to allege fraud in the probate court, and also show the necessity for the prosecution of the action in the court of equity.

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

Action by Sarah Z. Abrams against Elizabeth White and others. Judgment for defendants, and plaintiff appeals. Affirmed.

F. D. Culver, for appellant. I. N. Smith and Chas. L. McDonald, for respondents.

STOCKSLAGER, C. J. This case is before us on appeal from the district court of Nez Perce county. Plaintiff filed her complaint, to which an answer was filed by some of the defendants. Afterward plaintiff had permission to amend her complaint, which was done, and thereafter demurrers were filed by all of the defendants; the only one appearing in the record being that of defendant Elizabeth White, which is as follows: "(1) That the said complaint shows upon its fact that there is a misjoinder of the parties defendant, in this, that Chas. L. McDonald is improperly united as a party defendant in said cause. (2) That there is a misjoinder as to parties defendant herein, in this, that Chas. G. Kress is improperly joined in the above cause as a party defendant. (3) That there is a misjoinder as to parties affixed

herein, in this, that Chas. G. Kress, as administrator with the will annexed of the estate of John M. Silcott, deceased, is improperly joined as a party defendant. (4) That the said complaint does not state facts sufficient to constitute a cause of action against this defendant. (5) That said complaint does not state facts sufficient to constitute a cause of action." The demurrers of the defendants who were regularly served were argued and submitted to the court, and on the 27th day of July, 1905, the court made and caused to be entered of record an order sustaining the demurrers and judgment ordered and entered in favor of defendants for costs. From this judgment an appeal is taken.

A motion was submitted to this court to dismiss this appeal for the following reasons: "That the notice of appeal notifies that there will be more than one appeal taken, and that the bond on appeal is conditioned for the payment of a single \$300 under the statutory penalties and obligations, and that said bond is uncertain and ambiguous in that it does not state from or to which appeal it is conditioned." The notice follows: "Please take notice that the above-named plaintiff appeals to the Supreme Court of the state of Idaho, from that certain decision and order sustaining defendant's demurrers to plaintiff's amended complaint, and from the judgment of dismissal of the said district court and the whole thereof, entered herein on the 27th day of July, 1905, in favor of said defendants and against said plaintiff." This court has repeatedly held that, where the notice provided for two appeals, such as an appeal from the judgment and an order overruling a motion for a new trial, or any other appealable order, and but one bond was given in the statutory form and amount without particularly specifying whether the appeal was from the judgment or order, a motion to dismiss the appeal would be sustained. In this case, however, there was but one appeal to be taken, and that was from the judgment on the order sustaining the demurrers to the complaint; and, whilst the notice says the appeal will be from the order and the judgment, and the whole thereof, that part with reference to the order will be treated as surplusage only, and does not affect the bond on appeal from the judgment. The motion is denied.

Counsel for appellant urges that the court on its own motion "arrogated to itself the statutory privilege of holding against plaintiff on the grounds of want of jurisdiction, which seldom is, and never should be, invoked upon the court's own motion, unless unquestioned and conclusive." We cannot give our assent to this contention. If the court is satisfied from former decisions of this court, or from any well-founded reason, that it is without jurisdiction to hear and decide the questions presented by the pleadings, it becomes the duty of the court to refuse to try the case, and thus possibly save

large expense to all parties to the litigation. This rule has its foundation in equity, and it is upon the assumption that it is better to have the issues settled by the appellate court before the expense of a trial, than to take the entire case up after trial, and after large expenditures have been incurred. With this view of the case as it is presented to us, the only question we will examine and determine is, whether the court had jurisdiction to try the issues as presented by the pleadings; that is, the complaint and demurrers, and whether the demurrers were properly sustained. If the court was without jurisdiction, then it was not only its right but duty to so declare and refuse to try the case. It will be observed, however, that the court did not arbitrarily refuse to entertain jurisdiction. It is shown by the order sustaining the demurrers, to wit: " * * * The court having heard the arguments pro and con thereon, and having asked for arguments on the point of jurisdiction of this court to hear and determine this case, and the said point having been argued, and the court having been fully advised in the premises, it is now considered and ordered that the said demurrers, and each thereof, be sustained, as the court has no jurisdiction of the above-entitled cause. * * * " We are not advised of the contents of the demurrer of defendant McDonald or defendant Chas. G. Kress, or any of the other defendants to the action, and do not know whether the question of jurisdiction was raised in either of them or not. Want of jurisdiction is one of the grounds of demurrer provided for by our statute, and it seems the court requested an argument on this particular question. If we are to follow *Clark v. Rossier et al.*, reported in 78 Pac. 358, then the demurrer that the "complaint did not state facts sufficient to constitute a cause of action" was good, and should have been sustained, and, if the court erroneously founded his ruling on an improper foundation, it would not benefit the plaintiff.

We do not wish to be understood as intimating that the court did improperly decide the question of demurrer, as the record is not sufficient to give us this information. We can see no reason why the rule announced in *Clark v. Rossier et al.*, supra, should not be followed in this case. It may be true, as insisted by learned counsel for appellant, that a gross injustice has been done his client, but the statute provides a remedy for all errors of the probate and justices' courts by appeal to the district court. It may also be said that errors and mistakes in the probate court may be corrected by proper proceedings in that court, and, if not corrected there, an appeal may be taken to the district court, and from there to this court. Equity will not lend its aid where no effort is shown to have been made in the court of original jurisdiction, and the fact that a party has permitted the statutory time to run

against an appeal is not sufficient to authorize a court of equity to assume jurisdiction. It may also be said that, where there is an attempt to charge fraud, the particular act and thing constituting such fraud must be pointed out. It is not sufficient to allege that the plaintiff was absent at each and all of said sales and at the presentation and allowance of each of said accounts, and that she had no knowledge of the manner in which said estate was being administered until recent date, the latter part of December, 1904, and had therefore relied fully upon her said attorney to protect her interest in said estate. There is no fraud alleged here. Another allegation is: "That the order of sale of the above-described property was obtained by said defendants from said probate court by wrongfully, falsely, and unlawfully representing that said Elizabeth White was the executrix of said estate of David M. White, deceased, and that the estate of said John M. Silcott, deceased, was indebted to said estate, * * * Certainly no fraud alleged here. Again: "This plaintiff alleges that said claim was presented by said defendants, Elizabeth White and Charles L. McDonald, without authority to receive payment thereof, without authority to receipt for the same, and that the said Elizabeth White and Chas. L. McDonald well knew that the said Elizabeth White was not the executrix of said estate or authorized to present said claim or to receive the payment thereof, and knew that there was no legal representative of said estate, or any person authorized to present said claim or to receive the payment thereof." We find no fraud pointed out in any of these allegations, nor do we find anywhere in the complaint an allegation that comes within the rule for alleging fraud. If any of the wrongs complained of by plaintiff were committed by any of the defendants, she doubtless has a remedy other than the one sought to be enforced in this action.

The judgment is affirmed, with costs to respondent.

AILSHIE and SULLIVAN, JJ., concur.

WHITMAN v. McCOMAS.

(Supreme Court of Idaho. Dec. 20, 1905.)

1. EJECTMENT—ADMISSION AND REJECTION OF EVIDENCE.

On the trial of an ejectment case, the court should admit all testimony offered by the plaintiff tending to prove his possession.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 278.]

2. TRIAL—INSTRUCTIONS.

No instructions should be given to the jury, except those including the law applicable to the facts of the case as shown by the evidence, and the general principles of law governing the case.

(Syllabus by the Court.)

Appeal from District Court, Idaho County; E. C. Steele, Judge.

Action by R. C. Whitman against Jesse B. McComas. Judgment for defendant, and plaintiff appeals. Reversed.

L. Vineyard and T. H. Bartlett, for appellant. W. N. Scales, for respondent.

SULLIVAN, J. This is an action in ejectment, and involves the right to the possession of the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 27, T. 30 N., range 4 E., in Idaho county; the same being included in what is referred to in the record as the "W. F. Smith Ranch." United States survey of said land was but recently extended over it. The complaint contains the usual allegations of a complaint in ejectment, and judgment for possession is prayed for with damages. The answer is a specific denial of the allegations of the complaint. The cause was tried by the court with a jury, which resulted in a verdict for the defendant, and judgment was entered accordingly. The appeal is from the judgment. Numerous errors are assigned, going to the admission and the rejection of certain testimony, and the rejection and giving of certain instructions to the jury. It appears from the evidence: That the appellant and one M. S. McMurry were partners as early as December, 1902, and that such partnership was formed for the purpose of procuring title to certain land, including the land in question, situated in Idaho county, and raising stock thereon. At that time the appellant and said McMurry were residents of the state of Montana. McMurry went into Idaho county, Idaho, for the purpose of procuring a stock ranch for said partnership, and it appears from the evidence that he purchased what is known and referred to in the record as the "W. F. Smith Ranch," which includes the 40 acres in dispute, and took a conveyance of said Smith ranch in his own name and other lands. That some time in the spring of 1903 the respondent, who is the nephew of said McMurry, purchased an adjoining ranch known as the "Bowen Ranch," and it appears that the appellant and respondent and said McMurry agreed to and did fence a large tract of land consisting of about 480 acres, including the W. F. Smith ranch, a part of the Bowen ranch, and other lands. It appears that Whitman first came to the land in dispute in April, 1903, remained a day or two, returned to Montana, and again returned to Idaho in May, 1903, and remained there until the following October, when he went to Montana and returned to Idaho in April, 1904. Said partnership was dissolved about April, 1904, and under the dissolution agreement said McMurry conveyed whatever title he had in said W. F. Smith ranch to the appellant. The deed of conveyance is dated the 22d day of April, 1904, and was signed and acknowledged on that date. It was witnessed by the respondent J. B. McComas. Counsel for appellant on the trial offered that deed in evidence, and on objection by counsel for the respondent

the court excluded it. By that deed McMurry conveyed to appellant all of his right, title, and interest of every kind or nature, as stated in the deed, to wit: "In and to my squatter's right and location and possession, on a certain one-fourth section of land, including 160 acres of land known as the 'W. F. Smith Ranch,' lying in the Clearwater Meadows, which said 160 acres of land being bounded on the north and east by Jesse McComas' and on the south by Miss Cora McMurry's place. * * *" At the same time counsel for plaintiff offered a quitclaim deed of the same premises from the said W. F. Smith to the said McMurry. Those deeds were offered for the purpose of laying the foundation to show that plaintiff had deraigned his title to the right of the possession to the land in dispute in this action through them. We think the court erred in excluding said deeds. The object and purpose of counsel in offering them was to show that whatever title appellant had to the land, and his right to possession thereof, he procured through those deeds, and that he went into possession under the title deraigned through them. The land was at that time a part of the public domain, and had not yet been surveyed, and no segregation of it had been made by entering it under any of the land laws of the United States. The relevancy of that evidence is clearly apparent.

McMurry testified as a witness on behalf of the respondent and testified that he had released the 40 acres in dispute to the respondent McComas in the spring of 1903, and that he released it by and with the consent of the appellant; while the appellant testified that respondent never released it with appellant's consent, or at all. And the fact that he executed said deed of April 22, 1904, conveying said Smith ranch to the appellant, particularly describing it, and that said deed was witnessed by the defendant McComas, was a circumstance tending to support the evidence of the appellant. For, if the 40 acres in dispute, which is conceded to be a part of the W. F. Smith ranch, had been abandoned and turned over to McComas in March or April, 1903, why did McMurry convey the W. F. Smith ranch to appellant without excluding the 40 acres in dispute? And why did the defendant McComas witness said deed of conveyance about a year after he claims to have taken possession of the disputed 40-acre tract as his own? It seems to us that this is a strong circumstance supporting the testimony of the appellant, and is a circumstance that the appellant had a right to have placed before the jury. There is a conflict in the evidence in this case, and, if the fact that McMurry conveyed the Smith ranch to the appellant more than a year after he claimed to have turned the 40 in dispute over to the defendant, and the deed witnessed by defendant had been presented to the jury, we are not able to say that their verdict would have been in favor of the defendant.

Counsel for respondent states in his brief that the deed from McMurry to the appellant,

which was offered in evidence by the appellant, was rejected by the court as incompetent and irrelevant; but, regardless of that fact, he consented that it should be introduced in evidence, or that he himself introduced it, and that it was read to the jury, and that plaintiff's said Exhibit B is the same as defendant's Exhibit 3 (folio 253 of the transcript). It appears that the counsel has gotten the exhibits mixed in his mind, as plaintiff's Exhibit B was a quitclaim deed from W. F. Smith to one M. S. McMurry. Defendant's Exhibit A was a quitclaim deed from said McMurry to the appellant, and the only indication we have in the transcript that the defendant ever offered a paper marked defendant's Exhibit 3 is that the transcript contained the quitclaim deed from McMurry to the appellant under the caption of "Defendant's Exhibit 3." We have carefully searched the transcript to find whether plaintiff's Exhibit A was ever introduced in evidence, or that the defendant ever introduced said exhibit as his Exhibit 3, and have failed to find that defendant ever introduced said exhibit. However, said quitclaim deed from McMurry to the appellant was ruled out by the court when offered by counsel for the appellant, on the objection of counsel for the respondent as irrelevant, incompetent, and immaterial, and the record does not show that it was ever offered by the plaintiff or admitted in evidence on behalf of the respondent. After that deed had been rejected by the court in the presence of the jury as incompetent, irrelevant, and immaterial, and thus discredited, the introduction of it by the defendant would not cure the error made by the ruling of the court in the presence of the jury. The respondent had a right to prove his case in an orderly way, and not by the grace of respondent's counsel. That evidence had been condemned by the court, held immaterial, and rejected. Under that state of facts it would not be fair to the appellant to permit counsel for the respondent to say to the jury, "Although this evidence is incompetent and has been rejected by the court as irrelevant, I will introduce it." Under those circumstances, the jury would pay no attention to the evidence whatever. Errors of this kind cannot be cured in that way.

The record shows that the appellant furnished the money to McMurry with which he bought said W. F. Smith ranch, and, if the testimony of the plaintiff be true, McMurry is attempting to perpetrate a fraud upon his former partner by testifying that he had turned said 40 acres over to his nephew about a year prior to the time of the dissolution of the partnership, and prior to his conveying it by deed to his former partner, the appellant. It was error for the court to exclude the testimony of plaintiff to the effect that he entered into possession of the land in dispute under and by virtue of said deeds of conveyance. While it is true that the evidence was not sufficient to show that

the plaintiff had remained in possession of the land in dispute as late as the fall of 1904, when he was forcibly driven from it with a gun by the respondent, there is evidence to show that he went into the possession of the said premises lawfully, and then it devolved upon him to show that he continued in possession thereof. The disallowance of this evidence no doubt prejudiced the plaintiff's case and perhaps misled the jury, and it was error for the court to reject it.

Counsel for appellant offered in evidence the notice and claim of a possessory right dated November 4, 1904, made under the statutes of this state, and on objection of counsel for the defendant the court excluded it. This action of the court is assigned as error. It is alleged in the complaint that on the 3d day of November, 1904, the plaintiff was lawfully possessed of said tract of land, and that the defendant about 2 o'clock p. m. of that day entered into the possession of the said premises and ousted the plaintiff. As the appellant thus admits that he was ousted from said premises on the 3d day of November, 1904, a claim of possessory right made and filed on November 4, 1904, would not be competent evidence in the case. The court did not err in rejecting that notice.

Over the objection of counsel for the appellant, the court allowed the respondent to testify to conversations between himself and McMurry relative to McMurry allowing the defendant to take possession of the disputed forty, which conversations were not in the presence of the appellant. This was clearly error, for no conversations between the defendant and McMurry, not had in the presence of the appellant, could bind the appellant. The court erred in admitting such conversation.

McMurry testified that he released the 40 in dispute to the respondent in February or March, 1903, and that he notified his partner, Whitman, by letter, of that fact. We have in the record said letter from McMurry to Whitman, dated March 2, 1903, in which he says, among other things: "He [referring to defendant] wants us to let him have the forty that joins him on the west and we take the forty I spoke about on the plat, if he could get it that way, he would take it, and I would rather see him get it than some one else, but I told him that I couldn't make a trade of that kind at present, but I told him I would let him claim that forty and I would claim the other and then when we got our deeds we could transfer, you see he can't take the other forty for it doesn't join his place." This excerpt from that letter clearly indicates what McMurry had in mind at that time, and it was not that he would release this 40 to his nephew, but "would let him claim that forty," and after getting title from the government they would transfer to each other—McComas, the tract in dispute, to McMurry, and McMurry, the Camas 40 to McComas.

The giving of certain instructions are as-

signed as error. That part of the instructions (commencing at folio 312) as follows, "And, if the said McMurry and the said McComas agreed," etc., to and including that part of folio 316, ending with these words, to wit, "In the actual possession of the land in dispute," is clearly erroneous under the facts of this case, as the evidence clearly shows that McMurry notified McComas that Whitman was interested in that land with him, and that he could not make the change without Whitman's consent.

The refusal to give the requests of the plaintiff numbered 2, 3, 4, and 5 is assigned as error. They each refer to and are applicable to the evidence, and it was error for the court to refuse them. Much stress is laid by counsel for the appellant upon the fact that the respondent had done certain plowing and cut certain hay on the land in dispute. The testimony of the appellant tends to show that that was done under an arrangement and an agreement with the respondent, whereby he was to have the grain raised on the plowed land, and the hay cut thereon was simply an exchange of hay, and the fifth request above referred to applied to that state of facts and was the law applicable thereto.

The judgment is reversed, and a new trial granted. Costs of this appeal are awarded to the appellant.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

RICHARDSON et al. v. RUDDY et al.

(Supreme Court of Idaho. Dec. 19, 1905.)

1. PARTITION—REFEREES' REPORT—CONFIRMATION.

Where it is shown that the report of the referees appointed to partition real estate is unjust and inequitable, it should be set aside.

2. SAME.

Where it is shown that the referees have not complied with the order of the court in making such partition, their report should be set aside.

(Syllabus by the Court.)

Appeal from District Court, Idaho County; E. C. Steele, Judge.

Action by A. C. Richardson and others against Richard Ruddy and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Geo. W. Tannahill and James De Haven, for appellants. Clay McNamee and Geo. W. Goode, for respondents.

SULLIVAN, J. This is an action brought under the provisions of title 10, c. 5, of the Revised Statutes of Idaho of 1887, for the partition of certain real estate lying in Idaho county, and to have the defendant Richard Ruddy declared a trustee for the benefit of the plaintiffs and defendants named in the complaint, and was before this court on appeal at the March, 1904, term. See Richard-

son v. Ruddy, 77 Pac. 972. Three points were decided on that appeal, and the judgment of the lower court was affirmed. We held on that appeal in a suit for partition of real estate, if it appeared to the court that it was impracticable or inconvenient to make a complete partition, in the first instance the court might direct a partition between two or more of the parties, and, from time to time thereafter, might determine as to the other parties' shares and interest, and render a further judgment directing a partition in like manner of all the undetermined parts or portions of the property. After the case was remanded, the trial court proceeded to make partition between some of the other parties to the suit. It appears from the record that the trial court appointed W. C. McNutt, O. A. Fox, and W. C. Short referees, to make a partition of the premises described in the complaint, in so far as plaintiff Walker Richardson and defendant A. A. Kincaid were concerned. The report of said referees was filed September 15, 1904, and thereupon four of the defendants filed objections to the report objecting to its confirmation on a number of grounds. Said matter was heard before the court, and a number of witnesses testified, and some documentary evidence was introduced on the hearing, and the court thereafter entered judgment on the report of the referees. A motion for a new trial was denied. The appeal is from a judgment and order denying a new trial.

Counsel for appellants contend that the court erred in refusing to grant them a continuance in the original trial of this case. That matter was disposed of on the former appeal, and is *res adjudicata*. The matters that are before us for decision on this appeal are those arising out of the report of the referees and the judgment of the court thereon. That judgment is attacked on the ground that it is inequitable and unjust, and that the evidence shows the conduct of the referees was improper and reprehensible. The evidence shows that the most valuable parts of the tract of land partitioned were set off to the respondents Richardson and Kincaid. It is shown that the land set off to them was relatively worth from 25 to 50 per cent. in excess of the value of the remaining tracts. The court erred in rejecting all evidence offered tending to show that the partition made by the referees was not fair and equitable. Mrs. Conrad, one of the appellants, was to have five acres of land out of this tract. She was living on it, had improvements on it—an orchard, a dwelling house, and other improvements—and, instead of setting her improvements off to her, and the land on which they were situated, the referees gave that land to the respondent Richardson. One witness testified that he

would not give one acre of the land where Mrs. Conrad's improvements were for the whole five acres that was set apart to her. The evidence shows that McNutt, who was appointed one of the referees, also acted as the surveyor of said townsite, and charged fees both as surveyor and referee. He also employed the plaintiffs A. C. and Walker Richardson to assist in surveying, and filed his bill for costs in said matter amounting to \$814. He included therein \$50 attorney's fees, \$214 for services of chainmen, flagmen, and axmen, \$365 for town lots, and \$180 for referees' fees. The evidence clearly shows that no such fees should be allowed, for they almost result in confiscation. The idea that the referees must be on the ground during the survey, and charge fees for 12 days as referees, is simply preposterous.

McNutt testifies on direct examination that Mrs. Conrad selected the five acres set aside to her. He finally admitted that she did not select it, but testified that the referees did the best they could, and that they selected or set apart Mrs. Conrad's house and improvements, and the ground on which she lived, and where her garden and orchard were, to Walker Richardson, one of the plaintiffs, who assisted in the survey, and it would look as though he had probably assisted the referees in partitioning the property. Such conduct of the referees as is shown in this matter ought not to be tolerated. If it be true that there has been an equitable adjustment of this land, why not give the tracts selected for Richardson and Kincaid to the appellants who claim that the land apportioned to Richardson and Kincaid is double the value of that set aside to the others. Richardson and Kincaid both claim that the other tracts are just as valuable as those set apart to them. The court might let them have them.

The referees failed and refused to follow the directions of the court in the survey of the business lots involved. It appears that justice has not been done in this matter, and the judgment confirming the report of the referees must be set aside, with directions to the court to appoint other referees, who shall equitably and justly apportion said lands between the respective parties; and it is further ordered that no costs or expenses shall be awarded to the referees or to McNutt for making the survey of said land, nor to A. C. and Walker Richardson, plaintiffs, for assisting in making said survey.

The cause is remanded for further proceedings in accordance with the views expressed in this opinion. Costs of this appeal are awarded to the appellants.

STOCKSLAGER, C. J., concurs. AILSHIE, J., sat at the hearing, but took no part in the decision.

MILLER v. DONOVAN et al.

(Supreme Court of Idaho, Dec. 12, 1905. On Rehearing, Dec. 29, 1905.)

1. SALE—ACTION FOR PRICE—DEFENSES—EVIDENCE.

Whether plaintiff alleges the sale and delivery of property and failure and refusal by defendants to pay the purchase price, and defendants deny purchasing or receiving the property, evidence is not admissible under such denial for the purpose of showing illegality of contract or failure of title in plaintiff to the property alleged to have been sold.

2. SAME—PLEADING—ANSWER.

A defendant who desires to show illegality of contract as being in violation of a statute or of public policy, or would show failure of title or consideration, must affirmatively allege such defense, so as to apprise the adverse party of the nature of defense he will be called upon to meet.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1023.]

3. SAME.

Failure to make such allegations will only be excused where the illegality or failure of title of consideration appears from the complaint itself.

4. APPEAL—REVIEW.

Issues not raised by the pleadings and presented to the trial court will not be considered on appeal.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; R. T. Morgan, Judge.

Action by A. R. Miller against J. J. Donovan and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Charles L. Heltman, for appellants. Edwin McBee, for respondent.

AILSHIE, J. The plaintiff commenced this action in the lower court to recover on two causes of action. By his first cause of action he alleged the sale and delivery to the defendants of 440,815 feet of white pine, tamarack, and cedar saw logs, for which defendants promised and agreed to pay the sum of \$1,569.12; that the defendants have failed, neglected, and refused to pay any part thereof, save and except the sum of \$517.32; that there is still due and owing to plaintiff from defendants the sum of \$1,051.80. By the second cause of action plaintiff alleged that on about June 20, 1903, he entered into a contract with the defendants whereby he agreed to drive 440,815 feet of saw logs from a point on Dolan creek, in Kootenai county, to Clark's Fork river at the mouth of Dolan creek, for the sum of 50 cents per 1,000 feet, and that the defendants agreed to furnish and put in a boom in Clark's Fork river to hold and protect the logs to be driven by plaintiff. And plaintiff alleges that he commenced to drive the logs, but that defendants failed, neglected, and refused to prepare and put in the boom, and that by reason thereof plaintiff was put to extra labor, expense, and trouble in the performance of the contract on his part, and that such extra labor, expense, and trouble was to his damage in the sum of \$75, and

that the defendants had failed and refused to pay the plaintiff for his services in driving the logs in the amount of \$220.40, and prayed judgment for the total sum of \$1,347.20. Defendants' answer consisted of denials. In answer to the first cause of action defendants deny "that plaintiff did, on or about the 1st day of June, 1903, or at any other time, sell, or deliver to the defendants the 440,815 feet of white pine, tamarack, or cedar saw logs mentioned in the complaint of the plaintiff"; deny that they promised to pay plaintiff the sum of \$1,569.12, or any sum; deny the reasonable value of the logs; deny that they paid the plaintiff anything on the contract. The defendants closed their answer to plaintiff's first cause of action with the following paragraph: "Defendant, further answering, avers that on or about June 1, 1903, the plaintiff did negotiate with the defendant for the sale of certain saw logs, but that during said negotiation the defendant discovered that said logs were not the property of the plaintiff, but that they had been removed from land not owned by the plaintiff, and without the permission of the owner thereof, and forthwith did defendant cease all negotiations and refuse to make any contract pertaining to said logs, and refused to accept said logs under any condition whatever; that during the pendency of the above-named negotiations, and subsequent thereto, and independent thereof, the plaintiff secured credit of the defendant in the amount of \$517.32." The answer to plaintiff's second cause of action consists of specific denials. Defendants then plead a counterclaim against plaintiff for the sum of \$517.32. The case went to trial upon the issues thus made before the court without a jury. The court in its decision found in favor of the plaintiff and against the defendants on all the issues, and ordered judgment entered in favor of the plaintiff for the sum of \$1,347.20, and judgment was thereupon entered accordingly.

During the progress of the trial the defendants offered to introduce evidence tending to show that the logs for which plaintiff was seeking to recover the purchase price were cut by plaintiff from unsurveyed government lands, and that the title to the logs was not in the plaintiff at the time, but was in the United States government. To this offer the attorney for the plaintiff objected on the grounds that such question had not been made an issue by the pleadings in the case. The court, in ruling on the objection, said: "The question of title to these logs is not in issue here in the pleadings." After this ruling by the court it was agreed between counsel for the respective parties that the defendants might introduce such evidence as they had tending to show failure of title in plaintiff to the property which he claimed to have sold, and that the competency and admissibility of such evidence as might be introduced should be argued by counsel in making

their final argument of the case to the court. Under this agreement some evidence was introduced tending to show that the logs had been cut from a 40-acre tract of land which had been surveyed, but the survey had not yet been accepted by the government. It was also shown that one Tom Dolin, from whom plaintiff bought the timber, had occupied the land as a "squatter," under claim as a homestead, since about 1891, and that he had some 20 acres cleared and in orchard, meadows, gardens, etc. After the close of the evidence defendants asked leave to make an amendment to their answer, which was granted by the court, and the amendment was as follows: "Defendants admit that they did negotiate for the purchase of said logs, but, specially averring, show the court that during the pendency of said negotiations plaintiff stated that he would secure said logs from all liens and incumbrances and claims of any persons, and that he was to guaranty the title to the said logs. Defendants specially deny that plaintiff had title to said logs by reason of the fact that said logs were cut from unsurveyed lands."

The only serious contention made by the appellants in this court for a reversal of the judgment is stated by appellants' counsel in his brief as follows: "The main point upon which appellants rely is the fact that respondent had no title to the logs described in the complaint, the same having been cut from land belonging to the United States government; and even had there been a contract made and entered into by and between respondent and appellants, whereby said logs were actually sold and delivered to appellants, such contract would have been contrary to public policy and therefore void, and could not be enforced by the courts, and no valid judgment could be rendered thereon." Respondent contends, however, that there was no issue made in the lower court by the pleadings as to illegality of the contract, nor as to failure of plaintiff's title to the property which he claims to have sold to defendants.

The only issue made by the pleadings was: On the first cause of action a denial of the sale and delivery of the property. Indeed, if tested by the strict rules of pleading, it is extremely doubtful if, upon the first cause of action, the plaintiff would not have been entitled to a judgment on the pleadings. As to the second cause of action, the only issue was as to the making and entering into the contract; defendants denying that they entered into such contract. No issue was presented, either by the original or amended answer, as to the illegality of the contract or failure of title. It is true that the defendants inserted in their answer a paragraph as a reason why they did not enter into the contract alleged by plaintiff that plaintiff had no title to the property. But it would clearly make no difference what reasons defendants had for not entering into

the contract, if, indeed, they did not contract. Their reasons for not doing so were entirely immaterial, were no part of their defense, and evidence to that effect was clearly inadmissible. By the answer in this case the plaintiff was notified that the only issue to be tried was the execution of the contracts alleged and the delivery of the property. Under these allegations no reasonable person could have been expected to prepare for trial upon the issue of illegal contract or failure of title in plaintiff to the property about which he had contracted. How could he be expected to meet the issue of illegal contract, when the defendant denied that there had been any contract at all? We think the district judge was clearly correct when he held that want of title and illegality of contract were not an issue in the case. The answer of the defendants furnished the plaintiff with no information as to the nature of the defense which is being urged in this court. If the defendants did not enter into the contract and receive the property as alleged by the plaintiff, then they were not liable, and it would make no difference to them whether he owned the property or ever had the property. If they did enter into the contract as alleged by him, and received the property, then their answer did not present the issue upon which they expected to successfully defend against the plaintiff's cause of action, and they should not be heard to substitute a new defense upon appeal. The contention, as made in this court, would be in the nature of a confession and avoidance. In section 3355, *Estee's Pleadings* (4th Ed.), it is said: "All matters in confession and avoidance showing that the contract sued upon was void or voidable in point of law must be affirmatively pleaded. It seems that illegality in a contract sued on, though shown by the testimony, cannot avail the defendant, unless it is alleged in the pleadings, and that an allegation in the answer that the contract was illegal, coupled with an enumeration in the same paragraph of specific grounds of illegality, does not entitle the defendant to prove any grounds of illegality not so specified." This text seems to be supported by *Finley v. Quirk*, 9 Minn. 194 (Gil. 179), 86 Am. Dec. 93; *Buchtel v. Evans*, 21 Or. 315, 28 Pac. 67; *Jameson v. Coldwell*, 23 Or. 144, 31 Pac. 279; *Lyts v. Keevey*, 5 Wash. 609, 32 Pac. 534; *Heffron v. Pollard*, 15 Am. St. Rep. 771, 73 Tex. 96, 11 S. W. 165; 1 *Chitty's Pleadings* (16th Am. Ed.) 506; *Bliss on Code Pleadings*, § 330.

We conclude that the question argued by plaintiff on this appeal was not made an issue by the pleadings in the case, and is not therefore properly before this court for our consideration. It is fair to observe here that counsel who presents this appeal on behalf of defendants appears not to have been in the case until after judgment was entered against the defendants in the lower court. In fact the original answer appears to have been

drawn by one of the defendants, and the amendments thereto by other counsel who appeared for defendants on the trial of the case in the lower court.

For the reasons above stated the judgment will be affirmed, and it is so ordered. Costs awarded to respondent.

SULLIVAN, J., concurs.

Petition for Rehearing.

SULLIVAN, J. A petition for rehearing has been filed in this case, and counsel for the petitioner urges that the judgment in the court below was obtained by evidence introduced fraudulently and calculated to mislead the court. A number of affidavits and certificates are attached to the petition in support of that contention. Conceding that the judgment was obtained by "fraudulent" evidence which misled the court, that error or mistake cannot be reached and corrected on appeal or on petition for a rehearing. Evidence not presented on the trial cannot be considered on appeal. This matter was considered on the original hearing, but was not referred to in the opinion. We have carefully considered the authorities cited by counsel, as well as his contention contained in said petition, and the court is still inclined to adhere to its former conclusion that the question of the illegality of the contract sued on, or the failure of title in the plaintiff to the property referred to therein, was not put in issue by the pleadings, and for that reason could not be considered by the trial court. An issue of fact not raised by the pleadings and presented to the trial court will not be considered on appeal.

A rehearing is denied.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

WILLIAMS v. BROOKS et al.

(Supreme Court of Idaho. Dec. 7, 1905.)

VENDOR AND PURCHASER—OPTION—RENEWAL—CONSTRUCTION.

Where W. and B. enter into an agreement whereby B. secures an option to purchase certain mining property, and it is provided that the first payment of \$500 shall be paid "on acceptance of this bond by said second party's Eastern principals, and to be paid by 1st of April, 1903," and the agreement also contains a clause providing for abandonment and forfeiture of the option by B., and after the option has been forfeited W., B., and C. indorse thereon an agreement in the following words: "The time of the payment of the first \$500.00, herein provided for, is hereby extended thirty days, and the said second party agrees that the same shall be paid on or before May 4th, 1903. April 4th, 1903"—and after the date on which the payment falls due under the latter agreement B. and C. abandon and forfeit the option, and W. sues them to recover the \$500 payment, *held*, that the latter agreement was an unconditional and absolute agreement to pay the sum specified therein as the first payment.

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

Action by L. F. Williams against Walter C. Brooks and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Benj. F. Tweedy, for appellants. I. N. Smith, for respondent.

AILSHIE, J. This action was commenced to recover the sum of \$500 claimed by the plaintiff under the provisions of two written agreements which had been previously executed by plaintiff and defendants. The first agreement was executed on the 10th day of March, 1903. The portions of that agreement involved in this action are as follows: "That said party of the first part, for and in consideration of the covenants and agreements hereinafter contained, agrees to convey by good and sufficient title (and furnish abstract thereof) to said second party, upon payment by said second party to said first party as consideration for the above mining property, the sum of seventy-five thousand dollars (\$75,000.00), five hundred dollars (\$500.00) on the acceptance of this bond by said second party's Eastern principals, and to be paid by 1st of April, 1903; five hundred dollars (\$500.00) on examination of said property by said second party, at such time and as early as said first party is able to show said property; nine thousand dollars (\$9,000.00) on or before July 1st, 1904; and the balance, fifty thousand dollars (\$50,000.00) on or before January 1st, 1905. * * * It is mutually agreed that this instrument shall be binding upon the heirs and assigns of both and all the parties hereto, and in the event of the abandonment or forfeiture in this agreement on the part of the party of the second part, said second party shall deliver up said property to said first party free of all incumbrances and the payments which may be herein made or work and development done upon said property shall be forfeited by said second party and accepted by said first party in full discharge and liquidation of this agreement." The agreement of March 10th appears to have lapsed, and no payment was made under it. On April 4, 1903, the plaintiff and defendants entered into a renewal and extension agreement, which caused all the trouble in this case, and is as follows: "The time of the payment of the first \$500.00, herein provided for, is hereby extended thirty days, and the said second party agrees that the same shall be paid on or before May 4th, 1903. April 14, 1903. L. F. Williams, W. C. Brooks, by Culver, F. D. Culver." No payments were made under this additional or extension agreement, and the option was forfeited and abandoned. On September 22, 1903, the plaintiff commenced his action on the contract for the recovery of the first payment of \$500, which he alleged was an absolute and unconditional promise to pay the sum of \$500. Plaintiff claims that, in consideration of the continuation of the contract and exten-

sion of time for making the first payment, the defendants agreed absolutely to make the first payment irrespective of all other conditions and contingencies. The case went to trial with a jury, and a verdict was rendered in favor of plaintiff, and judgment was thereupon entered.

The plaintiff contends that the defendants have availed themselves of the full period of time allowed by the option and extension agreement up to and including May 4th. The defendants, on the other hand, claim that prior to May 4th they had a parol understanding and agreement with the plaintiff, whereby they forfeited and abandoned the option, and that all parties thereto were released from further obligation or liability thereunder. On this phase of the case there was a direct conflict in the evidence, and the court instructed the jury on this question as follows: "I instruct you that, if you find from the evidence that after the said latter agreement had been so entered into, and prior to May 4, 1903, said L. F. Williams and the said defendants, Brooks and Culver, entered into an oral agreement that the said original contract should be rescinded, and that it was agreed that said Williams should have said mining property, and that the plaintiff, Williams, agreed to do so, then the said rescinding of the first original agreement prior to said May 4, 1903, would release and relieve the said defendants from making the said first payment of \$500, and would be a complete defense to this action. The agreement, if you find from the evidence there was any agreement to so release and relieve both plaintiff and defendants from all their obligations under the first agreement made prior to the expiration of the time as extended for making the first payment thereon, to wit, May 4, 1903, would relieve all parties from any liability under the extension agreement dated May 4, 1903; but I also instruct you that such an agreement by said parties to so release the said parties from said original contract, so made and entered into at any time after the said 4th day of May, 1903, would be no defense to said obligation by defendants to pay said \$500 on or before May 4, 1903." It will therefore be seen that this branch of the case was fairly presented to the jury, and their finding under conflicting evidence is conclusive on that point.

The next question, namely, the correct construction to be placed on the provisions of these contracts, is a much more difficult and distracting proposition. Counsel for respondent maintains that under the renewal and extension agreement the payment became due May 4th, independent of the condition which was attached to the provision for payment of this sum in the original contract. In the agreement of March 10th it will be observed the payment of this first \$500 was conditioned "on acceptance of this bond by said second party's Eastern principals." Appellants admit that by the extension agreement

this first payment was not dependent on acceptance of a bond by "Eastern principals," but do contend that they still had the right to "rescind or abandon" the option under the provisions contained in the last paragraph of the contract of March 10th, and that after such abandonment or rescission they could not be held liable for any payments which had not been previously made. This construction would, it seems, be a correct view to take of the original contract, but the difficulty and confusion arises when we come to consider the language and effect of the extension agreement of April 4th. If this latter agreement was to have any force or effect as a contract, it must have been founded on some consideration. Evidently the parties considered it legal and binding. At the time it was made the original contract of March 10th was forfeited and had lapsed. It seems like a reasonable and logical deduction to say that the original contract was revived and renewed, and the time of first payment extended in consideration of the liability for the first payment becoming an unconditional and absolute promise to pay instead of a conditional liability as it was made in the first contract. Such consideration would be sufficient to support the contract of April 4th, but, in the absence of that consideration, it would be difficult to discover any consideration for the latter contract. It is true that, when we turn to the paragraph of the original contract providing for an abandonment and forfeiture of the option and all liability thereunder, the appellant's contention finds some support. It seems to us, however, that, since the issue was fairly submitted to the jury as to whether or not the appellants abandoned and forfeited the option prior to the date on which this payment became due and that issue was found against appellants, their contention must therefore necessarily fail on that branch of the case.

This case is not free from doubt, but it seems to us that the sounder reason is with the respondent. Both the trial court and jury having found for respondent, we are not inclined to disturb the verdict and judgment.

Judgment affirmed, with costs to respondent.

SULLIVAN, J., concurs.

SHAWNEE FIRE INS. CO. v. KNERR.
(Supreme Court of Kansas, Dec. 9, 1905. On Rehearing, Jan. 6, 1906.)

1. INSURANCE—IRON-SAFE CLAUSE—CONDITION PRECEDENT.

The iron-safe clause in the policy under consideration is a condition the performance of which is precedent to the right of the insured to maintain an action on the policy.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 853.]

2. SAME—WAIVER—EVIDENCE.

The acts of an adjuster while investigating the cause of a fire and the amount of loss sustained, made under a nonwaiver agreement, can-

not be construed into a waiver by the company of its right to insist that the policy was void because of the noncompliance with the iron-safe clause contained therein.

3. SAME—PERFORMANCE OF CONDITIONS.

In an action to recover on an insurance policy, the plaintiff must plead and prove the performance of all conditions precedent, or a waiver by the insurer. Where performance is pleaded, a general denial puts in issue the performance of all such conditions.

(Syllabus by the Court.)

Error from District Court, Dickinson County; R. L. King, Judge.

Action by E. I. Knerr against the Shawnee Fire Insurance Company. Judgment for plaintiff. Defendant brings error. Reversed.

Mulvane & Gault and G. W. Hurd, for plaintiff in error. E. C. Little, for defendant in error.

GREENE, J. On the 7th day of October, 1903, Mrs. E. I. Knerr, being the owner of a general stock of merchandise contained in a building situated in Manchester, Kan., procured a policy of insurance in the Shawnee Fire Insurance Company, of Topeka, Kan., on said stock in the sum of \$2,000. On the night of February 2-3, 1904, the stock was totally destroyed by fire. The company paid the defendant \$1,500 by way of settlement. The insured brought this action to recover the balance, \$500, on the ground that the settlement was obtained by duress.

Of the many questions argued by the plaintiff in error the one which is decisive of the case in this court arises under the following condition of the policy: "The assured under this policy hereby covenants and agrees to keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business, and further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in the within policy is not actually opened for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and, in case of loss, the assured agrees and covenants to produce such books and inventory, and in the event of a failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss." The insured neglected to keep a safe. She permitted the books used in conducting the business to remain in the store where the insured stock was kept at night, where they could not escape destruction if the stock and building burned. The building and stock were destroyed by fire in the night of February 2-3, 1904. The ledger, the cashbook, the daybook of credit sales, the bankbook, the invoices—in fact, all of the books pertaining to the business, except a book called a "ledgerette," which

is said to have contained the credit accounts—were in the desk in the building, and were destroyed. The company contends that the failure of the insured to comply with this condition of the contract of insurance forfeits her right to recover anything under the policy. This provision was inserted in the policy so that, if a fire did occur, the company would have some data from which it might approximate the actual value of the stock destroyed. It is not an unreasonable precaution. It is one with which the insured might very easily have complied. In any event the parties making the contract agreed that it should be performed by the insured, and, since it is a part of the contract, it cannot be ignored or arbitrarily set aside. It is generally held that a neglect on the part of the insured to substantially comply with a clause in an insurance policy to keep the books used in conducting the insured's business in an iron safe, or in some place where they will not be destroyed in case the place in which the insured stock is kept is consumed by fire, will avoid the policy. *Hanover Fire Ins. Co. v. Crawford*, 121 Ala. 258, 25 South. 912, 77 Am. St. Rep. 55; *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.* (Tex. Civ. App.) 28 S. W. 1027; *Standard Fire Ins. Co. v. Willock* (Tex. Civ. App.) 29 S. W. 218; *Goldman et al. v. Insurance Co.*, 48 La. Ann. 223, 19 South. 132; *Keet-Rountree D. G. Co. v. Mercantile Town Mut. Ins. Co.* (Mo. App.) 74 S. W. 469.

We see no good reason for not adhering to this rule in the present case. The binding force of this clause, and the consequent effect on the plaintiff's right to recover in case of noncompliance therewith, are not strongly denied. The insured contends that the company, by the conduct of its agents and adjuster, waived the performance of this condition. The fire occurred in the night of February 2-3, 1904. Notice was given the company, and its adjuster appeared in response thereto on the morning of the 8th. After the most common preliminary talk about the fire and the loss, and a disclosure that the books were destroyed, the adjuster refused to enter into a general investigation looking to an adjustment until the insured would sign a nonwaiver agreement. Knerr, who was acting for his wife, hesitated to sign such agreement until he had consulted a lawyer, and after having consulted his lawyer and his wife, the plaintiff, he returned, and both parties signed the following agreement:

"Nonwaiver Agreement.

"It is hereby mutually understood and agreed by and between E. I. Knerr of the first part and the Shawnee Fire Ins. Co. of Topeka, Kan. and other companies signing this agreement, party of the second part, that any action taken by said party of the second part in investigating the cause of fire or investigating and ascertaining the amount of

loss and damage to the property of the party of the first part caused by fire alleged to have occurred on Feb. 3rd, 1904, shall not waive or invalidate any of the conditions of the policy of the party of the second part, held by the party of the first part, and shall not waive or invalidate any right whatever of either of the parties to this agreement.

"The intent of this agreement is to preserve the rights of all parties hereto and provide for an investigation of the fire and the determination of the amount of the loss or damage, without regard to the liability of the party of the second part.

"Signed in duplicate, this 8th day of Feby., 1904."

By the terms of this agreement the insured said to the company: "Your acts while investigating the cause of the fire and the amount of damage or loss sustained shall not be construed into a waiver on your part of the performance by me of any of the conditions of the policy, either those which should have been performed in the past, or those which it becomes my duty to perform in the future." The acts of the company while investigating these two questions must be construed with reference to this agreement. Thus construed, there is no evidence of a waiver by the company of conditions which should have been performed by the insured previous to the fire.

It is also contended that the company's local agent, who insured the property, was perfectly familiar with the store and the stock carried by the insured, and knew when he issued the policy that the insured had no iron safe, and did not keep one in the store, and could not comply with the condition. Therefore the acceptance of the risk with this knowledge estopped the company to plead the nonperformance of this condition of the policy. The clause referred to requires the insured to keep the books in a fireproof safe in the building at night and at all times when the store was not open for business, or in some secure place not exposed to a fire which would destroy the house where such business was carried on. Conceding that the agent issuing the policy was familiar with the insured store, building, and stock, and knew that the insured did not keep an iron safe, and that he issued the policy knowing the existence of these conditions, that could not be construed into a waiver of the obligation of the insured to keep the books at night, and when the store was not open for business, in some secure place not exposed to a fire that would destroy the building in which the insured property was kept.

From any view that may be taken we are unable to sustain the judgment of the court below. It is therefore reversed, and the cause remanded for further proceedings. All the Justices concurring.

On Rehearing.

One of the contentions of the defendant in error on her motion for a rehearing is that

nonperformance of the conditions of the iron-safe clause in the contract of insurance was not pleaded by the insurer as a forfeiture of the policy, and that the original opinion was written upon a question not in issue by the pleadings. The rule of pleading in such cases was not given much attention in the original opinion, because the court did not think it required special mention. For this reason it is thought best to refer to this rule more at length now. The petition contained the policy and averred the performance of all of its conditions, one of which is the iron-safe clause. To this petition the insurance company filed a general denial and pleaded other separate defenses. Before the plaintiff could recover she would be compelled to plead and prove the performance on her part of all conditions precedent, or a waiver of such conditions on the part of the company. The denial of the defendant put in issue the allegations of performance of these conditions. *Surety Co. v. Bragg*, 63 Kan. 291, 85 Pac. 272. The rule of pleading in such actions is stated in 11 Encyc. of Pl. & Pr. thus: "Where the code practice obtains, the defendant may show, under a general denial, breach of conditions precedent, such as failure to give notice or proofs of loss, or that the loss or cause of the loss was not within the purview of the contract; but he cannot show a breach of conditions, representations, or 'warranties' not conditions precedent, or facts showing a right to avoid the policy, such as a willful burning of the insured property by the plaintiff." "A condition precedent calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which its obligation is made to depend. In the case of a mere warranty the contract takes effect and becomes operative immediately. It is true that where a policy of insurance so provides, if there is a breach of a warranty, the policy is void ab initio. But this does not change the warranty into a condition precedent, as understood in the law. It lacks the essential element of a condition precedent, in that it contains no stipulation that an event shall happen or an act shall be performed in the future before the policy shall become effectual." *Chambers v. Northwestern, etc., Ins. Co.* (Minn.) 67 N. W. 367, 58 Am. St. Rep. 549. The performance of the condition in the iron-safe clause being a condition precedent, the plaintiff was required to plead and prove its performance.

In the application for a rehearing it is insisted that this decision conflicts with the case of *Insurance Co. v. Milling Co.*, 69 Kan. 114, 76 Pac. 423. There was no principle involved in that case akin to the question decided here. In that case the insurance company in its answer pleaded certain conditions in the policy, the noncompliance with which by the insured it claimed was a forfeiture of its right to recover. To this de-

fense the insured demurred, and the demurrer was sustained. The cause was brought to this court upon that question. This condition set up in the answer did not declare that the noncompliance therewith would forfeit the policy, and it was held, since no provision for a forfeiture was contained in the condition, that the demurrer was properly sustained.

PHENIX INS. CO. v. STAHL.

(Supreme Court of Kansas. Jan. 6, 1906.)

1. INSURANCE—POLICY—IRON-SAFE CLAUSE—WAIVER.

Where a stock of merchandise is insured against fire by a policy containing what is known as the "iron-safe clause," requiring certain books and documents pertaining to the business to be kept at night in an iron safe, and a fire occurs, in which a part of such documents are destroyed by reason of the failure of the insured to comply with the terms of such clause, the insurance company does not lose the right to make a defense upon that ground by requesting the production of other evidence to supply that so destroyed, and by making an examination thereof with a view to determining the amount of the loss, where, before the insured is put to any inconvenience or expense in that connection, he enters into a written agreement with the agent of the insurance company, providing that such examination should not be deemed a waiver of any of its rights under the policy.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1071.]

2. SAME.

In the circumstances stated in the foregoing paragraph the liability of the company is not affected by the fact that before such non-waiver agreement is signed the representative of the company tells the insured what documents would be desired for examination in lieu of those destroyed, and also tells him that, if such documents are produced by him after the execution of such agreement, the loss will be paid.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1018.]

(Syllabus by the Court.)

Error from District Court, Brown County; William I. Stuart, Judge.

Action by John Stahl against the Phenix Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. G. Slonecker, Reed, Yates, Mastin & Howell, and Buckles & Pearl, for plaintiff in error. James Fulloon, for defendant in error.

MASON, J. John Stahl insured a stock of merchandise against fire in the Phenix Insurance Company. The policy contained what is known as the "iron-safe clause," requiring certain books and documents pertaining to the business to be kept in an iron safe at night and at other times when the building containing the goods was closed, and providing that a failure on the part of the insured to comply with this condition should avoid the policy. A loss occurred, and a part of the documents referred to were destroyed by reason of the neglect of the insured to

place them in the safe according to the terms of the clause mentioned. An adjuster for the company visited the scene of the fire, was informed in a general way of the situation, suggested that other documents might be accepted in lieu of those destroyed, but refused to proceed further until Stahl should sign a "nonwaiver agreement," reading as follows: "John Stahl assured under policy 21,054 of the Phenix Ins. Co., of Brooklyn, N. Y., hereby requests A. E. Pinkney, adjuster, to make examination of the books and papers and other evidences of loss (including assured's sworn statement if it be necessary), which he submits and made for the purpose of ascertaining the amount of loss sustained by assured on stock of merchandise, with the express understanding and agreement that such examination shall not be considered an acknowledgment of any liability of the said Phenix Ins. Co., of Brooklyn, N. Y., under said examination, nor a waiver or impairment of assured's obligation thereunder. It is further understood and agreed that any legal rights if any the said John Stahl may have under said policy are not impaired by his act in signing this request." This agreement, after some discussion, was executed by both parties. Proofs were then submitted and examined, but the company finally refused payment. The insured brought action upon the policy and recovered a judgment, from which the defendant prosecutes error.

The judgment can be sustained only in case there was some evidence tending to show that the insurance company had waived the right to claim the benefit of the failure on the part of the insured to observe the provisions of the iron-safe clause. The evidence relied upon by the defendant in error as having this effect was, in substance, that before the nonwaiver agreement was signed the company, by its adjuster, instructed Stahl what proofs he would have to submit in order to have his claim considered, and stated that, if he would make such proofs after signing the agreement, the company would settle with him and pay his loss, and that afterward he did furnish all the proofs required of him. While there was some talk about the matter of making proof of loss before the nonwaiver agreement was signed, nothing was in fact done toward an adjustment until afterward. In this aspect the case is the exact counterpart of *Shawnee Insurance Company v. Knerr*, 83 Pac. 611, under the authority of which the judgment must be reversed, unless a basis of distinction can be found in the statements made on behalf of the company before the execution of the nonwaiver agreement. The trial court told the jury in effect that if, before that time, the adjuster instructed Stahl to procure certain proofs, and Stahl afterward did so without having received any notice to the contrary, this might be held to constitute a waiver on the part of the company. In this we think the court erred. Stahl's efforts to furnish for the information

of the company satisfactory evidence of the extent of his loss were all made after entering into the nonwaiver agreement, and must be viewed in the light of that instrument, even although they conformed to directions previously given.

The evidence that prior to the execution of the nonwaiver agreement the adjuster said that, if the insured would furnish certain information after signing the agreement, the company would settle with him and pay his claim, cannot avail the defendant in error. This statement is alleged to have been made in the course of the oral negotiations leading up to the execution of the written contract, the terms and purposes of which it would destroy if given any effect whatever. To permit a verbal promise, made under such circumstances, to prevail over the written agreement finally made, would be to countenance the very evil against which the rule forbidding the contradiction of writings by oral testimony is designed to afford protection.

Objections have been made to the consideration of the case on review. These have been examined and found not to be well taken. In view of the conclusions already announced, the specific assignments of error are not thought to require discussion.

The judgment is reversed, and a new trial ordered. All the Justices concurring.

CITY OF GARNETT v. SMITH.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. MUNICIPAL CORPORATIONS — INJURIES CAUSED BY DEFECTIVE SIDEWALK — PETITION.

In an action for injuries resulting to plaintiff from falling on a defective sidewalk, the petition alleged that on a certain designated street, and along the south side thereof, and along the north side of a designated lot and block in defendant city, there was a certain sidewalk, and that on a certain date while passing over, along, and upon such sidewalk and street, plaintiff was tripped by one of the loose boards of said sidewalk at the point of said street as aforesaid. *Held*, that it was sufficiently definite as to the place where the injuries were received.

2. DAMAGES—PERSONAL INJURIES—PETITION.

A petition stating that plaintiff "was thrown with great force and violence to the ground, knocked down and two ribs of his right side broken or fractured, his left knee dislocated, his right arm strained, and the right side of his back just above his right kidney bruised," was sufficient to inform defendant of plaintiff's injuries, and it was proper to refuse to require a more definite statement.

3. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALK—CONTRIBUTORY NEGLIGENCE.

It is not contributory negligence for one to walk upon a defective sidewalk, although in so doing he must exercise ordinary care.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1677, 1679.]

4. TRIAL — REFUSAL OF INSTRUCTIONS ALREADY GIVEN.

Although requested instructions may have stated the law correctly, there was no error

in refusing to give them, where the court gave proper instructions on the same matter.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-659.]

Error from District Court, Anderson County; C. A. Smart, Judge.

Action by William V. Smith against the city of Garnett. From a judgment for plaintiff, defendant brings error. Affirmed.

J. G. Johnson and W. O. Knight, for plaintiff in error. Manford Schoonover, for defendant in error.

PER CURIAM. William V. Smith recovered judgment against the city of Garnett for damage resulting to him from falling on a defective sidewalk. The petition states: "That a certain public highway and street, known and designated as 'Seventh avenue,' was at the time the plaintiff received the injuries herein complained of and for a long time prior thereto * * * had been a public highway and street; * * * that along the south side of said avenue, street, and highway and along the north side of lot eleven (11), in block seventy-three (73), in said city of Garnett, there was at the time of the injuries hereinafter complained of, and for a long time prior thereto, a certain sidewalk used by said city for the free use and passage of all persons on foot and at all times; * * * that on August 29, 1902, while passing over, along and upon said sidewalk and street without fault or negligence upon his part, plaintiff was tripped by one of the loose boards of said sidewalk at the point on said street as aforesaid." These allegations are sufficiently definite as to the place on the sidewalk where the plaintiff alleges he received his injuries. In respect to his injuries the petition states that plaintiff "was thrown with great force and violence to the ground, knocked down and two ribs on his right side broken or fractured, his left knee dislocated, his right arm strained, and the right side of his back, just above his right kidney, bruised." No error was committed by the court in refusing to require plaintiff to make his petition more definite in this particular. From these allegations the defendant was sufficiently informed of the plaintiff's injuries to have a physician examine these parts to ascertain if any injuries had been sustained, and their extent.

The court overruled the defendant's demurrer to the plaintiff's evidence. Error is predicated on this. It is the theory of the defendant that the evidence introduced by the plaintiff proves that he was guilty of contributory negligence in going upon this walk which he knew was defective, when he might by crossing the street have traveled upon a perfectly safe walk. It is not contributory negligence for one to walk upon a defective sidewalk. In doing so, however, he must exercise ordinary care, such care as an ordinarily prudent man would exercise under similar circumstances. *Langan v. City*

of Atchison, 35 Kan. 318, 11 Pac. 38, 57 Am. Rep. 165; Emporia v. Schmidling, 33 Kan. 485, 6 Pac. 893; Maultby v. City of Leavenworth, 28 Kan. 745; City of Topeka v. High, 6 Kan. App. 162, 51 Pac. 306; City of Wichita v. Coggeshall, 3 Kan. App. 540, 43 Pac. 842; Osage City v. Brown, 27 Kan. 74.

It is also contended that the court erred in refusing to give certain instructions. These referred to the duty imposed upon the plaintiff to exercise care in traveling upon a sidewalk he knew to be defective. While these instructions may have stated the law correctly, the court did not omit to give proper instructions upon this question. Therefore there was no prejudicial error in refusing to give those asked by the defendant.

The judgment is affirmed.

MISSOURI CAN CO. v. ROSS.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. TRIAL—DEMURRER TO EVIDENCE.

On a demurrer to plaintiff's evidence, the court can take into consideration only those facts and those inferences of fact which are favorable to the plaintiff, and cannot consider defendant's evidence which tends to break down plaintiff's case.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 354-356.]

Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Judge.

Action by Blanche M. Ross against the Missouri Can Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Warner, Dean, McLeod, Holden & Timmonds and McFadden & Morris, for plaintiff in error. Keplinger & Trickett, for defendant in error.

PER CURIAM. In this case the principal contentions are that a demurrer to plaintiff's evidence should have been sustained, and that the court should have directed a verdict for the defendant. In arguing these propositions the defendant does not do what the law requires, viz., take into consideration only those facts and those inferences of fact which are favorable to the plaintiff. On the other hand, its own evidence is frequently brought forward and urged as breaking down the plaintiff's case, and in every instance in which the plaintiff's testimony is susceptible of an adverse interpretation it is given that turn, although the jury would have been justified in taking a different view.

The only question in the case upon which it fairly may be said there is a lack of evidence is that relating to the slipping and tipping of the foot rest, and the slipping of plaintiff's foot upon it. But, under the allegations of the petition, the evidence, and the instructions of the court, it was not necessary that the plaintiff should extend her evidence to this detail. The court by instruction

numbered 10 required her to prove an increase of hazard before she could recover, whether the accident happened through the insecurity of the foot rest or not. Other instructions completed the statement of the law upon that subject, and the facts fully warranted a recovery upon that ground. This being true, the matter of a movement of the foot rest became as incidental as, for example, the fact that plaintiff leaned to the left.

One instruction to the jury, that numbered 9, is criticised in two particulars. It is said the court called the piece of metal placed in front of the pedal of the machine a foot rest. The attorneys for the defendant so designated it in the course of the trial, and whether it was a die of the machine or not it was a foot rest, as it was placed and used at the time of the accident.

The other objection to the instruction is stated thus: "Yet more vicious is the portion of the instruction which allowed a recovery by plaintiff if the blade or die had been placed in front of the machine by a co-employee of the plaintiff without the knowledge or permission of the defendant." But such was neither the purpose nor the effect of instruction No. 7. By its express terms it covered only one phase of the case, viz., the inference which the plaintiff was authorized to draw in reference to the use of the foot rest. By instruction No. 10 the circumstances under which the defendant would become liable in case the plaintiff innocently and justifiably used the foot rest were stated, and no complaint is made in reference to it. The proposition of law quoted by the defendant from Labatt on Master & Serrant is sound and the controlling principles of the cases cited appear to be correct. But they do not meet or cover the facts of this case.

No useful purpose would be subserved in analyzing the testimony. The assignments of error are not well grounded, and the judgment of the district court is affirmed.

CITY OF OTTAWA v. GREEN.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. EVIDENCE—OPINION EVIDENCE.

In an action against a city for damages occasioned by an alleged fall upon a defective sidewalk, where plaintiff has testified to the manner in which he fell and that the fall caused a rupture in the region of the groin, it was not error to refuse to permit a physician, who never had examined plaintiff's injuries, but who was present and heard plaintiff's testimony, to give his opinion concerning the probability of a person being ruptured in the manner testified to by plaintiff.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2367.]

2. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALK—ACTION FOR INJURIES.

In such a case, where plaintiff was familiar with the defective condition of the walk, but nevertheless attempted to use it in the dark, an instruction in the following form was proper: "It was not negligence for him to pass over

a cross-walk known to him to be dangerous, but in doing so he must use care and caution reasonably commensurate with the known danger. * * * Consider carefully his knowledge of the condition of the walk, the nature of the defect, whether easily visible or apparent, or not, the nature and manner of the accident, and then determine, in the light of all the circumstances, whether the plaintiff on his part exercised the care and caution that a person of reasonable prudence would have exercised in the light of such knowledge."

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Municipal Corporations, §§ 1683, 1755.]

3. APPEAL—REVIEW—ERROR AFFECTING SUBSTANTIAL RIGHTS.

The failure of the successful party in a jury trial to pay jury fees, in compliance with Gen. St. 1901, § 3050, does not affect the substantial rights of the defeated party, nor is it an error raised by a motion for a new trial.

(Syllabus by the Court.)

Error from District Court, Franklin County; C. A. Smart, Judge.

Action by Charles C. Green against the city of Ottawa. Judgment for plaintiff, and defendant brings error. *Affirmed*.

Geo. D. Rathbun, for plaintiff in error.
Gamble & Costigan, for defendant in error.

PORTER, J. Charles C. Green recovered a judgment of \$400 against the city of Ottawa for injuries which he claimed to have received from a fall upon a defective walk. The city appeals.

The petition described the location of the defective walk at the intersection of Second street, running east and west, and Mulberry street, running north and south, and the walk as a plank cross-walk. The defect averred was that "the planks * * * were curved upward, so that they and the dirt which was beneath them formed an abrupt elevation and obstacle directly in the way of the eastern approach to said cross-walk, the top of which was about 10 inches above the level of said approach; that said curvature of the planks also formed a steep incline on said cross-walk," etc.; that plaintiff, exercising due care, etc., while attempting to use the walk, was made to stumble and fall, causing among other injuries a rupture in the region of the groin on the right side. The evidence shows that the walk was in a dangerous condition and had been in such condition for more than three years; that several other persons had fallen in the same manner and at the same place as claimed by plaintiff. In each instance the superintendent of streets of the city was notified of these accidents and of the condition of the walk and requested to repair the defect, but no attention was paid to the requests, so that the city had both actual and constructive notice of the defect. Plaintiff lived a short distance from the defective walk, and had used it frequently and knew of its condition. His duties as janitor required him to leave home early in the morning, and on the morning of September 22, 1903, he

left home about 4 o'clock. He testified that it was a dark morning and not light enough for him to see the obstruction; that he was aware of it and was going along carefully on that account; that he felt along the wire fence to discover when he passed the corner; and that while endeavoring to avoid the obstacle, and doing all in his power to that end, he reached the place before he knew it and stumbled and fell and was injured, as set out in the petition. The physician who treated him the same day testified to the existence of the hernia or rupture; that he was a member of the board of pension examiners; and some months prior to that had made an examination of plaintiff who was an applicant for a pension, and that plaintiff had no rupture at that time. The answer, in addition to a general denial, set up the defense of contributory negligence. No reply was filed, but it may be assumed that the parties and the court treated the issues as joined by a reply, since no objection by defendant is raised in the record.

Several errors are alleged, many of them so unsubstantial that it seems unnecessary to do more than state them. The court properly denied defendant's motion to require plaintiff to make the petition more definite and certain by stating the way in which he was hurt. The petition set forth in plain and concise language how it occurred without needlessly reciting every detail.

Error is also insisted upon because the court sustained certain objections to testimony offered by defendant. Defendant city called one Dr. Davis as an expert witness, and he was asked the following questions: "Q. Did you hear the testimony of the plaintiff Green in this case? A. I heard part of it; I came in after he commenced giving his testimony. Q. Did you hear him describe the manner in which he fell or stumbled on the crossing? A. Yes, sir. Q. Now, I will ask you to state to the jury, from your knowledge and experience as a physician, the probability of a man rupturing himself in the manner testified to by Green? * * * Q. I will ask you to state to the jury what is the usual and ordinary manner in which rupture occurs?" Objections to the last two questions were sustained, and error is claimed upon the authority of A., T. & S. F. R. Co. v. Brassfield, 51 Kan. 167, 32 Pac. 814. That case was like this in many respects. The injury there was a rupture claimed to have been caused by a sudden strain occasioned by the dropping or turning of a heavy railroad tie, one end of which plaintiff was lifting. A physician who had examined plaintiff was permitted to testify, over defendant's objections, that such injuries may be produced without great violence or shock, but that he had never seen a rupture of that character except as the result of more or less violence. After stating that he was present and heard plaintiff testify how the injury was inflicted, he was further asked to state

whether, in his opinion, Brassfield's condition could have been produced or brought about in the manner which he (Brassfield) had detailed to the jury. He answered that it must have been done by violence. The court said: "It would have been more regular to have put the facts to him in a hypothetical form, and obtained his opinion upon the facts testified to by Brassfield. The testimony of the latter on his question, however, was not obscure or involved, and, being very brief, the company can have suffered no prejudice from this irregularity." In the present case Dr. Davis had not heard all the testimony of plaintiff and never had examined his injuries. But aside from these differences, the case cited is no authority upon which plaintiff in error may rely. It does not go to the extent of holding that it would have been error to refuse to permit such a question, but merely that in that case, considering the answer and the circumstances, the party against whom it was offered suffered no prejudice, though the question itself was irregular. The trial court properly sustained the objection.

Defendant complains because the court would not permit it to show by Dr. Davis that a man 60 years of age, with the right knee stiff from a gunshot wound, would be more liable to rupture than a person not so affected. In justice to the doctor himself it should be stated that there is nothing in the record from which it could be inferred that he would have so testified, had the objection not been sustained.

There is no variance between the notice of the claim filed with the city, where it stated a claim for injuries "caused by a fall on the walk near the northeast corner of Second and Mulberry streets," and the petition, where it was referred to as a "crosswalk." "Walk" and "crosswalk" mean the same thing. Both are sidewalks, and the city is bound to keep both in repair. The notice challenged the attention of the city to a particular place at the intersection of the two streets. From the photographs in evidence it appears that the city could have had no difficulty in locating the place of accident with such a notice. The photographs were taken eight days after plaintiff's fall, and error is complained of in admitting them without proof that they showed the condition of the walk on the date of the accident. The fact that several witnesses, including some offered by the city, afterward identified the photographs as showing the exact condition of the walk as it had existed for several years prior to and up to the time of the accident, rendered this irregularity of no consequence.

The following instruction given by the court is complained of as not stating fully the duty of a person familiar with the al-

leged defective sidewalk: "It was not negligence for him to pass over a cross-walk known to him to be dangerous, but, in doing so, he must use care and caution reasonably commensurate with the known danger. * * * Consider carefully his knowledge of the condition of the walk, the nature of the defect, whether easily visible or apparent, or not, the nature and manner of the accident, and then determine, in the light of all the circumstances, whether the plaintiff on his part exercised the care and caution that a person of reasonable prudence would have exercised in the light of such knowledge." It is urged that there should have been included the elements of time, light, locality, mud, manner of traveling, and the crippled condition of plaintiff. To "determine, in the light of all the circumstances," means to consider these elements and everything else in evidence. The instructions considered together cover the law of the case and leave no room for any claim of prejudice on the part of defendant. *City of Emporia v. Schmidling*, 33 Kan. 485, 6 Pac. 893; *Langan v. City of Atchison*, 35 Kan. 318, 11 Pac. 38, 57 Am. Rep. 165.

It is contended also that the case should be reversed because the jury fees, provided by Gen. St. 1901, 3056, were not paid by the successful party before judgment rendered on the verdict. A statement appears in the record to the effect that these fees were not paid as provided by law. The failure to pay these fees was an irregularity, but not one which either affected the substantial rights of plaintiff in error, or of which it can complain. *City of Topeka v. Tuttle*, 5 Kan. 311, 425. The provision of the law is for the benefit of the county, and the party against whom the judgment is entered is not affected in any way by a failure to comply. Moreover, this court can consider only errors to which the attention of the trial court was challenged by the motion for a new trial, and this irregularity is not thus raised.

The court committed no error in denying the motion for a new trial. The grounds relied upon were insufficient, and no diligence was shown or sufficient reasons given why the evidence was not produced at the trial.

Counsel insist that, because Green was a cripple and took no lantern with him when he ventured upon the defective walk in the darkness, and because he could have gone some other street, "either he was guilty of contributory negligence, or that he has fabricated the whole thing." It is sufficient to say that all these matters were passed upon by the jury, and that there appears no lack of evidence in the record to sustain the verdict.

The judgment will be affirmed. All the Justices concurring.

STATE ex rel. LANDER et al. v. LEWIS.

(Supreme Court of Kansas. Nov. 11, 1905.)

APPEAL — CASE-MADE — SETTLEMENT AND SIGNING—EXPIRATION OF TERM OF JUDGE.

Under the facts of this case it is held that no time had been fixed for settling and signing a case-made when the trial judge's term of office expired.

(Syllabus by the Court.)

Proceeding by the state, on the relation of Charles Lander and another, to compel W. H. Lewis, district judge, to settle a case-made. Denied.

John F. Hanson, for relators. Grattan & Grattan, for defendant.

BURCH, J. This proceeding is brought to compel a district judge to settle and sign a case-made after his term of office has expired. In the district court the motion for a new trial was overruled on December 22, 1904, and at the same time the following order was made: "At which time plaintiffs were given 30 days to make and serve a case-made for the Supreme Court of the state of Kansas, and the defendant given five days after service to suggest amendments; the case to be signed and settled on two days' notice of either party at any time thereafter." The judge's term expired on January 9, 1905. The case was served on January 20, 1905. Amendments were suggested on January 25th and afterward, but on the same day notice was served that the case would be settled and signed on January 28th. On that day, the thirty-seventh after the making of the order, the judge refused to act in the premises, on the ground that he no longer had jurisdiction to do so.

The order involved is quite similar to the one discussed in the case of *Mowery v. Bank*, 67 Kan. 128, 72 Pac. 539, which reads as follows: "Plaintiffs are allowed till and including the 1st day of February, 1902, to make and serve a case-made for appeal to the Supreme Court, and the defendant is allowed till and including February 28, 1902, to suggest amendments thereto; case to be settled and signed thereafter on five days' written notice by either party." This order was made on November 1, 1901, and the judge's term expired in January, 1902, before any notice of settlement or signing had been given. The difference between the indefinite general term "thereafter" and the indefinite general phrase "at any time thereafter" is not sufficient to form the basis of a principle. In all other essential respects the facts in *Mowery v. Bank* and in this case are strictly analogous. Although the attorneys in *Mowery v. Bank* made no point upon the word "thereafter," Mr. Justice Pollock, speaking for the court, made the following clear statement of the law: "As the order of the trial judge did not fix the time for the settlement of the case, but left the date of settlement uncertain, contingent upon the giving of the

written notice of the time and place of settlement by counsel, and as the time for the settlement of the case remained undetermined and unfixed at the date of the expiration of the term of office of the trial judge, we are constrained to hold that the petition in error must be dismissed for want of jurisdiction in this court." In *Butler v. Scott*, 68 Kan. 512, 75 Pac. 496, Mr. Justice Mason made the following equally perspicuous declaration: "The object of the provision in question is to preserve the jurisdiction of the trial judge, after his term has expired, not for an indefinite time, but only during a fixed and certain period. If, when his term expires, a time has been fixed within which the case is to be settled, and, as in this case there has been no extension of time, that is the limit of his jurisdiction. He may settle the case within that time, but not later. And if, when his term expires, no provision has been made as to the time of settlement, but a time has been fixed within which the case is to be made, that time, including that given for suggesting amendments, is the limit of his jurisdiction. He may settle the case within that time, but not later." It is impossible to say that the wholly undefined and indeterminate period of "any time" means a fixed and ascertained time within which counsel might, by giving notice, and the uncertainty as to when the case would be settled. Neither is it possible, under the language of the statute and of the decisions quoted, to say that the two days' notice of settlement and signing which might be given at will at any time, and which might be delayed indefinitely, constituted any portion of a time actually fixed when the judge went out of office. The court is not inclined to reverse the decisions referred to, and numerous others of like import.

The various attacks made by the plaintiff upon the statute governing the case cannot be supported, and the writ of mandamus is denied. All the Justices concurring.

CITY OF SALINA v. BLAKSLEY.

(Supreme Court of Kansas. Nov. 11, 1905.)

CONSTITUTIONAL LAW—RIGHT TO BEAR ARMS.

Section 4 of the Bill of Rights, which provides that "the people have the right to bear arms for their defense and security," is a limitation on legislative power to enact laws prohibiting the bearing of arms in the militia, or any other military organization provided for by law, but is not a limitation on legislative power to enact laws prohibiting and punishing the promiscuous carrying of arms or other deadly weapons.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Weapons, § 3.]

(Syllabus by the Court.)

Appeal from District Court, Salina County: R. R. Rees, Judge.

James Blaksley was convicted of carrying a pistol within the city of Salina, and appeals. Affirmed.

David Ritchie, for appellant. R. A. Lovitt, for appellee.

GREENE, J. James Blaksley was convicted in the police court of the city of Salina, a city of the second class, of carrying a revolving pistol within the city while under the influence of intoxicating liquor. He appealed to the district court, where he was again convicted, and this proceeding is prosecuted to reverse the judgment of the latter court.

The question presented is the constitutionality of section 1003 of the General Statutes of 1901, which reads: "The council may prohibit and punish the carrying of fire arms or other deadly weapons, concealed or otherwise, and may arrest and imprison, fine or set at work all vagrants and persons found in said city without visible means of support, or some legitimate business."

Section 4 of the Bill of Rights is as follows: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power." The contention is that this section of the Bill of Rights is a constitutional inhibition upon the power of the Legislature to prohibit the individual from having and carrying arms, and that section 1003 of the General Statutes of 1901 is an attempt to deprive him of the right guaranteed by the Bill of Rights, and is therefore unconstitutional and void. The power of the Legislature to prohibit or regulate the carrying of deadly weapons has been the subject of much dispute in the courts. The views expressed in the decisions are not uniform, and the reasonings of the different courts vary. It has, however, been generally held that the Legislatures can regulate the mode of carrying deadly weapons, provided they are not such as are ordinarily used in civilized warfare. To this view, there is a notable exception in the early case of *Bliss v. Commonwealth*, 2 Litt. (Ky.) 90, 13 Am. Dec. 251, where it was held, under a constitutional provision similar to ours, that the act of the Legislature prohibiting the carrying of concealed deadly weapons was void, and that the right of the citizen to own and carry arms was protected by the Constitution, and could not be taken away or regulated. While this decision has frequently been referred to by the courts of other states, it has never been followed. The same principle was announced in *Idaho in re Brickey*, 8 Idaho, 597, 70 Pac. 609, 101 Am. St. Rep. 215, but no reference is made to *Bliss v. Commonwealth*, nor to any other authority in support of the decision. In view of the disagreements in the reasonings of the different courts by which they reached conflicting conclusions, we prefer to treat the question as an original one.

The provision in section 4 of the Bill of Rights "that the people have the right to bear arms for their defense and security" refers to the people as a collective body. It was the safety and security of society that was being considered when this provision was put into our Constitution. It is followed immediately by the declaration that standing armies in time of peace are dangerous to liberty and should not be tolerated, and that "the military shall be in strict subordination to the civil power." It deals exclusively with the military. Individual rights are not considered in this section. The manner in which the people shall exercise this right of bearing arms for the defense and security of the people is found in article 8 of the Constitution, which authorizes the organizing, equipping, and disciplining of the militia, which shall be composed of "able-bodied male citizens between the ages of twenty-one and forty-five years. * * *" The militia is essentially the people's army, and their defense and security in time of peace. There are no other provisions made for the military protection and security of the people in time of peace. In the absence of constitutional or legislative authority, no person has the right to assume such duty. In some of the states where it has been held, under similar provisions, that the citizen has the right preserved by the Constitution to carry such arms as are ordinarily used in civilized warfare, it is placed on the ground that it was intended that the people would thereby become accustomed to handling and using such arms, so that in case of an emergency they would be more or less prepared for the duties of a soldier. The weakness of this argument lies in the fact that in nearly every state in the Union there are provisions for organizing and drilling state militia in sufficient numbers to meet any such emergency.

That the provision in question applies only to the right to bear arms as a member of the state militia, or some other military organization provided for by law, is also apparent from the second amendment to the federal Constitution, which says: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Here, also, the right of the people to keep and bear arms for their security is preserved, and the manner of bearing them for such purpose is clearly indicated to be as a member of a well-regulated militia, or some other military organization provided for by law. Mr. Bishop, in his work on *Statutory Crimes*, in treating of this provision, which is found in almost every state Constitution, says, in section 793: "In reason, the keeping and bearing of arms has reference only to war and possibly also to insurrections wherein the forms of war are, as far as practicable observed." Com-

monwealth v. Murphy (Mass.) 44 N. E. 138, 32 L. R. A. 606, strongly supports the position we have taken. The defendant was convicted of being a member of an independent organization which was drilling and parading with guns. The guns, however, had been intentionally made so defective as to be incapable of being discharged. The prosecution was had under a statute which provided that: "No body of men whatsoever, other than the regularly organized corps of the militia [and certain other designated organizations], shall associate themselves together at any time as a company or organization, for drill or parade with fire-arms, or maintain an armory in any city or town of the commonwealth. * * *"

On the trial the defendant invoked the provisions of the Massachusetts Bill of Rights, "the people have a right to keep and bear arms for the common defense," in support of his contention that he had the right to bear arms. The court said: "This view cannot be supported. The right to keep and bear arms for the common defense does not include the right to associate together as a military organization, or to drill and parade with arms in cities or towns, unless authorized to do so by law. This is a matter affecting the public security, quiet, and good order, and it is within the police power of the Legislature to regulate the bearing of arms, so as to forbid such unauthorized drills and parades." The defendant was not a member of an organized militia, nor of any other military organization provided for by law, and was therefore not within the provision of the Bill of Rights, and was not protected by its terms.

The judgment is affirmed. All the Justices concurring.

LEWIS et al. v. SNYDER et al.

(Supreme Court of Kansas. Nov. 11, 1905.)

APPEAL — HARMLESS ERROR — INSTRUCTIONS IN PROCEEDINGS TO CONTEST WILL.

In proceedings to contest a will, where the court itself considered the testimony, and later found, without regard to the verdict and answer of the jury, "that the testator was of sound mind and memory and legally competent to make a will," any error in the instructions given to the jury, or any irregularities of the jury, become immaterial.

Error from District Court, Linn County; W. L. Simons, Judge.

Proceedings by Byron H. Lewis and others against William Snyder and others to contest a will. From a judgment against contestants, they bring error. Affirmed.

Biddle & Lardner, for plaintiffs in error. J. I. Sheppard and John C. Cannon, for defendants in error.

PER CURIAM. In a contest of a will, made by James Lewis, in which he gave his property to a nephew and niece, instead of to his wife and children, the court called a

jury and submitted to it the single question: Was Lewis of sound mind and memory when he executed the will? The jury upon a mass of conflicting testimony made an affirmative finding. The court itself considered the testimony, and later found, as the judgment recites, "without regard to the verdict and answer of the jury," that Lewis was of sound mind and memory and legally competent to make a will at the time the will in question was executed. Since the court did not adopt the advisory finding of the jury, but acted independently and for itself determined the facts, the instructions given to the jury, or any irregularities of the jury, became immaterial. A few objections to rulings on testimony are mentioned, but there is nothing substantial in any of them.

The contention, so earnestly pressed here, that the finding of the court that Lewis was of sound and disposing mind when he executed the will was not supported by the evidence, has led to a careful reading of all the testimony in the record. There is considerable testimony, it is true, tending to show that the testator was mentally unbalanced and incompetent; but there is also a great deal of testimony going to establish testamentary capacity. It is manifest that Lewis was irascible and eccentric, but there is an abundance of evidence which upholds the finding of the court that he was competent to make a will; and this appears to have been the opinion of the contesting parties when the will was made, for about that time they negotiated contracts with Lewis dividing the property, and they accepted conveyances which he then made.

Judgment affirmed.

STATE v. DOUGLASS.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. INFORMATION—FORMAL REQUISITES—VERIFICATION.

An information cannot be quashed because the clerk of the district court who administered the oath, after naming the county, omitted to follow it with the word "county."

2. CRIMINAL LAW—APPEAL—EXCEPTIONS—NECESSITY.

The overruling of an application to delay a criminal trial until a party may present an affidavit showing what an absent witness will testify to is not reviewable, in the absence of an exception.

Appeal from District Court, Cherokee County; W. B. Glasse, Judge.

Frank Douglass was convicted of crime, and he appeals. Affirmed.

Ira Heaton and W. R. Cowley, for appellant. C. C. Coleman, Atty. Gen., Al. F. Williams, and H. C. Finch, for the State.

PER CURIAM. An information, otherwise sufficient, presented, signed, and sworn to by the county attorney, is not vulnerable to a motion to quash because the clerk of the

district court who administered the oath, after naming the county, omitted to follow such name with the word "county."

The overruling of an application to delay a trial until a party might present affidavits showing what absent witnesses would testify, not excepted to, cannot be considered by this court. In the present case no exceptions were taken to the overruling of the application.

STATE v. KNOLL.

(Supreme Court of Kansas. Nov. 11, 1905.)

HOMICIDE—MANSLAUGHTER IN THE SECOND DEGREE.

The evidence in this case is legally insufficient to establish a killing in an unusual manner within the meaning of section 16 of the crimes act (Gen. St. 1901, § 2001), defining manslaughter in the second degree to be "the killing of a human being without a design to effect death, in the heat of passion, but in a cruel and unusual manner, unless it be committed under such circumstances as to constitute excusable or justifiable homicide."

Johnston, C. J., dissenting.

(Syllabus by the Court.)

Appeal from District Court, Ellis County; J. H. Reeder, Judge.

John Knoll was convicted of manslaughter, and appeals. Reversed.

W. E. Saum and A. D. Gilkeson, for appellant. C. C. Coleman, Atty. Gen., and E. A. Rea, for the State.

BURCH, J. The defendant was convicted of manslaughter in the second degree under section 16 of the crimes act (Gen. St. 1901, § 2001), which reads as follows: "The killing of a human being without a design to effect death, in the heat of passion, but in a cruel and unusual manner, unless it be committed under such circumstances as to constitute excusable or justifiable homicide, shall be deemed manslaughter in the second degree." In this appeal it is urged that the evidence wholly fails to sustain the verdict and judgment. The facts are few, simple, and so far as the decisive circumstance is concerned, undisputed. They are outlined in a general way in the opinion of this court, rendered upon a former appeal, in the case of the State v. Knoll, 69 Kan. 767, 77 Pac. 580. To the statement there made it is, however, necessary to add a few particulars:

The deceased was a small man, not very stout, in poor health, and a hunchback. The defendant was a much larger and stronger man. The deceased had a revolver, but made no attempt to use it. The defendant, who was unarmed, defied the deceased to shoot, and then grappled him and bore him to the floor. While upon the deceased, he choked him and beat him with his fists until they were bloody. After the encounter the deceased was found to have a bruised and bleeding eye, a bruise on the back of his head, bruises on his breast, an abrasion on his

back—which, however, was probably a bed sore—and the tibia of his left leg was broken. A daughter of the deceased described the onset as follows: "Then Knoll jumped up and grabbed my papa * * * and rolled him on the floor." The wife of the deceased gave the following testimony: "They pushed me away, and then Alex and Knoll got together in the dining room there, in the store. I seen Alex had a revolver, and I said, 'Alex, give me the revolver,' and he says, 'No,' he won't, and Knoll says, 'Shoot me if you can.' I guess that is how it was; and then they grabbed some way, and I run to the door then to see is there help coming. * * * I motioned for them to hurry up, and in this time little Anna says, 'Mama, mama, he has got papa down; he is choking him.' And I run through, and sure enough there lay the revolver in the corner, and I seen right away that it wasn't discharged. Knoll was on Alex, and I gave Knoll a push away, and Alex says, 'My leg is broke.' 'Now,' he says, 'Sponsor, what have you done; you have broke my leg, look at me.' The blood was running from his face, and his leg was broke." She explained the breaking of her husband's leg thus: "Where the scuffle was there is a counter; and it has a scantling underneath the counter, and my idea is that he was again the counter this way [illustrating], and he got that leg in there some way, and he pushed him down, threw him down, and twisted that leg off and John fell on him." She further said that she would call it a wrestle at first, that they both staggered, that her husband had been drinking, and that Knoll was bad drunk. The defendant's own account of the occurrence was as follows: "Then he went up stairs and got his gun. I says, 'Alex has gone to get his gun,' and she says, 'No, he won't shoot.' The house was north and south, and he turns around with his face to the south, and held up the revolver and says, 'Now, what are you going to do?' and I says, 'Shoot, shoot.' He didn't say anything more, but he swore like everything. And then I don't know just how it happened, but we grabbed, and I grabbed his left arm this way, and he had the gun this way with this hand, and we grabbed and fell down, and the gun flew away, and Mrs. Denning grabbed the gun, and he tried to hit me, and I got his hands, and held them, and says, 'Now will you quit?' and he says 'No, not for any ————', and I grabbed his arms, so, and crossed them on his breast, and I hit him in the face and in his eye. Then I asked him if he got enough, and he says 'Yes, I give up,' and Mrs. Denning came and says: 'John, that is enough now. What have you done? You have broke Alex's leg.'"

As stated in the former opinion: "Denning was suffering from chronic alcoholism and fatty degeneration of the heart. In consequence of his injury, he was put to bed, and by reason of the inactivity thus enjoined,

and his previous diseased condition, self-infection resultant from the inability properly to throw off the natural secretions ensued, from which complication he died on the 23d of March, 32 days after his injury. While his physical condition prior to his injury was such as would have eventually resulted in his death, the injury which he received hastened that result." These facts show clearly enough a homicide committed in the heat of passion, without a design to effect death, and without excuse or justification. But was the killing done "in a cruel and unusual manner?" There is, of course, no fixed standard, either of cruelty or of wantonness of manner, by which homicides may be measured, and yet the Legislature evidently attached much meaning to the distinction which it indicated by the use of the words quoted. By section 26 of the crimes act (Gen. St. 1901, § 2011), the involuntary killing of another in the heat of passion by means neither cruel nor unusual is made manslaughter in the fourth degree. The punishment for manslaughter accomplished in a cruel and unusual manner is confinement and hard labor in the penitentiary for not less than three nor more than five years, while that for manslaughter by means neither cruel nor unusual is confinement and hard labor in the penitentiary not exceeding three years, or by imprisonment in the county jail for not less than six months. Cruelty and an unusual manner are therefore vital and essential elements of manslaughter in the second degree. To be such, however, they cannot be discovered in the common pitilessness and pain attending homicides generally, nor in the departure from ordinary use involved in turning common weapons or common instruments or methods of accomplishment to the killing of human beings. Fatal shootings and stabblings and poundings, mutilations of flesh and fractures of bones are all cruel enough and they cannot be said to represent the usual demeanor of men; hence something more must have been intended. Special stress and emphasis must be imposed upon the words used in order to accomplish the legislative purpose, and this may be done without departing from their ordinary signification since they are comparative terms susceptible of variant shades of meaning.

It must be said, therefore, that in order to constitute manslaughter in the second degree, there must be some refinement or excess of cruelty sufficiently marked to approach barbarity, and to make it especially shocking; and the unusual character of the manner displayed must stand out as sufficiently peculiar and unique to create surprise and astonishment and to be capable of discrimination as rare and strange. "In a sense, every killing may be said to be cruel, and killings may be said to be unusual, but surely it was not in this sense the legislature used the terms for if so, they add no meaning to the section. It is not difficult to conceive

the idea of a killing in the heat of passion that would be cruel or unusual, but within it would never be embraced the instance of one who in the heat of passion in the course of angry altercation struck a single fatal blow with an ordinary working implement which he had in his hand at the commencement and during the entire progress of the altercation." *State v. Wilson*, 98 Mo. 440, 447, 11 S. W. 985, 987. In the case of *Schlect v. State*, 75 Wis. 486, 44 N. W. 509, the defendant, who shot his antagonist with a pistol, was convicted of manslaughter in the fourth degree under a statute defining that crime as, "The involuntary killing of another by any weapon, or by any means, neither cruel or unusual, in the heat of passion, in any cases other than such as are herein declared to be justifiable or excusable homicides." The court said: "There are three ingredients of the offense which, concurring, are supposed to distinguish this one from any other criminal homicide. They are: (1) Involuntary; (2) a weapon neither cruel or unusual; and (3) the heat of passion. * * * What is a cruel weapon, we need not define. If a pistol is a cruel weapon, then any weapon that is most likely to take life, or commonly used to take life, is a cruel one, and all weapons are cruel. It must be some other than such a common weapon that can be distinguished cruel. It is a usual weapon or not unusual. This is evident." On the other hand, a lighted kerosene lamp full of oil has been declared to be undeniably a weapon or means both cruel and unusual. *Bliss v. State*, 117 Wis. 596, 607, 94 N. W. 325.

In the facts of this case it is somewhat difficult to discover a sufficient viciousness of mind on the part of the defendant and a sufficiently grievous effect upon the deceased to amount to that cruelty which the statute requires. Although severe pain was inflicted without necessity, and although there was not merely an indifference to such pain, but a certain savage pleasure in causing it, still there is no more atrocity, and no more peculiar or extreme agony than might be exhibited in and result from any drunken brawl. Conceding, however, as upon the whole it is probably wisest to do, that the spectacle of a burly drunken bully crushing to the floor a weak and sickly cripple, snapping a bone, and mauling his flesh is too revolting to pass for less than that extreme cruelty which the law contemplates, the court is unable to say that the manner in which it was accomplished was unusual. Nothing but unaided bodily strength and energy, used according to the common custom of fighting men, appears. The fact that a leg was broken does not change the character of the means employed to break it. Death must always result to complete the crime, and if the deceased's back or neck had been broken or his body had been crushed by his fall, or as a result of his beating, the cir-

cumstance would not have changed the character of the offense, unless perhaps the force displayed had been so tremendous as to become phenomenal. Such an exhibition could scarcely occur with those staggering, wallowing, drunkards. If, therefore, the manner of the killing in this case could be said to present an instance of such aggravated cruelty as to amount to brutality, it nevertheless occurred after the ordinary manner in which brutishness is made manifest, and since both cruelty and unusualness must be proved the defendant was not shown to be guilty of the crime of manslaughter in the second degree.

In the case of *State v. Linney*, 52 Mo. 40, 42, it is said: "We know no standard by which the court could define what constitutes cruel or unusual killing. Every killing is generally cruel, and there is no definite or usual manner of performing the act that I am aware of. Therefore, it is a subject that must be left to the jury to be determined by the testimony in the case." After the decision in *State v. Wilson*, already quoted, this statement can scarcely any longer be the law, since the same court there undertook to declare a meaning for the statute and to hold a given state of facts to be without that meaning. In the case last referred to the court did no more than discharge its plain duty. Juries are not interpreters of statutes. Their function is to determine what testimony proves. By the statute under consideration the Legislature has fixed a standard by which the criminality of killings is to be measured. The meaning of that statute this court is bound to know and to pronounce; and when a given state of facts is proved it is under the further obligation to say whether those facts are legally sufficient to meet the requirements of its definition. If the evidence be circumstantial in its character, or if it be conflicting and may be made the basis of different inferences, the court cannot interfere, but such is not this case. The court must here declare whether a killing in an unusual manner is shown precisely the same as it was obliged to declare whether deliberation and premeditation had been proved in the case of *Craft v. State*, 3 Kan. 450, and whether murder in the second degree had been established in the case of *State v. Diebolt*, 54 Kan. 129, 37 Pac. 992. If, upon another trial, the facts should be substantially similar to those presented by this record, instructions under both section 26 and 27 of the crimes act ought to be given, since the question of cruelty is a difficult one, and the defendant should be allowed the benefit of any reasonable doubt.

The judgment is reversed and the cause remanded.

GREENE, MASON, SMITH, PORTER,
and GRAVES, JJ., concur.

JOHNSTON, C. J. (dissenting). The manner of the killing is an element of the offense, and is a question of fact for the determination of a jury. The jury did decide that the manner of the killing was both cruel and unusual, and a majority of the court approve of the finding that it was cruel. If there is testimony fairly tending to show that the method of the killing was unusual, it was the duty of the court to submit the question to the jury, and its verdict should not be set aside. In this state homicides are uncommon, and it is not easy to define the usual manner in which unlawful killings are committed. In almost every case it must necessarily be a question for the jury to determine. The act of a large, robust man attacking a weak and sickly cripple, choking him, beating him on the face and body, and twisting his leg off, as one of the witnesses described it, is sufficiently unique in manner to make it a jury question as to whether or not it is a usual or an unusual killing. I am therefore of the opinion that there was sufficient testimony to take the question to the jury, and that its verdict should be upheld.

ROBINSON v. PIERCE.

(Supreme Court of Colorado. Nov. 6, 1905.)

1. CONTRACTS—CONSTRUCTION—CONDITIONS.

A seller of bank stock agreed to refund to the purchaser the proportionate share of any loss that might result to the purchaser, owing to the bank's failure to recover a sum that had been previously misappropriated by an officer; it being provided that the loss should be deemed to have been sustained if the money should not have been recovered at the expiration of a year. *Held*, that recovery after the year was a defense to an action by the purchaser on the contract.

2. SAME—RELEASE OF OBLIGATION—ACT OF OTHER PARTY.

The purchaser of the stock having consented to the release of a security, out of which the misappropriation might have been made, it precluded a recovery by him on the contract.

Appeal from Las Animas County Court;
J. A. Lindsey, Judge.

Action by T. A. Pierce against W. H. Robinson. From a judgment in favor of plaintiff, defendant appeals. Reversed.

A. F. Hollenbeck, for appellant. E. L. Campbell, for appellee.

CAMPBELL, J. In April, 1893, the defendant, Robinson, was the owner of seven shares of the capital stock of the American Savings Bank, of Trinidad, Colo. He desired to sell the same, and plaintiff, Pierce, desired to buy. They began negotiations to accomplish the end which each had in view. At first they differed as to its value, but finally concurred in the opinion that if \$5,250 of the bank's money which, in the previous January, had been misappropriated by its former vice president, was ultimately recovered, the stock

would be worth the price which Pierce paid for it. In order to maintain its value at the purchase price, and as a part of the contract of sale, the defendant Robinson signed a writing whereby he agreed to refund to the plaintiff the proportionate share of the loss, including expenses and interest, which he, as the owner of seven shares of the capital stock, would sustain, in the event that the bank, in its efforts to recover the whole or part of the converted funds, met with failure. The writing contained a proviso that the loss should be deemed to have been sustained by the bank if this money was not received by it within one year from the time it was withdrawn by the vice president. The defendant further stipulated that the verified affidavit of one of the officers of the bank, stating the amount of money received, if any, and the expense and damage incurred in the matter of its recovery, should be deemed conclusive evidence of such statements for the purposes of the agreement. Various attempts were made by the parties amicably to settle their differences; the plaintiff asserting, and the defendant denying, that the bank had sustained a loss. No certificate was furnished by the officer of the bank, as contemplated by the written contract, until the 12th of December, 1893, when the president furnished one thus reading: "That said bank sustained a loss in January, 1893, by the withdrawal * * * of \$5,250, and that no part of said money was received previous to February 1, 1894. I further certify that the * * * bank paid an attorney's fee in the endeavor to recover said money of \$346."

To the complaint stating the foregoing facts, and the further allegations that the bank had sustained the loss contemplated by defendant's promise, in that no part of the money had been received previous to February 1, 1894, and that defendant had not paid the proportion thereof which he agreed to pay by the terms of the writing, an answer was filed by defendant, containing, *inter alia*, two separate defenses which are material upon this review. One defense is that at the time the written contract was made, and long afterwards, and to the knowledge of both parties thereto, the bank had in its possession a number of shares of its capital stock standing in the name of and owned by the defaulting vice president, whose value was greater than the amount of its money which he had misappropriated, and that it had a preferred statutory lien upon the same for the indebtedness of its vice president, and that, with the knowledge and consent and approval of plaintiff, it voluntarily relinquished its lien upon the same, the enforcement of which would have prevented any loss to the bank, or its shareholders. The other defense is that, before the beginning of the action, though after the expiration of one year from the date of the withdrawal of the money, the bank recovered from the wrongdoer the full amount of his debt, interest,

and all costs and expenses; hence the bank sustained no loss by reason of the withdrawal mentioned in the contract. To these distinct defenses of the answer a demurrer on the ground of insufficiency was sustained, and the trial, upon plaintiff's evidence in support of the complaint, resulted in a judgment in his favor for the stipulated percentage of the loss.

It is altogether clear from the record that plaintiff's theory of the case was that, since no part of the money withdrawn by the vice president was received by the bank within one year from the date of its withdrawal, defendant's liability under the contract became absolute, fixed, and unchangeable, and even though all of the money may have been received one day after the time specified, and though the bank in reality suffered no loss, the defendant was bound to refund the stipulated sum. This was also the theory of the trial court, and judgment was rendered in accordance with it. Counsel have discussed at considerable length the nature of this written instrument—whether the contract therein contained is one of guaranty, suretyship, or indemnity. It is not important that it be given a name. It is clear that the contract is original, not collateral. Whatever be its form, the object and plain intent of the parties was that the defendant should pay, or, as the contract expresses it, "refund," to the plaintiff the loss which he, as a stockholder, might sustain in the event that the bank's resources were reduced by its failure to recover the whole or any part of the misappropriated fund. If the bank received all of it, and all expenses, interest, and costs, it would not sustain any loss. It is true that the writing says the loss shall be deemed to have been sustained if the misappropriated money is not received by the bank within one year from the date of withdrawal, and it may be, and doubtless is, also true that plaintiff's liability under the contract was fixed—but not unalterably—upon the happening of the contingency therein provided for. But if before the beginning of the plaintiff's action the bank should receive, by suit or otherwise, the total amount of money withdrawn, the interest provided for, and all costs and expenses of recovering the same, the plaintiff is not entitled to a judgment; for he has not sustained the loss from which the contract was intended to save him harmless. Time is not expressly made the essence of the contract, and there is no necessary or fair implication from its terms that such was the intention of the parties. The defense of a full receipt by the bank of this money before suit brought, with interest, and costs and expenses incurred in its recovery, was a good defense to the cause of action set up in the complaint. Then, too, if, as the other special defense alleged, the plaintiff voluntarily consented to the release of the lien which the bank held upon the wrongdoer's stock out of which it might have fully indemnified itself against

the loss occasioned by the withdrawal of its money, the defendant ought not to be held to his contract; for the plaintiff, by his own wrongful act which contributed to the loss, in equity released the defendant from its obligation. There is no express agreement by plaintiff that he would refrain from doing something which would cause loss to the bank, yet it would be inequitable and shocking to the moral sense to permit him to recover when his own affirmative act occasioned or contributed to the loss.

There are other questions discussed in the briefs, but the foregoing shows that prejudicial error was committed by the court in sustaining the demurrers to the two mentioned separate defenses.

The judgment is reversed, and the cause remanded; and, if further proceedings be had, they must be in accordance with the views herein expressed.

Reversed.

GABBERT, C. J., and STEELE, J., concur.

34 Colo. 234

AXELSON v. ANDERSON.

(Supreme Court of Colorado. Nov. 6, 1905.)

1. APPEAL—REVIEW—RECORD.

Orders of the lower court refusing to dissolve an injunction, denying an application for additional security in the injunction proceedings, denying a motion for continuance, and also a challenge to the array of jurors, will not be reviewed, where the facts upon which any one of such orders was made are not before the appellate court.

2. SAME—NECESSITY OF EXCEPTIONS.

It was sufficient reason for declining to interfere that no exception was taken and embodied in the bill of exceptions as to any one of the orders objected to.

3. SAME—REVIEW OF RULINGS ON PLEADINGS—PLEADINGS NOT IN RECORD.

Alleged error in overruling a demurrer to a counterclaim cannot be reviewed, where the entire pleadings in the case are not in the record.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2878, 2880-2882.]

4. SAME—ERROR IN TRYING TITLE.

Alleged error in trying title to real estate cannot be reviewed, where the entire pleadings are not in the record.

5. SAME—NECESSITY OF OBJECTIONS IN LOWER COURT—ORAL INSTRUCTIONS.

Error in giving oral instructions is not reviewable, where no objection was made at the time the instructions were given.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1309.]

6. SAME—REVIEW—NECESSITY OF EVIDENCE IN RECORD.

The Supreme Court cannot determine whether the lower court erred in rendering judgment, where the entire evidence is not in the record.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2869, 2911.]

Appeal from District Court, Phillips County; E. E. Armour, Judge.

Action by L. A. Axelsson against J. P.

Anderson, consolidated with an action by J. P. Anderson against L. A. Axelsson. From orders refusing to dissolve an injunction and denying an application for additional security in the matter of the injunction awarded in the second action, and also denying a motion for continuance and a challenge to the array of jurors, said Axelsson appeals. Affirmed.

Phillip Zimmerman and Ernest L. Williams, for appellant. Rogers & Barry, for appellee.

GUNTER, J. Appellant sued to recover damages for alleged trespasses on realty. The action, by consent, was consolidated with one by appellee against appellant involving the same property. The issues in the trespass action went to a jury and were found for appellant, and the court resolved the issues in the second action mentioned for appellee. Judgment was for appellee for the land in question, \$10 damages and costs. A preliminary writ of injunction, issued in aid of the action brought by appellant, on hearing, was dissolved by the court. A writ of injunction was awarded appellee in his said action against appellant. This, upon hearing, the court refused to dissolve. The court denied appellant's application for additional security in the matter of the last-mentioned writ of injunction. A motion for a continuance by appellant was denied; also appellant's challenge to the array of jurors. It is said that in all of these orders the court erred.

Sufficient reasons for declining to interfere with the action of the lower court are that the facts are not before us upon which any one of such orders was made, nor was an exception taken and embodied in the bill of exceptions as to any one of such orders.

It is said that the court erred in overruling appellant's demurrer to the counterclaim of appellee, and in trying title in this action. We are unable to pass on either of these questions, because the entire pleadings in the case are not before us. The pleadings in the case brought by appellee against appellant are not even in the transcript of the record.

It is said the court erred in giving oral instructions. There was no objection made, at the time the jury was charged, to the giving of the instructions orally, and for this reason appellant is not in any position to complain.

It is said that the court erred in rendering judgment in favor of appellee. This we are unable to determine, because the entire evidence is not before us.

Judgment affirmed.

THE CHIEF JUSTICE and MAXWELL, J., concur.

35 Colo. 16

EATON v. LARIMER & WELD IRR. CO.
et al.

(Supreme Court of Colorado. Nov. 6, 1905.)

1. WATERS AND WATER COURSES — IRRIGATION DITCHES—DIVERSION OF WATER—COMPLAINT.

Plaintiff alleged that he was the owner of third-class water rights in an irrigation ditch, and that stock of the irrigation company was issued to the owners and holders of second-class rights, under contracts which were in full force and effect, and which provided that each right should only be used to irrigate specified lands, and that defendant, F., was the owner of a second-class water right secured under one of such contracts, and that he with the consent of the irrigation company, was taking water from the ditch for the use of nonincluded lands, and thereby diverting more water than he was entitled to, by which plaintiff was injured. *Held*, that the complaint alleged an infringement on plaintiff's water rights, and therefore stated a cause of action.

2. SAME — RIGHT OF USE — LIMITATIONS — WAIVER.

Where, in a suit to restrain a diversion of water from an irrigation ditch, plaintiff alleged that the water was diverted under a contract with an irrigation company limiting the rights of stockholders to the irrigation of specified lands, which was still in force and effect, and there was nothing to show that such limitation had been waived by the irrigation company, the complaint could not be held insufficient on demurrer, on the ground that the limitation was subject to waiver by the company, and that its board of trustees were the final arbiters of disputes between stockholders and had waived such requirements.

Error to District Court, Weld County; Christian A. Bennett, Judge.

Action by Bruce G. Eaton, as executor, etc., of B. H. Eaton, deceased, for whom he was substituted, against the Larimer & Weld Irrigation Company and others. From a decree sustaining a demurrer to the complaint and dismissing the cause, plaintiff brings error. Reversed.

Jas. W. McCreery and John T. Jacobs, for plaintiff in error. H. N. Haynes, for defendants in error.

GABBERT, C. J. According to the averments of the complaint, the defendant in error company is the owner and in the control of a ditch in which there are three classes of water rights. The plaintiff owned the third class, which is only entitled to the use of water remaining after the first and second class rights are satisfied. It also appears that the stock of the company was issued to the owners and holders of the second class rights under contracts now in full force and effect, which provide, *inter alia*, that each right should only be used upon specified lands for irrigation, and that, when rights were sold equal to the estimated capacity of the ditch, a certain number of shares of stock of the company should be issued to the owner of every water right sold. The complaint then avers that the stock of the company has been issued to the owners and holders of these contracts, but

that this transaction in no manner changed or modified the rights of the contract holders with respect to the use of water. It then avers that the defendant in error Finley is the owner of a water right secured under one of these contracts, and with the consent of the defendant company is taking water from the ditch for use on lands described in his contract, as well as on others, whereby he is diverting more water than necessary to irrigate the land described in his contract. It is then charged that this excess use deprives the plaintiff of water to which he is entitled.

Defendants interposed a general demurrer to the complaint, which was sustained, and the cause dismissed. This was error. The complaint clearly states facts which entitled the plaintiff to relief. The demurrer admits its averments, and, according to them, the defendants are infringing upon and depriving the plaintiff of his just rights. He is the owner of junior rights, but the owner of a senior right cannot enlarge his use of water to the injury of a junior right holder. It is said by counsel for defendants that, when the stock was issued to the water right holders, the limitation imposed by the contracts that water should be used upon specified lands was no longer in force. We do not so read the complaint. It states that the contract is in full force and effect, and that the issuance of stock did not enlarge or change the rights of the water right holders.

It is also urged by counsel for defendants, in support of his contention that the ruling below is correct, that the limitation of use to particular land was subject to waiver by the company, and that the board of trustees are the final arbiters of disputes between consumers, that this board have waived the requirements restricting the application of water, that the decree in the Wyatt Case, affirmed in part by this court (23 Colo. 490, 48 Pac. 528), fixed the rights of the parties to this action to be that the preferred water right owners had the right to the use of water without any other restriction than that of beneficial use, and that the maximum amount should not be exceeded. We can only look to the complaint to determine its sufficiency, and cannot consider extraneous matters. If the conditions exist which counsel for defendants has called to our attention, and upon which he relies in support of his demurrer, and are material (upon which we express no opinion), they cannot be considered, because they do not appear upon the face of the complaint, and therefore cannot be raised by demurrer.

The judgment of the district court is reversed, and the cause remanded, with directions to overrule the demurrer to the complaint.

Judgment reversed.

GODDARD and BAILEY, JJ., concur.

35 Colo. 13

SIERRA BLANCA MINING & REDUCTION CO. v. WINCHELL.

(Supreme Court of Colorado. Nov. 6, 1905.)

1. MINES AND MINING—CLAIMS—LOCATION—ADVERSE PROCEEDINGS—INSTRUCTIONS.

Where, in a suit in support of an adverse claim to a mining location, there was uncontradicted evidence on plaintiff's behalf that the discovery notice of the J. M. claim was posted on June 30, 1899, and on the part of defendant that the discovery notice of the C. C. claim was posted on August 28th following, that the claims conflicted, and that mineral in place was discovered in the respective discovery cuts of each claim, it was error for the court to refuse to charge that if the locators of the J. M. claim discovered mineral and posted notice of discovery, and the location of the C. C. was based on the discovery and location within the ground claimed by the former according to its notice of discovery made within 60 days from the date such notice was posted, the location of the C. C. was invalid.

2. SAME—ASSESSMENT WORK.

Where the discovery and location of a subsequent conflicting mining claim, as evidenced by a discovery notice, was made within 60 days of the date of the posting of the discovery of the claim with which it was in conflict, the claim so subsequently located was invalid, regardless of the nonperformance of the assessment work on the earlier location.

3. SAME—POSTING NOTICE—APPROPRIATION—TIME.

A location notice properly made and posted on a valid discovery of mineral is an appropriation of the territory therein specified for 60 days, as against subsequent locators.

Appeal from District Court, Costilla County; Chas. C. Holbrook, Judge.

Action by the Sierra Blanca Mining & Reduction Company, a corporation, against Howard H. Winchell, in support of an adverse against defendant's application for a patent to the Cripple Creek lode mining claim. From a judgment for defendant, plaintiff appeals. Reversed.

Hall, Babbitt & Thayer, for appellant. Patterson, Richardson & Hawkins, for appellee.

GABBERT, C. J. During the progress of the trial the parties stipulated that the conflict between the Keystone and Cripple Creek lodes should follow the result of the contention between the Jessie Mac and the Cripple Creek, and that no testimony need be given as to the Keystone conflict with the Cripple Creek lode. The controversy is thus narrowed to a determination of the rights of the parties in the conflict between the Jessie Mac and Cripple Creek. The judgment must be reversed, because of the refusal to give an instruction requested by plaintiff. This instruction was to the effect that if it appeared from the testimony that the locators of the Jessie Mac discovered mineral and posted notice of discovery, and that the location of the Cripple Creek was based upon a discovery and location within the ground claimed by the Jessie Mac according to its notice of discovery, made within 60 days from the date

such notice was posted, then the location of the Cripple Creek lode was invalid.

This was an important question, and no instruction was given which fully and clearly called the attention of the jury to this point. There was testimony on the part of the plaintiff (which does not appear to have been contradicted) to the effect that the discovery notice of the Jessie Mac was posted on the 30th day of June, 1899. The testimony on behalf of the defendant was to the effect that the discovery notice of the Cripple Creek was posted on August 28th following. The ground claimed by the latter was within the boundaries of the Jessie Mac, as indicated by the notice of discovery thereon. According to the stipulation of the parties, mineral in place was discovered in what was claimed to be the respective discovery cuts of the two claims. The other acts necessary to perfect a mineral location were contested, especially the sufficiency of the discovery work on the Jessie Mac lode. Whether or not, however, this work was performed was not controlling. If the discovery and location of the Cripple Creek was within the boundaries of the Jessie Mac, as evidenced by its discovery notice, and such discovery and location was made within 60 days of the date the Jessie Mac notice of discovery was posted, then the Cripple Creek location was invalid, and this invalidity would not be cured by the failure of the claimant of the Jessie Mac to perform the necessary discovery work.

A location based upon a discovery within the limits of an existing and valid location is void. *Sullivan v. Sharp* (Colo. Sup.) 80 Pac. 1054. A location notice properly made and posted upon a valid discovery of mineral is an appropriation of the territory therein specified for the period of 60 days. During this period, no one can initiate title thereto which would be rendered valid by the mere failure of the first appropriator to perform the necessary discovery work within the time prescribed by law. *Omar v. Soper*, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246.

Judgment reversed.

GODDARD and BAILEY, JJ., concur.

34 Colo. 475

MINNESOTA CANAL SUPPLY DITCH & RESERVOIR CO. v. CONINE.

(Supreme Court of Colorado. Nov. 6, 1905.)

APPEAL—REVIEW—FINDINGS—SUFFICIENCY OF EVIDENCE.

The findings of the trial court will not be disturbed on appeal, where they are supported by substantial evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3979-3089.]

Appeal from District Court, Delta County; Theron Stevens, Judge.

Action by the Minnesota Canal Supply Ditch & Reservoir Company against William F. Conine. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

C. M. Hammond and W. H. Burnett, for appellant. A. R. King, for appellee.

GUNTER, J. Action to enjoin appellee from taking water for irrigation purposes from Deep Creek ditch. Finding and decree for appellee. The right to one cubic foot of water per second of time was the question involved, and its determination presented but a question of fact. There was substantial evidence adduced to sustain the finding on this question of fact, and this is all there is in the case. We are concluded by the finding of the trial court.

Judgment affirmed.

The CHIEF JUSTICE and MAXWELL, J., concur.

34 Colo. 356

BEAMAN, Sheriff, v. STEWART et al.
(Supreme Court of Colorado. Nov. 6, 1905.)
SHERIFFS—WRONGFUL SEIZURE ON EXECUTION—DEMAND FOR RETURN.

Demand for the property prior to commencement of an action against a sheriff for the wrongful taking and detention or wrongful conversion of personalty, it being taken by him on execution against another than the owner, so that the taking or seizing is wrongful in the first instance, is not necessary.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sheriffs and Constables, § 266.]

Appeal from District Court, Pueblo County; N. Walter Dixon, Judge.

Action by Alexander T. Stewart and another, copartners doing business under the firm name and style of Stewart & Frost, against James L. Beaman, as sheriff of Pueblo county. Judgment for plaintiffs. Defendant appeals. Affirmed.

Bicksler, McLean & Bennett, for appellant. A. W. Arrington, L. A. Crane, and H. G. Bell, for appellees.

MAXWELL, J. This was an action brought by Stewart & Frost, as plaintiffs, against defendant, Beaman, as sheriff of Pueblo county, for damages alleged to have been sustained by plaintiffs on account of the wrongful and unlawful taking and detention by defendant of certain personal property of plaintiffs. The answer was a general denial, an admission of the taking and detention, a justification under certain writs issued out of the district court of Pueblo county against the property of the F. H. Stewart Carriage Company, and that the property was not the property of plaintiffs, but was the property of the carriage company. A trial to a jury resulted in a verdict and judgment for plaintiffs.

The court instructed the jury, in substance, that under the evidence the property involved was the property of Stewart & Frost, and that the only question for the jury to consider was the question of damages. This instruction is called in question, on the ground that it excluded from the consideration of the jury the question of a demand for possession of the property prior to the commencement of the action. Appellant contends that the cause of action alleged in the complaint is not one of conversion of property, but for unlawfully and wrongfully taking and detaining, and that therefore allegation and proof of a demand for its possession was necessary prior to the commencement of the suit. *Rlethmann v. Godsman*, 23 Colo. 202, 46 Pac. 684, and *Moynahan v. Prentiss*, 10 Colo. App. 295, 51 Pac. 94, are cited in support of this position. The facts in the cases cited render them of no value as authorities on the point here under consideration, and, further, the question here presented was not ruled in those cases. Herein the property was taken from Stewart & Frost, the owners thereof, under writs against the carriage company. Hence the seizure was wrongful in the first instance, and demand therefor prior to the commencement of the suit was unnecessary. *Stone v. O'Brien*, 7 Colo. 458, 4 Pac. 792; *Smith v. Jensen*, 13 Colo. 213, 22 Pac. 434. In *Schluter v. Jacobs*, 10 Colo. 449, 454, 15 Pac. 813, 815, it is said: "It is well settled that the taking by attachment of personalty not the property of the defendant in the attachment is a tortious taking, and constitutes a conversion of such property." In principle, there is no difference between taking by attachment and taking by execution. It is settled in this state by the above cases that in actions for the wrongful taking and detention, or for the wrongful conversion of personalty, demand therefor prior to the commencement of suit is unnecessary, where the taking or seizure was wrongful in the first instance. There was no error in the instruction.

The question of estoppel, urged by appellant, is decided adversely to his contention by *Beaman v. Stewart*, 19 Colo. App. 222, 226, 74 Pac. 344, a case which seems to be connected with the case in hand, and wherein the facts as there stated are substantially the facts of this case. Furthermore, an estoppel has not been pleaded, and therefore could not have been relied upon as a defense.

No error appearing in the record, the judgment will be affirmed.

Affirmed.

GABBERT, C. J., and GUNTER, J., concur.

34 Colo. 298

ELLIOTT v. ELLIOTT.

(Supreme Court of Colorado. Nov. 6, 1905.)

1. APPEAL—REVIEW—EXCEPTIONS.

Errors apparent on the record may be reviewed, though there is no bill of exceptions, and no exception was saved.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2417.]

2. DIVORCE—SEPARATE SUPPORT AND MAINTENANCE.

Where the complaint is merely for an absolute divorce with alimony as an incident, and both parties are shown guilty, so that neither is entitled to divorce, it is error to decree separate support and maintenance; *Mills' Ann. St. §§ 1566a, 1567*, authorizing a decree for alimony and maintenance only where divorce is decreed.

Error to County Court, City and County of Denver; Ben B. Lindsey, Judge.

Action by Jennie E. Elliott against William R. Elliott. Decree for plaintiff. Defendant brings error. Reversed.

John A. De Weese, Earl B. Coe, and Chas. W. Tankersley, for plaintiff in error. Henry Howard, Jr., for defendant in error.

MAXWELL, J. Action by defendant in error, as plaintiff in the court below, against plaintiff in error, as defendant, for a divorce and alimony. A common-law marriage, adultery, and extreme cruelty were alleged. A divorce, suit money, temporary and permanent alimony were prayed. The answer was a general denial and an affirmative defense that at the date of the alleged common-law marriage the defendant had a wife living, which fact plaintiff well knew. There was no reply. Upon trial to a jury a verdict was returned to the effect that there was a common-law marriage, and that both parties had been guilty of adultery and extreme cruelty. The court decreed that plaintiff and defendant are duly married and are husband and wife; that both were guilty of adultery and extreme cruelty; that neither party is entitled to a divorce and that same is denied to both; that plaintiff's complaint is dismissed "so far only as she seeks a decree of divorce on the grounds set out in her said complaint, which are adultery and extreme cruelty"; that defendant pay forthwith the costs; that plaintiff is entitled to separate support and maintenance; that within 10 days defendant pay to the clerk of the court for the use of plaintiff \$25, and on the 15th day of each and every month a like sum of \$25, until further order of the court, and within 60 days pay to the clerk of the court \$150 as attorney's fees.

Defendant in error moves to dismiss the writ of error upon the grounds (1) that all questions raised by the assignments of error are raised in this court for the first time; (2) that there is no bill of exceptions, and no exception was saved to the findings and decree of the court below. This case is presented here upon the record proper. The

motion to dismiss is denied, upon the authority of *Hume v. Robinson*, 23 Colo. 359, 47 Pac. 271, where it is said: "The case is presented here upon the record proper, and numerous errors are assigned, but, no exceptions having been taken or reserved on the trial in the court below, most of them cannot be considered on this review. In fact, it is insisted by counsel for defendants in error that for want of exception, duly reserved, to the findings and judgment of the court below, no error, however apparent from the record, can be considered, and in support of this claim cite several of the decisions of this court; but none of the cases cited nor any decision of this court supports this contention. Those cases are to the effect that, unless an exception is taken and duly preserved to the judgment of the court below, this court cannot review the evidence; but none of them go to the extent of holding that an exception is necessary to enable this court to review cases upon the record proper. As was said in the case of *Burton v. Snyder*, 21 Colo. 292, 40 Pac. 451: 'The jurisdiction of this court is frequently exercised to review cases upon the record proper, in the absence of a bill of exceptions, and by the sections of the Code referred to the motion interposed in this case is properly a part of such record. It will, of course, be conceded that the taking of an exception and preserving the same by bill is necessary to a review of the evidence, or upon the law as applied to the evidence, and the Colorado cases go no farther than this.' See, also, *Daum v. Conley*, 27 Colo. 56, 61, 59 Pac. 753; *Bitter v. L. L. Co.*, 10 Colo. App. 307, 309, 51 Pac. 519.

Applicable to the merits, pertinent provisions of the statute are: "In all actions for divorce the defendant may file a cross-complaint, in which may be set forth any legal grounds for divorce against the plaintiff; and if upon the trial thereof both parties shall be found guilty of injuries or offenses which would entitle the opposite party to a decree of divorce, then no divorce shall be granted to either party." 3 *Mills' Ann. St. § 1566a*. " * * * such court or judge may grant alimony and council [sic] fees pendente lite and when a divorce shall be decreed may make such order and decree touching the alimony and maintenance of the wife * * * as may be reasonable and just. * * * " *Id. § 1567*. In obedience to the mandate of section 1566a, supra, the court was right in denying the divorce to either party, but that portion of the decree dismissing plaintiff's complaint so far only as it sought a divorce and decreeing alimony to the plaintiff was error. This being an action under the statute for a divorce, the procedure and relief to be granted is controlled by the statute. Alimony should only have been awarded pursuant to the provisions of the statute. No divorce having been decreed, no order or decree touching alimony should have been made. Section 1567, supra. In

Redington v. Redington, 2 Colo. App. 8, 13, 29 Pac. 811, 812, the Court of Appeals announced the rule which should control in cases of the character disclosed by this record. It is there said: "On the coming in of the verdict establishing the desertion by the husband, the court, being advised by the wife's admission that she had been guilty of adultery, should have dismissed both bill and cross-bill and left the parties bound by the tie which they had severally dishonored. Under these circumstances and with the pleadings and the suit in its present shape the court should make no decree concerning alimony."

The force and effect of section 1567, *supra*, in actions of divorce is conceded by counsel for defendant in error, however, who maintains that this was a suit in equity, first, to establish a marriage; second, for a divorce on the grounds alleged; and, third, for a division of common property and for alimony, with costs of suit. A sufficient answer to this contention is that the complaint filed herein does not contain averments sufficient to constitute a cause of action for separate support and maintenance. Without reciting the averments contained in the two causes of action set forth in the complaint, it suffices to say it clearly appears therefrom that the primary object was to secure "an absolute divorce," as it is termed in the summons prepared by counsel, and alimony was a mere incident to the divorce. Stripped of all allegations sufficient to constitute a cause of action for divorce, there is nothing left in the complaint upon which any relief could be predicated, so that, when the court below dismissed the "plaintiff's complaint so far only as she seeks a decree of divorce" in effect, the action was dismissed.

Further, this record discloses a state of facts which brings this case clearly within the rule announced in Redington v. Redington, *supra*, as follows: "It is a rule recognized in all courts, and applicable to all classes of actions, that every suitor who seeks redress at the hands of a court should come unfettered and unsullied by faults and wrongs of his own commission against the contending party. This principle has become authorized in the law as 'clean hands.' It is plainly and palpably violated and infringed whenever a litigant who prays a divorce has been guilty of any act which under the statute would furnish the defendant a cause of action as against him. This alone ought to be sufficient to defeat the plaintiff's right of recovery, for she was guilty of a great offense against the marital obligation before she filed her bill. It has never been sufficient even under the English authorities to respond that, even though this be true, you first sinned and I may therefore recover. The law left them where it found them"—cited with approval in Cupples v. Cupples (Colo. Sup.) 80 Pac. 1039. Mattox v. Mat-

tox, 2 Ohio, 233, 15 Am. Dec. 547, was a bill for a divorce, in which it appeared that both parties had been guilty of adultery. The court said: "The bill must be dismissed. It would be a libel on the Legislature to suppose that the statute was designed for the convenience of that class of characters to which these parties seem to belong. It was intended for the relief of injured innocence, not to encourage persons of loose morals, or, rather, of no morals at all, to live in the open, scandalous violation of the common rules of decency. This application is to the equitable jurisdiction of the court, and must be decided by the principles which prevail in courts of equity. The complainant must come with clean hands and a chaste character, not stained with the same infamy and crime of which she complains. These parties are in pari delicto, and to grant relief to either of them would be offering a bounty to guilt. It would place the permanency of the marriage contract, in every case, at the disposal of the contracting parties, and remove one of the strongest motives to that correctness and chastity of conduct, which is necessary to render the marriage state either pleasant or convenient."

While it is true that the last two cases cited were actions for divorce and the question of alimony was not involved, we think the rule therein announced a salutary one, which should be enforced where alimony is sought in such cases as this record presents. Upon the coming in of the verdict in this case the court should have dismissed the action. In not having done so, error was committed, which will result in a reversal of the judgment and a remand of the cause, with directions to enter an order of dismissal.

Reversed.

GABBERT, C. J., and GUNTER, J., concur.

34 Colo. 472

COLORADO-PHILADELPHIA REDUCTION CO. v. FRETZ.

(Supreme Court of Colorado. Nov. 6, 1905.)

MASTER AND SERVANT — INJURIES TO SERVANT—FELLOW SERVANTS.

Defendant, through its proper servants, was attempting to repair a feed pipe in its ore reduction plant, and had provided abundant means of support therefor, and appliances convenient at hand for holding the lower section of the pipe in place, but during the progress of the repairs the lower section of the pipe was either pushed by one of the other employes or fell out of place and struck plaintiff, an employe, causing the injuries complained of. Held, that the negligence, if any, by which the pipe was caused to fall, was that of plaintiff's fellow servants, for which the defendant was not liable.

Appeal from District Court, El Paso County; Louis W. Cunningham, Judge.

Action by Solomon Fretz against the Colorado-Philadelphia Reduction Company. From a judgment for plaintiff, defendant appeals. Reversed.

Wolcott & Vaile and W. W. Field, for appellant.

GUNTER, J. The feed pipe in the reduction plant of appellant had separated into two sections, and its employes were attempting to repair the pipe by reuniting the sections. The lower section was about six feet in length, square, of heavy timber, and lined with iron. It stood vertically and firmly in a socket about two inches deep and upon the framework of the crushing machine. At the time of the effort to connect the sections the lower section was being held in place by three employes, and the upper section was being supported by a rope held by another employe. Appellee (plaintiff) at the time of the accident was employed in the sampling department of the mill, which department adjoined the crushing room, in which was the feed pipe. Appellee and all men employed in the adjoining room worked in the one room or the other as they were required. Appellee was familiar with the crushing room, its appliances, and its then condition, and he could, and did, see the lower section of pipe and the men occupied in its repair. Appellee was called by the foreman, McIntire, from the sampling room and requested to aid in connecting the pipe. When appellee entered the room the foreman, by manual labor, was attempting to connect the two sections of pipe, and, as stated, one man by a rope was holding the upper section in place. While some provision had been made for screwing the lower section to the socket, it was not so fastened at this time, because it was necessarily loose in order to make the union of the sections. Appellee assisted the employe in holding the rope, and, after holding the rope for a little time, they tied it to another piece of machinery, stepped aside, and stood disengaged and looking on as the attempt to effect the union of the two sections went on. The lower section of the pipe fell and struck appellee. There is uncertainty as to the cause of the fall. One witness thinks it was jarred out of position by the motion of other machinery in operation in the room. The same witness suggests that some one may have slipped and moved the pipe. The foreman, McIntire, says he may have leaned against the pipe and caused it to fall. There is no evidence but that there were abundant means present to hold the pipe in place if they had been availed of. There is undisputed evidence that there were abundant and sufficient appliances provided for use in such repairs as that which was in progress, all of which appliances were within convenient reach and could have been used if desired.

The complaint charges that the negligence of appellant company consisted in its permitting the feed pipe to be and remain in a dangerous condition without sufficient support. We fail to find in the record any evidence of negligence upon the part of appellant

in the pipe being without safe support. The facts simply are: The feed pipe was out of repair; appellant through its proper servants, was attempting to repair it; there were abundant means of support in the men and appliances conveniently at hand for holding the lower section in place, and if there was negligence in the failure to use them, it was the negligence of the fellow servants of appellee. We find no evidence in this record of negligence upon the part of appellant in permitting the feed pipe to remain in a dangerous condition without sufficient support. The judgment should be reversed.

Reversed.

GABBERT, C. J., and MAXWELL, J., concur.

34 Colo. 359

WINCH v. EDMUNDS.

(Supreme Court of Colorado. Nov. 6, 1905.)

1. SPECIFIC PERFORMANCE — CONTRACTS ENFORCEABLE — SUFFICIENCY OF CONSIDERATION.

A contract for the sale of real estate, setting forth the receipt of \$500 from the purchaser, showed a good and sufficient consideration, entitling the purchaser to specific performance.

2. SAME—UNILATERAL CONTRACT.

A contract for the sale of real estate, setting forth the receipt of \$500 from the purchaser and providing that the deed was to be delivered within 30 days from the date of the contract, at which time the purchaser should pay the balance of the purchase price or execute a mortgage upon the property to secure the payment thereof, and that in the event of his failure to pay such balance or execute the mortgage the sum paid was to be forfeited as liquidated damages, was not a unilateral contract, but was enforceable by the purchaser.

3. PRINCIPAL AND AGENT—EXPRESS AUTHORITY TO SELL REAL ESTATE.

In an action to enforce specific performance of a contract to convey real estate executed by an agent of the owner, numerous letters were introduced, written by defendant to the agent, in which he commended the agent for the manner in which he was handling his business, urged him to sell all his property at that place, and authorized him to act as he thought best. The owner was a nonresident, and the agent had acted in various transactions similar to the one in controversy, all of which had been ratified and confirmed by such owner. The vendee entered into possession of the property and made valuable improvements thereon, and the part payment which he made on account of the purchase had not been returned. *Held*, that the agent was more than a real estate broker, and that he had authority to make the contract sued on.

Appeal from District Court, Logan County; E. E. Armour, Judge.

Action by Philip Edmunds against Allen Winch. From a judgment for plaintiff, defendant appeals. Affirmed.

Brown & Hays, for appellant. E. M. Kelsey, for appellee.

MAXWELL, J. Action to enforce specific performance of a contract to convey real estate, executed by an agent of the owner

of the property. A trial to the court below, without a jury, resulted in a judgment decreeing specific performance of the contract, to reverse which this appeal was prosecuted to the Court of Appeals.

From the admissions in the pleadings and the evidence the following facts are established: Appellant, a resident of Chicago, Ill., was the owner of the real estate involved, together with a number of other parcels of real estate at Sterling, Colo. Henderson, since 1894, acted as his agent in the collection of rents, payment of taxes and insurance, repairs, and sales of property. In 1899 Henderson wrote appellant asking him to quote prices upon all his property at Sterling. In response to this, appellant wrote Henderson quoting prices upon all property which he owned at Sterling, including the property herein involved, which he listed at \$1,200. Henderson, preceding February, 1901, acting as the agent of appellant, sold for him five pieces of property at the list prices, which sales were ratified and confirmed by appellant. February 28, 1901, Henderson, acting as agent of appellant, entered into a contract in writing with appellee which recited the receipt of \$500 on account of the purchase price, a description of the property, the price \$1,200, balance of which was to be paid within one year from the date of the contract, with 8 per cent. interest, deed to be delivered within 30 days from the date of the contract, at which time appellee should pay the balance of the purchase price, \$700, or execute a mortgage upon the property to secure the payment thereof with interest at 8 per cent., payable within one year in the event of the failure of appellee to pay the balance of the purchase price, \$700, or execute a mortgage to secure the payment of the same within one year. The \$500 paid was to be forfeited as liquidated damages. Immediately upon the execution of the contract, appellee entered into possession of the property, placed permanent and valuable improvements thereon, and, up to the time of the trial, continued in the possession thereof. March 28, 1901, appellee tendered Henderson the balance of the purchase price, \$700, which Henderson declined to receive for the reason, as stated, that appellant had declined to execute the deed, at the same time informing appellee that he believed appellant would yet complete the deal. At the time of the trial, the \$500 paid by appellee on account of the purchase price of the property had not been returned to him. The answer denied the execution of the contract by appellant, and denied Henderson's authority to execute the same.

It is urged here that the contract is a unilateral contract without consideration, and therefore unenforceable. With this contention we do not agree. The contract sets forth the receipt of \$500 from appellee, which is a good and sufficient consideration, which sum

was to be forfeited upon the failure of appellee to comply with the terms of the contract. In this respect, the contract is clearly distinguishable from the contract under consideration in *Smith v. Bateman*, 8 Colo. App. 336, 46 Pac. 213, and *Id.*, 25 Colo. 241, 53 Pac. 457, and for that reason those cases and the authorities there cited are not in point.

Appellant also insists that authority to a real estate broker to sell real estate is only authority to find a purchaser, and does not vest in such broker authority to execute a contract binding on the principal. Undoubtedly this is the rule as applied to real estate brokers. The facts in this case, however, as shown by the evidence and found by the trial court, constituted Henderson the general agent of appellant for the sale and disposal of all his real estate at Sterling. The evidence upon this point is clear and convincing. At the trial numerous letters were introduced, written by appellant to Henderson, in which he commended him for the manner in which he was handling his business, urged him to sell and dispose of all his property at Sterling, as he did not intend to return there, and authorized him to act as he thought best. It abundantly appears from the evidence in the record, that Henderson was more than a mere broker to find a purchaser, that he was a general agent authorized by appellant in writing to make the contract which is relied upon in this case. *Malone v. McCullough*, 15 Colo. 460, 24 Pac. 1040, and *Speer v. Craig*, 16 Colo. 478, 27 Pac. 891, are relied upon by appellant as decisive of this case. In the *Malone-McCullough Case*, the facts as stated in the opinion of the court clearly distinguish it from the case in hand; in addition, the opinion expressly states that whether an "authority to sell" necessarily carries with it the power to do whatever may be necessary to execute a binding contract to convey is not essential to a decision of the case. In that case it clearly appeared that the agent or broker was not the general agent of the vendor; that the transaction involved was the only one, so far as the record shows, in which he was engaged; that the vendor, the vendee, and the broker were residents of the same city and had offices within a few hundred feet of each other; that small effort upon the part of the vendee or her attorneys would have furnished definite and reliable information of the measure of the authority of the broker; and that failure to make such inquiry left the plaintiff without equities in her favor. In the *Speer-Craig Case*, the opinion assumes that the brokers were duly directed by the owner to sell the property, and thereby eliminates from that case any question of the authority of the broker to make a binding contract upon the vendor.

In the case at bar the owner of the property was a resident of Chicago, his agent and the vendee were residents of Sterling, Colo.; the

agent had acted for his principal in various transactions similar to the one in controversy, all of which had been ratified and confirmed by the principal upon the execution of the contract; the vendee entered into possession of the property and made valuable and permanent improvements thereon; the \$500 which had been paid by him on account of the purchase price of the property had not been returned to him. Under the facts of this case the judgment of the court below was right, and will be affirmed.

Affirmed.

The CHIEF JUSTICE and GUNTER, J., concur.

34 Colo. 444

HOBSON et al. v. ANDERSON.

(Supreme Court of Colorado. Nov. 6, 1905.)

1. EQUITY—FINDINGS OF JURY—CONCLUSIVENESS.

In an equity case, the findings of the jury on issues submitted to them are not conclusive, and the court may make findings of its own.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 815-817.]

2. DEEDS—VALIDITY—CONSIDERATION.

Where one who held title to certain lands to secure a debt agreed with the debtor to make a deed of the lands to him and to place it in escrow, to be delivered to him on payment, there was no consideration for the agreement, nor for the deed when signed.

3. CANCELLATION OF INSTRUMENTS—DEEDS—VALIDITY OF INSTRUMENT.

Where one agreed without consideration to make a deed which was to be held in escrow by a third person, and she executed it and delivered it to the grantee to deliver it to the third person, and the grantee died with the deed in his possession, in a suit against his administrator it was proper to decree cancellation.

Error to District Court, Pueblo County; N. Walter Dixon, Judge.

Action by Mrs. Lizzie P. Anderson against Albert W. Hobson, as executor of the last will of George H. Hobson, deceased, and others. Judgment in favor of plaintiff, and defendants bring error. Affirmed.

J. H. McCorkle, for plaintiffs in error. Joseph Dye and J. A. Cram, for defendant in error.

GUNTER, J. This was an action by defendant in error, Mrs. Lizzie P. Anderson, to cancel a deed signed by her and running to George H. Hobson, now deceased. The parties defendant were the heirs at law of said George H. Hobson and the executor of his last will and testament, Albert W. Hobson. From a judgment granting the relief prayed, two of the heirs have brought this appeal.

The instrument sought to be cancelled was a general warranty deed purporting to convey lot 2, block 58, and lots 17 and 18, block 59, city of Pueblo. The complaint alleges as to lot 2 that when defendant in error, Mrs.

Anderson, made the deed in question, January 31, 1899, she was the owner in fee of such lot; that as to the other lots she then held title to them to secure an indebtedness of \$2,900, owing by George H. Hobson to herself; that, while she so held the three lots, she agreed with deceased to make a deed running to him of said lots 17 and 18, and to place the same in the hands of Asbury E. Hobson, to be held by him until said indebtedness of \$2,900 was paid, then to be delivered to George H. Hobson. Pursuant to this understanding, defendant in error made the deed and handed it to George H. Hobson for delivery to Asbury E. Hobson, to be held by him under the above agreement. After the execution of the deed said lot 2, without her knowledge or consent, was included therein. George H. Hobson died with the deed yet in his possession; therefore without delivery to Asbury E. Hobson, as agreed at the time of its execution. The deed is now in the hands of the executor of George H. Hobson. The \$2,900 has not been paid. The answer was by the widow and daughter of deceased. It puts in issue the allegation of the complaint that at the time of the making of the deed sought to be canceled defendant in error was the owner in fee of said lot 2; also, the allegation as to the inclusion of said lot 2 after the execution of the deed. The answer also alleges that defendant in error held the title to the three lots described in the deed to secure the payment of certain moneys loaned by her to deceased, and that deceased had conveyed to her such lots to secure said loan, that defendant in error had executed the deed sought to be canceled in acknowledgment that she so held the lots, and, under the agreement, that on payment of such indebtedness she would reconvey the three lots to the owner, the deceased. The testimony for plaintiffs in error was that defendant in error agreed to make the deed in question, and to place the same in escrow, and that she executed the deed, and before it was delivered she revoked the agreement. There was no consideration for the agreement to make and place the deed in escrow, nor was there any consideration for the deed when signed.

Certain issues were submitted to a jury, and it made findings thereon. These findings it is unnecessary to recite, because the action was equitable and the court made findings of its own. *McClelland v. Bullis* (Colo.) 81 Pac. 771. The court found that defendant in error agreed with George H. Hobson to make the deed in question and to place the same in escrow, as hereinbefore recited; that under the agreement it was to embrace said lot 2, as well as lots 17 and 18; that under this agreement she made the deed, and that at the time of its making it included said lot 2. It further found that after the execution of the deed it was never delivered, and that the \$2,900 note had never been paid, and ordered the cancellation of the deed. We think its judgment was right. The facts

summed up are simply these: Defendant in error, without consideration, agreed to make the deed in question. She executed the deed, but before its delivery revoked her agreement, which included the deed.

The judgment should be affirmed.

34 Colo. 481

GEISSEMAN v. GEISSEMAN.

(Supreme Court of Colorado. Nov. 6. 1905.)

1. DIVORCE — COMPLAINT — SUFFICIENCY OF ALLEGATIONS.

A complaint for divorce on the ground of extreme cruelty, which alleges generally that defendant was guilty of extreme and repeated acts of cruelty, and contains allegations that defendant chronically quarreled with plaintiff, and nagged him about trivial things, and destroyed his peace of mind, but fails to aver any specific acts of cruelty, or to give time and place or attending circumstances, is subject to a motion to make more certain.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 293, 300.]

2. PLEADING — INDEFINITENESS—WAIVER OF DEFECT.

Where defendant, in a suit for divorce on the ground of extreme cruelty, files an answer denying the charge, and fails to move to have the complaint made more certain, an objection at the beginning of the trial to the introduction of evidence by plaintiff, because of the indefiniteness of the complaint, comes too late.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1435.]

3. DIVORCE—PRACTICE—NECESSITY OF TRIAL.

Sess. Laws 1893, p. 236, c. 80, § 1, makes extreme or repeated acts of cruelty by one of the married pair towards the other a ground of divorce. Section 5, p. 238, provides that no default for want of appearance shall be allowed in any action for divorce; but, if defendant fails to appear or plead, the case may be set for trial as though an appearance had been made. *Held* that, where a complaint alleged both extreme and repeated acts of cruelty, the failure of the answer to deny the commission of repeated acts of cruelty did not authorize the entry of judgment by default; but it was necessary for plaintiff to prove his case.

4. SAME—GROUNDS — CRUELTY — WHAT CONSTITUTES.

The acts of a wife in objecting to her husband's building a new house, finding fault with him for losing a hitching post, scolding him for coming home late at night, objecting to the kind of work he did and the places where he worked, and insisting on having her own way, the result of which conduct was to deprive the husband of some sleep and cause him worry, did not constitute extreme or repeated acts of cruelty, within the meaning of Sess. Laws 1893, p. 236, c. 80, making such acts ground of divorce and providing that they may consist as well of the infliction of mental suffering as bodily harm.

5. SAME—EFFECT OF VERDICT.

The verdict of a jury in a divorce case has as great weight and is entitled to the same consideration as a verdict in an ordinary civil action, but is not entitled to any more consideration.

Appeal from Pueblo County Court; L. B. Gibson, Judge.

Action by Clarence E. Geisseman against Minnie Geisseman. From a judgment for plaintiff, defendant appeals. Reversed.

Colo. Rep. 78-83 P.—29

Geo. Salisbury, for appellant. Stimson & Smith, for appellee.

CAMPBELL, J. Action for divorce on the ground of extreme and repeated acts of cruelty by defendant, consisting in the infliction upon plaintiff of mental suffering. Defendant appeared and filed an answer, denying that she was guilty of extreme cruelty. Upon the trial before a jury the issues were found for the plaintiff, upon which the court rendered a decree dissolving the bonds of matrimony. Defendant appeals.

1. The first objection argued is that the complaint is fatally defective, in that there are charged no specific acts of cruelty, giving time, place, and circumstances. The statement in the complaint is, generally, that the defendant was guilty of extreme and repeated acts of cruelty. This is followed by allegations that a short time after marriage the defendant developed a chronic habit of quarreling and fault-finding with the plaintiff, and continued the practice of nagging him, so that finally they separated and made division of the property; that afterwards they lived together again, but it was not long before the defendant again commenced to quarrel with and nag the plaintiff about trivial things, which rendered his life miserable and a great burden to him, destroyed his peace of mind, and rendered the marriage relation impossible to be endured. There is lacking in the complaint any averment of specific acts of cruelty. No time or place is mentioned, and no attendant circumstances are given. Had defendant made a motion to have the complaint in this respect made more certain, an order giving the relief might, and should, have been entered. But she did not do so. On the contrary, she filed an answer denying the charge of extreme cruelty. Her objection at the beginning of the trial to the introduction of evidence by plaintiff, because of such indefiniteness, came too late. *Sylvia v. Sylvia*, 11 Colo. 319, 323, 17 Pac. 912; *Rosenfeld v. Rosenfeld*, 21 Colo. 16, 40 Pac. 49.

2. The judgment must be reversed because of the legal insufficiency of the evidence. Our statute on divorce (Sess. Laws 1893, p. 236, c. 80) makes extreme or repeated acts of cruelty by one of the married pair towards the other a ground of divorce, and such acts of cruelty may consist as well in the infliction of mental suffering as bodily violence. The answer denies extreme but not repeated acts of cruelty. Judgment for default, for failure to make this denial, could not be entered; but under section 5 of our divorce act trial must be had and proof of the charge made. The complaint does not allege, nor does the evidence show in any true sense, repeated acts of cruelty of a character which justifies the decree in plaintiff's favor. The only evidence to support the complaint was the testimony of plaintiff himself. He testifies that throughout most of their married life defendant had the chronic habit of finding fault

and nagging him for nearly everything he did. When asked to give specific instances, the only ones he mentioned were that he wished to build a new house and defendant objected; that she found fault with him for losing the weight or block which was used as a hitching post for their horses when they were being driven to a wagon; that she scolded him for coming home late at night, and objected to the kind of work he did and the places where he worked, and insisted on having her own way. He says that the effect of this conduct was such that he could not stand it any longer; that it kept him nervous and deprived him of a good many nights' sleep, and caused him worry in the daytime; and although he did not say that it impaired his health, he was of opinion that it would have that effect if continued long enough, and he thinks he "could not have stood it," to use his own expression. The attending circumstances of these specific instances were not detailed, and, for aught that appears to the contrary, plaintiff may have been equally at fault with the defendant, and she may have had sufficient provocation to excuse her conduct. At all events, there being no other facts given except the bare general statements in the nature of plaintiff's conclusions, already referred to, we are of opinion that the facts are too trivial in character to justify a decree of divorce. A verdict of a jury in a divorce case has as great weight, and is entitled to the same consideration, as the verdict in an ordinary civil action. *Gilpin v. Gilpin*, 12 Colo. 508, 21 Pac. 612. But it certainly is not entitled to any more consideration.

The fact was developed at the trial that defendant is of mixed blood. We suppose plaintiff was of the Caucasian race, although that fact does not directly appear. Considering the inadequacy of the evidence to establish the cruelty charged, we are persuaded that the racial question improperly contributed to the verdict. At all events the facts elicited at the trial are legally insufficient to authorize a court to decree a divorce.

The judgment is reversed, and the cause remanded.

Reversed.

GABBERT, C. J., and STEELE, J., concur.

34 Colo. 496

EMBLEM v. BICKSLER, McLEAN & BENNETT.

(Supreme Court of Colorado. Nov. 6, 1905.)

1. ATTORNEY AND CLIENT—EMPLOYMENT OF ATTORNEY—COMPENSATION.

Where attorneys were called into a case by the attorney originally retained by the client, but afterwards corresponded directly with the client, and were instructed by him to proceed with the case, and were asked to name a fee, and were told that the attorney originally retained was no longer in the case, they were entitled to a reasonable compensation from the client for services performed by them, although

they were never expressly hired by the client, and there was no express agreement for compensation and the client subsequently wrote them that the attorney originally retained was again in the case.

2. SAME—AUTHORITY OF ATTORNEY—EMPLOYMENT OF ASSISTANT COUNSEL.

The mere retainer of counsel does not authorize him to employ assistant counsel at the expense of his client in the litigation in which he is engaged.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 326.]

3. APPEAL—HARMLESS ERROR—SUBMISSION OF ISSUES.

The action of the court in submitting a question of law to the jury, instead of determining that question itself and directing a verdict in accordance with its determination, was harmless to appellant, where the court, in denying a motion for a new trial, virtually held as a question of law that appellees were entitled to recover.

Appeal from District Court, Arapahoe County; P. L. Palmer, Judge.

Action by Bicksler, McLean & Bennett against George F. Emblem. From a judgment for plaintiffs, defendant appeals. Affirmed.

Carlon, Skelton & Morrow, for appellant. Thos. H. Hood, for appellees.

CAMPBELL, J. Action to recover attorney's fees. Judgment for plaintiffs. Defendant appeals.

The plaintiffs are practicing lawyers in the city of Denver, and defendant is a resident of Nebraska. The defendant employed Ambrose, a Chicago lawyer, to bring an action in the federal Circuit Court of Colorado to quiet title to his Colorado lands. The contract with Ambrose obligated defendant to advance all the costs of the action and to pay an attorney's fee of \$150, \$50 of which was paid Ambrose when the contract was made, and the remainder was to be paid when the action was finally determined or its subject-matter adjusted. Authority was given to Ambrose to employ associate counsel, but, if employed, not at defendant's expense, but Ambrose must compensate him. Ambrose corresponded with plaintiffs, and requested their assistance in conducting the action, and they prepared and filed the complaint. Because of Ambrose's failure to send plaintiffs the marshal's fee for serving process on defendants, practically nothing was done for about a year after the complaint was filed. Upon inquiry of plaintiffs as to the status of the case, defendant learned of the delay and its cause, and entered into a correspondence directly with them in regard to it, and it is upon this correspondence alone that defendant's liability, the only issue in the case, is to be determined; for it is conceded that plaintiffs performed the services, and the amount of the fee claimed is reasonable. The plaintiffs asked the court to direct the jury to return a verdict for them, and defendant requested a direction in his favor. The court refused both requests, and substantially charged the jury that, if they found from the

evidence that plaintiffs were employed by defendant to act as attorneys in the action, they should return a verdict in their favor for the agreed value of their services; and in this connection said that it was not necessary for plaintiffs to establish an express contract of employment, but that the same might be proved by the acts and conduct of defendant, and from such reasonable inference therefrom as, in the minds of the jury, was warranted.

From the correspondence, and other uncontradicted evidence, it appears that defendant first retained Ambrose upon the terms already stated. This arrangement as to the amount of fees, and Ambrose's undertaking with respect to sharing them, was never communicated by either party to the plaintiffs until after they had performed the services. Defendant knew that plaintiffs first came into the case in pursuance of the authority conferred upon Ambrose. But plaintiffs did not, at the time they performed the services, look to Ambrose for compensation, and were justified in believing that defendant would reward them. It is true that defendant did not expressly hire, or agree to pay, plaintiffs, but after having written to them, long after their entrance into the case, that he considered Ambrose out of it, and thereafter repeatedly urged them to look after the litigation, although no specific fee was agreed upon, and no express employment shown, he should be held to pay a reasonable compensation. In the letter of defendant to plaintiffs, in which he states that Ambrose is out of the case, defendant asked plaintiffs to state what fee they would charge for conducting it to a conclusion, to which plaintiffs responded that they would name the amount when defendant informed them fully of the facts. This the defendant never did, although thereafter, as well as before, he told the plaintiffs, "by all means keep your eye on the case," which they did by conducting negotiations that ended in obtaining the relief asked for. Such other facts, if any, as apparently or really conflict with the foregoing, do not militate against their legal effect. Our conclusion is that the letters written to plaintiffs by defendant constitute an implied promise to pay the plaintiffs for services rendered. The law undoubtedly is that the mere retainer of counsel is not authority for him to employ assistant counsel at the expense of his client in the litigation in which he is engaged. *Lathrop v. Hallett* (Colo. App.) 77 Pac. 1095. This doctrine finds expression, also, in *Northern Pac. Ry. Co. v. Clarke*, 106 Fed. 794, 45 C. C. A. 635; *Sedgwick v. Bliss*, 23 Neb. 617, 37 N. W. 483; *McCrary v. Ruddick*, 33 Iowa, 521; *Hogate v. Edwards*, 65 Ind. 372; and *Evans v. Mohr*, 153 Ill. 561, 39 N. E. 1083. In *Brigham v. Foster*, 7 Allen, 419, the rule is recognized, but it was there said, that though a contract between the client and counsel first employed may require the attorney to pay additional counsel

that may be engaged which binds the parties to it, yet if such agreement is withheld from such additional counsel, and the latter performs professional services in a case, at the request of the original attorney, without any knowledge of such secret agreement, and the client knows of the rendition of the services, and avails himself of the benefit, and consults with and adopts the latter as his counsel in the case, a valid contract to pay therefor may arise. The case in hand is certainly stronger in plaintiffs' favor than are the ones referred to in favor of associate counsel, because, after defendant had written plaintiffs that Ambrose was out of the case, he requested them to render these services, which they did, and consulted them as his attorneys, and availed himself, and received the benefit, of the same. The mere fact that afterwards he wrote them that "Ambrose was in again," and the other fact that the amount to be paid plaintiffs was not agreed upon, are not important.

If the question as to whether there was an implied contract, is one of law, and not of fact, under the undisputed evidence, and if the court should have directed a verdict in accordance with its determination of that question, instead of submitting it for the jury to find, defendant is not harmed by either action of the trial court; for, in denying the motion for a new trial, it virtually held, as a question of law, that plaintiffs were entitled to recover. Indeed, we are clearly of the opinion that the court ought to have directed a verdict for plaintiffs. The judgment is right and should be affirmed.

Affirmed.

GABBERT, C. J., and STEELE, J., concur.

35 Colo. 132

ROSEBERRY v. VALLEY BUILDING & LOAN ASS'N.

(Supreme Court of Colorado. Dec. 4, 1905.)

1. APPEAL—TIME FOR PRAYER—STATUTE.

Under the direct provisions of Mills' Ann. Code, § 388, the prayer for an appeal must be made within five days after the judgment or decree is rendered.

2. SAME — FAILURE TO PERFECT — CHANGE TO ERROR.

Under the direct provisions of Mills' Ann. Code, § 388a, the Supreme Court is required, when it would have jurisdiction on error of a cause in which an appeal has been unsuccessfully attempted to be taken, to order it entered as pending on writ of error.

3. CORPORATIONS — FOREIGN CORPORATIONS — RIGHT TO TRANSACT BUSINESS—STATUTES — CONSTRUCTION.

A single act of business is not within 1 Mills' Ann. St. §§ 499, 500, 1868, prohibiting foreign corporations from engaging in business in Colorado until they have conformed thereto; and where, in an action by a foreign building and loan association to foreclose a mortgage, it does not appear that plaintiff transacted any business in the state, except that involved in the action, the statute is no defense.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2526, 2527.]

Appeal from District Court, Teller County; William P. Seeds, Judge.

Action by the Valley Building & Loan Association against J. M. Roseberry. From a decree in favor of plaintiff, defendant appeals. Appeal dismissed, and cause entered as on error. Dismissed.

W. O. Temple and S. D. Crump, for appellant. Parker & Scott, for appellee.

CAMPBELL, J. Action to foreclose a mortgage executed by defendant to secure his promissory note or bond to plaintiff. From the decree of foreclosure in plaintiff's favor, defendant appealed. The only error assigned is to the ruling of the trial court striking out, on plaintiff's motion, a portion of the amended answer.

1. The final decree was entered on April 22, 1901, at the February, 1901, term of court. No appeal was prayed for within five days from the time the decree was rendered, or during the term at which it was entered, and the cause was not continued over that term. At the next regular term of court, which convened on the 6th day of May following, and on the 29th day of that month, an appeal was prayed for and allowed, and by the giving and approval of the appeal bond prescribed in that order appellant claims that the pending appeal was perfected. The prayer and allowance came too late. The prayer must be made within five days after the judgment or decree is rendered. Section 388, Civ. Code. The appeal must therefore be dismissed. But, as we would have jurisdiction on error, the cause must be entered as pending on writ of error, which section 388a, Mills' Ann. Code, requires to be done, and such order is hereby made. We proceed, then, to dispose of the cause on its merits.

2. The order by which portions of the amended answer were stricken is so indefinite that it is not entirely clear just what portion of the pleading was eliminated, and because of this uncertainty the error assigned might be disregarded. But we shall assume that the intention was to include all of the first defense of the amended answer, and, as its identity is ascertainable from the record, we proceed to dispose of the assignment on its merits.

3. The gist of this defense is that the plaintiff is a foreign corporation, and has failed to comply with the requirements of sections 499, 500, and 1868, 1 Mills' Ann. St., and by reason thereof cannot maintain this action, since these sections of the statutes prohibit foreign corporations from engaging in business in this state until they have conformed thereto. The allegation with respect to plaintiff's carrying on business is that it has engaged, and is still engaged, in the business of making loans and selling stock in the state of Colorado. For aught that appears to the contrary in this defense, the only business which plaintiff actually transacted in this state is that

involved in this action. There is no averment that it has made any other loan or sold any other stock, and proof of the allegation which is made would be that plaintiff loaned money to defendant and took his mortgage. It has been repeatedly decided in this jurisdiction that a single act of business does not come within the purview of these statutes. *Kindel v. Lithographing Co.*, 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311, and cases therein cited. Indeed, appellant concedes that the point has been ruled against him repeatedly by this court and our Court of Appeals, and his only reason for again presenting the question is because of certain language found in *Miller v. Williams*, 27 Colo. 34, 59 Pac. 740. Not only is there nothing in the opinion in that case to justify appellant's contention, but it was there expressly decided that a single act of doing business in this state is not within the statutes.

For the reasons given, the appeal and writ of error are dismissed.

Appeal and writ of error dismissed.

GABBERT, C. J., and STEELE, J., concur.

35 Colo. 135

GILES et al. v. DE COW.

(Supreme Court of Colorado. Dec. 4, 1905.)

APPEAL — LIABILITY ON BOND — EFFECT OF PENDENCY OF WRIT OF ERROR.

A bond on appeal from the county court to the district court cannot be enforced while a writ of error from the Supreme Court to the county court to review the same judgment is pending, where the writ is made to operate as a supersedeas.

Appeal from Teller County Court; Albert S. Frost, Judge.

Action by Sarah De Cow against E. S. Giles and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Benj. W. Coleman, for appellants.

CAMPBELL, J. Action on a statutory bond given on appeal to the district court from a judgment which appellee, De Cow, recovered against appellant Giles in the county court of Teller county. It is not clear that the complaint on its face shows any breach of the conditions of the bond under the statute regulating appeals from the county to the district courts. But as the trial court, in overruling the affirmative defense of the answer, committed reversible error, we shall not inquire as to the sufficiency of the complaint.

As alleged in defendant's affirmative defense, before this action on the bond was brought, the defendant obligors sued out a writ of error from the Supreme Court to the county court of Teller county, from the original judgment of the county court, which had previously been appealed to the district court by the giving of the bond here sued on, and this writ of error was made to operate

as a supersedeas, and was still pending. During the pendency of the writ of error in the Supreme Court, the judgment creditor was not in a position to enforce the original judgment. He could not sue out a writ of execution, or maintain an action, thereon. 3 Cyc. 908 et seq.; *Hurd v. People*, 14 Colo. 207, 23 Pac. 342. Since the judgment creditor, the plaintiff obligee here, could not enforce that judgment against the principal obligor, this action on the bond cannot be enforced against him or his sureties thereon. 3 Cyc. 938 et seq. In *Rockwell v. District Court*, 17 Colo. 118, 29 Pac. 454, 31 Am. St. Rep. 265, this court says that an appeal bond under our practice has a twofold office: It serves to suspend the enforcement of the judgment pending the appeal, and gives the appellee additional security for his judgment in case the same be affirmed or the appeal dismissed. The appeal bond is in no sense a substitute for the judgment appealed from. While the enforcement of the judgment is suspended by the appeal, the bond is but a contingent security, and appellee can have no remedy upon it during the period of suspension. Of course, all these observations are not literally applicable to the case before us, because the bond sued upon is not the one which, given in the writ of error, suspended the enforcement of the judgment; but the case is authority for the proposition that the appeal bond is merely a conditional and additional security for the payment to the appellee of his judgment, and suspends its enforcement while the appeal is pending.

A case quite similar to the one at bar is *Cook v. King*, 7 Ill. App. 549. It was there held that an appeal bond is a mere security for the payment of the judgment, from which it logically follows that whatever discharges the judgment discharges also the liability of the obligors on the bond. The facts of that case which make it, in principle, the same as the case at bar, were that a judgment was appealed from the circuit court to the appellate court, and afterwards dismissed, which dismissal of the appeal made the obligors on the bond liable for the payment of the judgment. In the suit upon that appeal bond one defense was that after the judgment appealed from had been dismissed, the same had been brought for review to the appellate court by writ of error, and by reason of errors in the record, the judgment was reversed. The court held that since the appeal bond was given to secure the payment of the sum that might be recovered on appeal, whatever can be deemed a legal satisfaction of that judgment is a bar to an action on the bond. Applying that principle to the facts of the case, it was held that, although the judgment whose enforcement had been suspended by giving the appeal bond was dismissed, and the contingency had therefore happened which gave rise to the liability of the obligors, yet the

subsequent reversal of the judgment on a writ of error extinguished all liability thereunder, and the judgment itself was effectually wiped out of existence; hence the obligors were discharged.

In the case in hand the original judgment was not reversed at the time this action was tried below, but its enforcement was suspended by the order of the Supreme Court making the writ of error a supersedeas. The judgment was, as a matter of fact, afterwards reversed with instructions to the county court to dismiss the action. *Giles v. De Cow*, 30 Colo. 412, 70 Pac. 681. The trial court should, at least, have suspended proceedings until final determination of the writ of error in the Supreme Court. Had it done so, judgment could not have been rendered on the appeal bond for the obligee, for the reversal of the judgment would have been equivalent to a decision that legal damage could not result to him by any breach of its conditions. In *Cook v. King*, supra, it was held that plaintiff was entitled to recover at least nominal damages, because the action upon the appeal bond was begun before the judgment therein described was reversed; but here the action was not instituted until after the enforcement of such judgment was suspended by the supersedeas allowed in the writ of error. Our conclusion also finds support in *Parnell v. Hancock*, 48 Cal. 452; *Cass v. Adams*, 3 Ohio, 223; *Bank v. Rogers*, 13 Minn. 407 (Gil. 376) 97 Am. Dec. 174; *Ellis et al. v. Fisher et al.*, 10 La. Ann. 479.

The judgment in favor of the plaintiff must be reversed, and the cause remanded, with instructions to the county court to dismiss the action.

Reversed.

GABBERT, C. J., and STEELE, J., concur.

35 Colo. 138

BELL v. GONZALES.

(Supreme Court of Colorado. Dec. 4, 1905.)

TRESPASS—INCLOSURE OF LAND—STATUTORY PROVISION.

Sess. Laws 1885, p. 220, authorizing a recovery in an action of trespass for injuries by animals breaking through a lawful fence, does not prevent a recovery for a willful trespass by driving sheep on uninclosed land, against the owner's consent and contrary to his express warning.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, §§ 330-332.]

Appeal from District Court, Las Animas County; Jesse G. Northcutt, Judge.

Action by Lorenzo D. Bell against Jesus Gonzales. From a judgment of dismissal, plaintiff appeals. Reversed.

Morgan & Smith, for appellant.

CAMPBELL, J. Action for damages for wanton trespass by defendant upon uninclosed

lands of plaintiff. Defendant's demurrer to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, was sustained; and, the plaintiff electing to stand by his complaint, the court dismissed the action. From this judgment of dismissal the plaintiff appeals.

There is no appearance in this court by the appellee. Hence it is only by inference and from statements made by appellant in his brief that we are advised of the nature of defendant's contention below. Apparently defendant's position, in which the trial court coincided, was that the case came within our statute relating to the inclosure of lands by a lawful fence; hence no liability was incurred because plaintiff's lands were open. That such was his contention is obvious because, if this statute does not change the ordinary law of trespass, the complaint undoubtedly contains all averments necessary to the creation of a legal liability on the part of the defendant. It alleges the possession and right of possession in the plaintiff of certain lands, and that, while they were in his possession, the defendant, being the owner of a large herd of sheep, against plaintiff's consent, and notwithstanding he expressly warned defendant not to pasture his herd thereon, at the same time pointing out its location, during a stated period, willfully and unlawfully drove and herded these sheep on these lands, to the plaintiff's damage in a certain sum.

The statute which is supposed to be controlling was passed by the Fifth General Assembly, and is found at page 220 of the Session Laws of 1885. The first section describes what shall be a lawful fence in this state, and the third provides that whoever makes and maintains such a lawful fence around his inclosure may recover in a suit for trespass from the owner of any animals which break there-through or whatever damages are thereby sustained, and further provides that no person shall be allowed to recover damages for any injury to crops or grass, or other vegetable products, unless the same at the time of the trespass are inclosed by a legal and sufficient fence. The statute has no bearing whatever upon the case made by the complaint. In *Morris v. Fraker*, 5 Colo. 425, this court established the rule in this jurisdiction that owners of crops can recover for damages done thereto by the trespasses of cattle only when the same are, at the time of trespass, inclosed by a good and sufficient fence. In *Willard v. Mathesus*, 7 Colo. 76, 1 Pac. 690, the doctrine of *Morris v. Fraker* was held inapplicable where the damage was done to crops growing upon uninclosed lands by a

flock of sheep while they were in charge of a herder. In such a case it was held to be the duty of the herder in charge to use ordinary care to prevent their trespassing, and for his negligence in this respect the owner must respond for resulting damages. If liability attaches for mere negligence, a fortiori would it for an affirmative, willful trespass. In *Nuckolls v. Gaut*, 12 Colo. 361, 21 Pac. 41, it was intimated, though not expressly decided, that, where one willfully and deliberately drives his cattle upon the premises of another for the purpose of pasturing on crops growing thereon, damages may be awarded. In *Norton v. Young*, 6 Colo. App. 187, 40 Pac. 156, the court said that it was impossible to concede that the existence of a lawful fence is necessary to protect one's property against a willful trespasser who breaks into an inclosure and destroys property, citing to the proposition *Fugate v. Smith*, 4 Colo. App. 201, 35 Pac. 283.

Other Western states have enacted similar fence laws, and in construing them it is universally held, so far as our investigation has extended, that they do not "authorize cattle owners deliberately to take possession of such lands, and depasture their cattle upon them [uninclosed lands of another] without making compensation, particularly if this were done against the will of the owner, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage." *Lazarus v. Phelps*, 152 U. S. 81, 85, 14 Sup. Ct. 477, 38 L. Ed. 363. A case quite in point is *Monroe v. Cannon*, 24 Mont. 316, 61 Pac. 863, 81 Am. St. Rep. 439. In our judgment the law as contained in the foregoing excerpt applies to the case in hand. Without burdening the opinion with the citation of authorities, we refer to their collation in 12 Am. & Eng. Enc. Law (2d Ed.) 1045.

The judgment, being in conflict with the law as herein declared, must be reversed and the cause remanded. We observe, however, that it may be that the value of the grass destroyed and water polluted, for which damages are claimed, is not sufficiently pleaded, or it may be the allegation concerning the same is wholly inadequate as a basis for the recovery of substantial damages. But, as no objection on the ground of uncertainty was raised, and as the acts charged against defendant in the complaint entitled plaintiff, at least, to nominal damages, that pleading, in the particular noted, is good as against the only ground of demurrer interposed.

Reversed.

GABBERT, C. J., and STEELE, J., concur.

(33 Mont. 359)

**STATE ex rel. BRUCE v. DISTRICT COURT
OF SECOND JUDICIAL DIST. FOR
SILVER BOW COUNTY et al.**

(Supreme Court of Montana. Jan. 8, 1906.)

**1. CONTEMPT—INTERFERENCE WITH JUDICIAL
PROCEEDINGS.**

Code Civ. Proc. § 2170, makes any unlawful interference with the process or proceedings of a court a contempt. Section 3463 defines "process" as a writ issued in the course of judicial proceedings, and "writ" is defined as a written order or precept, issued in the name of the state, of a court or judicial officer. Sections 840-843, in relation to the recovery of possession of personal property, provides that, when a delivery is claimed, plaintiff must make an affidavit stating certain facts, and that he may, by an indorsement on the affidavit, require the sheriff of the county to take the property from defendant, and the officer is required to serve on the defendant a copy of the affidavit and undertaking. *Held*, that where defendant in replevin refused to receive a copy of papers, and threatened the officer with violence if he took possession of the property, and while the officer was absent seeking assistance secreted the property, he was guilty of a contempt, though he had not been served with summons and though the order indorsed by plaintiff on the affidavit was not strictly within the definition of "process."

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, § 49.]

**2. SAME — ORDER TO SHOW CAUSE — SUFFI-
CIENCY.**

Where one was served with an order to show cause why he should not be punished for contempt, and he appeared, and was found guilty after a full investigation of the facts, and the order, when served, was accompanied by copies of the affidavits setting forth the facts constituting the charge, an objection that the order to show cause was not sufficiently specific in designating the particular contempt was without merit.

Certiorari by the state, on the relation of M. H. Bruce, to review the action of the district court of the Second Judicial district for the county of Silver Bow in convicting relator of a contempt in an action against the relator by Dennis O'Connell. Writ set aside, and proceedings dismissed.

J. T. Fitzgerald, for relator. Sanders & Sanders, for respondents.

BRANTLY, C. J. Certiorari. The relator was adjudged guilty of contempt by the district court of Silver Bow county, and by this proceeding seeks to have the judgment of conviction annulled, on the ground that it is void because made in excess of jurisdiction.

From the record it appears: That on October 3, 1905, an action was commenced in the district court of Silver Bow county against the relator by one Dennis O'Connell to recover the possession of a horse and buggy, of the value of \$150. That upon the filing of the complaint summons was issued and delivered to the sheriff with a copy of the complaint for service. That at the same time the plaintiff in the action delivered to the sheriff a proper affidavit and undertaking on claim and delivery, with an order, indorsed upon the affidavit, directed to the

sheriff, requiring him to take the property from the possession of the relator. That the sheriff thereupon directed Patrick F. Meagher, one of his deputies, to serve the summons and take possession of the property as directed in the order. That the deputy proceeded to the residence of the relator, and, having found him there in the possession of the property, made known to him his mission, and thereupon offered to deliver to him copies of the summons and complaint, and also of the undertaking and affidavit, with the order indorsed thereon. That the relator refused to receive them, or any of them. That the relator also told the said deputy that the property was his, and that he was going to defend it. That, the deputy having told the relator that he was going to take it from the barn where it was locked up, the relator with threatening demeanor said: "You get it!" "You lay your hands on that lock!" That thereupon the deputy, fearing violence, went for assistance. That upon his return he found that the property had been taken away, and since that time neither the sheriff nor any of his deputies has been able to find the property and take possession of it under the order in compliance with the statute.

On October 12th, the foregoing facts having been made to appear to the court by affidavits filed by plaintiff in the action and the said Meagher, an order was made requiring the relator to show cause why he should not be punished for contempt for his action in the premises. Upon a hearing the relator was found guilty, and sentenced to pay a fine of \$175, and in default of payment to be confined in the county jail until payment be made or until he had served one day for every two dollars thereof. Contention is made that the judgment of conviction is void (1) in that it does not appear that the relator unlawfully interfered with the process or proceedings of the court; and (2) in that the order issued to the relator in the contempt proceeding required him to show cause why he should not be punished for unlawful interference with the process of the court, whereas he was convicted of an unlawful interference with the proceedings of the court.

1. Section 2170 of the Code of Civil Procedure provides: "The following acts or omissions, in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: * * * (9) Any unlawful interference with the process or proceedings of a court. * * *" This provision defines as a contempt, not only any unlawful interference with the process of the court, but also with its proceedings, whether technically falling under the head of "process" or not. It is said by the relator that any resistance of, or interference by him with, the sheriff in his effort to obey the order of the plaintiff indorsed upon the affidavit, was not an interference with the pro-

cess of the court, because the order was not made by the court, nor was it authorized by it or issued under its authority. By section 3463 of the Code of Civil Procedure, "process" is defined as a writ issued in the course of judicial proceedings; and the word "writ" is defined as an order or precept in writing, issued in the name of the state, or of a court or judicial officer. The order in question does not fall strictly within the definition of the word "process" as given in this section; but, without stopping to discuss the nature of the order, it is sufficient to say on this point that it is one of the proceedings in an action of this character authorized by statute, and performs the office of process, whether it be called technically "process" or merely a "proceeding in the case." The action of the relator in resisting the officer who was proceeding in obedience thereto and undertaking to accomplish one of the necessary steps in the case authorized by law (Code Civ. Proc. § 843) was clearly an interference with the proceedings of the court in the cause, and was a contempt.

The word "proceeding" applies to any step to be taken in a cause which is authorized by law in order to enforce the rights of the parties or effectuate the proper conduct of it while pending in court. The idea could not for a moment be tolerated that the defendant in an action in claim and delivery could, by a sufficient resistance to the officer, avoid service of the summons and order, and then make such disposition of the property involved that it could not be taken possession of by the officer and held pending investigation of the question of title, thus defeating the purpose of the action. The writ of replevin has been dispensed with in this state, and the proceedings provided for under section 840 et seq. of the Code of Civil Procedure, to gain possession of the property and to hold it pending the trial of the cause, has been substituted in its stead. So that, whether it be called "process" or a "proceeding in the case," any unlawful interference with it by the defendant is a contempt of the authority of the court. It is also said by counsel for relator that the record shows that at the time of the occurrence of the acts charged as a contempt, the defendant had not been served with summons, and therefore the court had not acquired jurisdiction over him in the action. It is true that, in a technical sense, he had not been served with summons; for, though informed by the deputy that the latter had that process in his hand, he refused to receive the copy of it or of any of the other papers, and at once announced the intention to prevent the taking of the property. Under these circumstances he cannot be heard to say that he did not interfere with the proper conduct of the proceedings of the court in the action. He knew the mission of the deputy sheriff, and knew that he had the summons and other papers au-

thorizing the taking of the property. His behavior was not only a contempt of the authority of the court, but a flagrant one.

2. The second contention we think is without merit. The order served upon the defendant directed him to show cause why he should not be punished for contempt of the authority of the court. No complaint is made but that the affidavits state a contempt. Whether the order to show cause should have been more specific in designating the particular contempt is a question that we need not discuss, because the defendant appeared in obedience to the order, and was found guilty after hearing and full investigation of the facts constituting the particular contempt. Besides, the order, when served, was accompanied by copies of the affidavits setting forth the facts constituting the charge. Such being the case, we are of the opinion that he has no cause to complain.

The writ heretofore issued is set aside and the proceedings dismissed.

Dismissed.

MILBURN and HOLLOWAY, JJ., concur.

STATE ex rel. ROCKY MOUNTAIN BELL TELEPHONE CO. v. MAYOR, ETC., OF CITY OF RED LODGE et al.

(Supreme Court of Montana. Dec. 18, 1905.)

MANDAMUS — MUNICIPAL OFFICERS — DESIGNATING STREETS FOR TELEPHONE WIRES.

Under Code Civ. Proc. § 1961, authorizing the Supreme Court to issue a mandate to any inferior tribunal to compel the performance of an act which the law enjoins as a duty resulting from an office, a telephone company cannot have a mandamus to compel a city council to designate the streets on which the company may erect its poles and construct its lines, as it has a right to use any of the streets for that purpose, and the council is only required to designate the places in the streets where the poles may be placed.

Appeal from District Court, Carbon County; Frank Henry, Judge.

Mandamus by the state, on relation of the Rocky Mountain Bell Telephone Company, against the mayor and city council of the city of Red Lodge and another. From a judgment for the relator, defendants appeal. Reversed.

O. F. Goddard and Geo. W. Pierson, for appellants. H. G. & S. H. McIntire and Sydney Fox, for respondent.

HOLLOWAY, J. This is a proceeding in mandamus by the state, on the relation of the Rocky Mountain Bell Telephone Company, against the mayor and the city council of Red Lodge and the city of Red Lodge. After the formal allegations the petition sets forth that the relator is desirous of installing a local telephone exchange in Red Lodge, and, in order to do so, it is necessary for the company to erect its poles and construct its lines along all the streets, alleys, and avenues of

the city which have not already been designated; that it made demand upon the respondents that they make a designation of all such streets, avenues, and alleys in said city, upon which streets, avenues, and alleys the company may erect its necessary poles, fixtures, etc.; and that this demand was refused. The prayer of the petition is that an alternative writ of mandate issue, directed to the respondents, commanding them to make a further designation of all the other streets, avenues, and alleys in the city of Red Lodge not already designated, upon which streets, avenues, and alleys the company may erect its necessary poles and fixtures for the proper construction and maintenance of its telephone lines and local exchange, etc. Upon this verified petition an alternative writ of mandate was issued, together with an order to show cause. The alternative writ followed the language of the prayer of the petition as set forth above. The respondents answered, and attempted to show cause why a peremptory writ should not issue. Thereupon the relator moved for judgment on the pleadings, which was sustained, and a judgment for relator entered, directing the peremptory writ of mandate to issue in terms substantially similar to the commanding portion of the alternative writ mentioned above, and for relator's costs. From this judgment the respondents in the trial court appealed. Certain specifications of error are made by appellants in their brief, but, under our view of the case, these need not be considered.

Section 1961 of the Code of Civil Procedure provides that the writ of mandate "may be issued by the Supreme Court or the district court, or any judge of the district court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." What were the respondents in the trial court (appellants here) asked to do? To designate all streets, avenues, and alleys in the city of Red Lodge which had not been designated for the company's long distance system, upon which streets, avenues, and alleys the company might erect its poles and construct its lines for a local exchange. Is this a duty enjoined upon a city or upon its mayor or council? In *State ex rel. Rocky Mountain Bell Tel. Co. v. Mayor, etc., of Red Lodge*, 30 Mont. 338, 76 Pac. 758, an application was made for a writ of mandate to compel the city council of Red Lodge to designate where, in the streets, avenues, and alleys, the telephone company might place its poles, lines, etc., for the purpose of conducting a long distance telephone business; and upon appeal this court held that the company had the absolute right to use the streets, avenues, and alleys for the purpose of conducting such business, subject, however, to the right of the city to make reasonable regulations as to where, in the streets, the posts,

poles, and abutments should be placed, the height of the poles to be used, etc. If the company has the right to conduct its business, and to use all the streets, alleys, and avenues, what is its purpose in asking the city to designate such streets, alleys, and avenues? The term "designate" is defined as follows: "To mark out and make known; to point out; to name; to indicate; to show; to distinguish by mark or description; to specify; to call by a distinctive title; to indicate or set apart for a purpose or duty." Webster's International Dictionary. Now, what would this company have the city of Red Lodge do? Name its streets? Point out their boundaries? Or furnish an officer to show the agents of the company where a particular street or alley is located? Or would it have the city give it permission to do business? However convenient it might be to have these things done, the city does not owe this company the duty of doing any of them. As said in the *Red Lodge Case*, above, it is the duty of the city to designate the places in the streets, alleys, and avenues where the poles, abutments, etc., are to be placed. But the city was not asked to do this, and it is not sought to compel it to do it in this proceeding. If the company asked for what it wanted, it is not entitled to the relief sought, and does not need it. If it meant to ask that the city be compelled to designate places in the streets for its poles, etc., as it did in the *Red Lodge Case*, above, it failed to express its meaning; and, as it did not ask for the relief to which it might have been entitled, the trial court was not justified in granting relief to which it was not entitled. Had the company asked the city to designate places in the streets, alleys, and avenues where its poles, abutments, etc., might be placed, we must presume that the city would have complied. But the city cannot be coerced into doing an idle thing, for, had it fully complied with the demand pleaded in the petition, the telephone company would have been no better off than before.

While the particular point upon which we have decided this appeal is not urged in appellants' brief, still this court will not give sanction to a judgment which it would not enforce in contempt proceedings—if such should arise by reason of the failure of appellants to comply with the judgment—and will not consent that the writ of mandate may be made use of for a purpose for which it was not intended, or wherein its use would be vain. The facts set forth in the petition do not entitle the relator to any relief.

The judgment is reversed, and the cause remanded to the district court, with directions to dismiss the proceedings.

Reversed and remanded.

BRANTLY, C. J., and MILBURN, J., concur.

35 Colo. 105

LA JARA CREAMERY & LIVE STOCK ASS'N v. HANSEN.

(Supreme Court of Colorado. Dec. 4, 1905.)

1. WATERS AND WATER COURSES—SEEPAGE WATERS — APPROPRIATION — STATUTES — CONSTRUCTION.

Sess. Laws 1889, p. 215, § 1, providing that all ditches constructed for the purpose of utilizing the waste, seepage, or spring waters of the state shall be governed by the same laws relating to priority of right to water in ditches constructed for the purpose of utilizing the water of running streams, if valid, is applicable only to appropriations of waste, seepage, and spring waters before they reach a natural stream, whether by natural surface flow or percolation, or by being artificially turned into the same; and the waters after reaching a natural stream become, in the absence of an intention by the owner to reclaim them, a part of the waters of the stream, and inure to the benefit of the appropriators of its waters.

2. APPEAL—FINDINGS OF REFEREE—CONCLUSIVENESS.

Where the witnesses in a cause did not testify in the presence of the trial court, but before a referee, and the trial court affirmed the findings of the referee, the Supreme Court will weigh the evidence; the findings of the referee not being binding on an appellate court in the sense they would be if the trial judge, whose judgment is reviewed, had heard the witnesses.

3. WATERS AND WATER COURSES—RIGHT TO SEEPAGE WATER—PROOF THAT WATER IS SEEPAGE WATER.

Where the evidence is conflicting on the issue whether the water which a person has collected is seepage water, or comes from a defined subterranean channel or from another source, and there is no estimate of the quantity of the seepage water, the person cannot claim the water under Sess. Laws 1880, p. 215, § 1, providing that ditches constructed for the purpose of utilizing waste, seepage, or spring waters shall be governed by the laws regulating rights in water in ditches constructed for the purpose of utilizing the water of running streams.

4. SAME—BURDEN OF PROOF.

A person claiming a right to water as seepage water, under Sess. Laws 1889, p. 215, § 1, has the burden of proving that the water claimed is seepage water and the quantity thereof.

5. SAME—EVIDENCE—SUFFICIENCY.

Proof, by a person claiming a right to water as seepage water, that the bed of a river above his land is dry during most of the summer season, that through his lands there is running water, that the volume thereof is larger than it was before water was brought from another stream, without showing how much of the water he collects comes from the latter stream, and how much of that first rises on his own lands, and how much is brought up from beneath the surface by driving of piles, and how much of the surface channel is the result of contributions thereto from other sources, does not establish a right to the water by virtue of Sess. Laws 1880, p. 215, § 1, providing that ditches constructed for the purpose of utilizing seepage waters shall be governed by the laws regulating ditches constructed for the purpose of using waters in running streams.

Appeal from District Court, Conejos County; Charles C. Holbrook, Judge.

Action by the La Jara Creamery & Live Stock Association against Peter Hansen. From a judgment for defendant, plaintiff appeals. Affirmed.

D. E. Newcomb, Jr., for appellant. Rogers, Shafroth & Gregg, for appellee.

CAMPBELL, J. The parties are appropriators of water from the La Jara river, a natural stream in water district No. 21; the appellee being the senior appropriator, the headgate of whose ditch is lower down the stream than that of appellant. After these appropriations, and decrees therefor, were made, divers other persons made appropriations of water from another natural stream in the same water district—Conejos river—which has no connection whatever with the La Jara. These subsequent appropriations were not made for the purpose of irrigating lands whose natural drainage is into the Conejos, but were diverted and carried in ditches over an intervening ridge and spread upon the lands of the appropriators which lie in the natural watershed of the La Jara river, higher up that stream than the lands which belong to the parties to this proceeding. The appellant claims that some of the water thus applied passes by seepage from the lands thus irrigated and first rises again upon lands belonging to, or controlled by, it, and some of it first rises on lands of other parties, while all of it ultimately reaches the La Jara channel. In its statement of claim appellant alleges that it began to make use of these seepage waters in 1886 or 1887, and it claims, by virtue of the appropriation then made—the right to which, it is said, is recognized and confirmed by an act of the General Assembly passed in 1889—so much of such seepage water as first rises upon lands which it owns or controls. In this proceeding, brought for the purpose of having its right thereto adjudicated, the matter was referred to a referee for findings and a report. He heard evidence, and his conclusion was that the evidence was so contradictory that he was unable to find therefrom that appellant had made such appropriation, and he recommended a decree accordingly. The district court affirmed these findings and rejected the claim.

1. Appellant's contention is that it has a right, recognized and confirmed by the General Assembly, to make an appropriation of seepage water. The act relied upon is found in Sess. Laws 1880, p. 215, and reads: "Sec. 1. That all ditches now constructed or hereafter to be constructed for the purpose of utilizing the waste, seepage or spring waters of the state, shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the water of running streams; provided, that the person upon whose lands the seepage or spring waters first arise, shall have the prior right to such waters if capable of being used upon his lands." Whether, and to what extent, this act is constitutional, we decline to say, for the case, as made, does not come within its provisions. It will be observed that the act purports to make applicable to appropriations of waste, seepage, and spring waters of the state the same laws that govern appropriations of the water

of running or natural streams, with the proviso that the person upon whose lands the seepage or spring waters first arise shall have the prior right thereto, if the same can be used thereupon. Whatever may be the rights of the owner of the overlying lands to intercept and use upon their surface the waters seeping or percolating beneath them and before they reach a natural stream, or the right of a landowner to use the waters of a spring that rises thereon, no such question is here involved. The appellant seeks to make an appropriation of what it calls seepage water after the same has reached the channel, or bed, of a natural stream. As we read the record, the appellant does not claim seepage water which first rises on its own lands, at a point outside of the natural stream that flows through them, but waters which first rise in the bed of the stream itself, not before, but after, they actually reach the channel and form part of the volume of the stream. Nor does appellant claim that this seepage forms part of any water, the right to the original or first use of which belongs to appellant as an appropriator, and has been once utilized and turned into the stream with an intent on his part again to use it, or that it is the water that naturally percolates through its own soil. It is water the original right to use which for irrigation belongs to, and has been fully utilized by, others and afterwards, by natural law, percolates therefrom and through appellant's lands and reaches, and first rises in, the bed of a stream running through the same, which appellant claims the right to divert from the stream itself as against prior appropriators therefrom. We do not understand that this statute was intended to apply to such appropriations. If valid at all, it is applicable only to appropriations of waste, seepage, and springs waters, before they reach the channel or bed of a natural stream, whether by natural surface flow, by percolation, or by being artificially turned into the same. After waste waters reach the stream, unless there is then an intention by the owner to reclaim them, they become part of its volume, and inure to the benefit of the appropriators of its waters, to be enjoyed in accordance with their numerical priorities. That this is the law when waste water is turned into a natural stream, with no intent of the owner to reclaim it, has been expressly decided. There is no difference in principle between waste water thus added to a natural stream and water which, by natural law, so finds its way into such channel by percolation, surface, or subterranean flow. *Storage Co. v. Reservoir Co.*, 25 Colo. 87-94, 53 Pac. 386; *Kinney on Irrigation*, §§ 183, 259; *Clark et al. v. Ashley et al.* (Colo.) 82 Pac. 588; *McClellan v. Hurdle*, 3 Colo. App. 434, 33 Pac. 280.

2. If, however, this were a case within the statute, and if it be conceded that the statute is applicable and constitutional, appellant has

failed to sustain its claim on that theory. As already said, in discussing the first proposition, the water which it claims as seepage water, as is admitted, comes originally from another stream in another watershed having no connection with the La Jara river, and no claim is made thereto by those who first diverted it. After it is spread upon lands, constituting a part of the watershed of the La Jara, all of it to which appellant asserts any right comes naturally by seepage or percolation into the channel of that stream and there first arises. All of the water taken from the Conejos river is spread upon lands belonging to various persons, and by percolation reaches therefrom to lands of appellant and others, but it is only that portion which first rises upon lands owned or controlled by appellant, after it reaches the same in the bed of the river, that it claims by virtue of the appropriation here asserted. The referee found, and the district court came to the same conclusion, that the evidence did not support this contention. Appellant, however, says that the preponderance is in its favor, and properly insists that it is our duty to weigh and sift this evidence since the witnesses were not present before the district judge, and the findings of the referee are not binding upon an appellate court in the sense they would be if the trial judge whose judgment is reviewed had seen the witnesses and heard them testify. That duty we have tried to perform, and have carefully read the evidence, and we cannot say that the district court erred in its findings. In the first place, the evidence is conflicting as to whether or not the water which appellant has collected in the stream itself by the construction of dams is seepage water proper, or, if so, how much is natural seepage and how much is the Conejos river increase, or how much comes from the defined subterranean channel of the stream itself. It is a well-known fact that some streams in this state, after running for less or greater distances on the surface, sink, and by a well-defined subterranean channel flow for a number of miles, and then come to the surface again. *Platte Valley I. Co. v. Buckers I. Co.*, 25 Colo. 77, 53 Pac. 334.

The method which appellant employs to collect and divert the so-called seepage water is by driving two parallel rows of piling in and across the channel of the river, the banks of which are five or six feet high, and filling in between the two rows so as to prevent the water from passing below the artificial dam thus constructed. When the water is thus raised high enough, it is carried through ditches, dug for the purpose, to the lands to be irrigated. At best, it is largely a matter of opinion from what particular source come the waters that reach the channel of a natural stream. Springs, surface drainage, percolation, seepage other than that naturally coming through adjoining lands, the subterranean flow, may all contribute to, and form part of, its visible volume. The

witnesses here are not in accord on this point. Some say that the water claimed by appellant is seepage water whose presence in the valley of the La Jara is due to the diversion from the Conejos. Others deny this. The burden was on appellant, not only to show this fact, but also the quantity. *Howcroft v. Union, etc., Irr. Co.*, 25 Utah, 311, 71 Pac. 487. We find no estimate even of the latter. Appellant relies largely on the fact, to which there is evidence, that the river bed of the La Jara for many miles above its lands during most of the summer season is dry, while through its lands there is running water. And the volume thereof, at this point, is much larger than it was before the water was brought over from the Conejos. But how much of the water that it collects at and by its dams in the river bed comes from Conejos seepage, and how much of that first rises on its own lands, how much is brought up from beneath the surface by driving of the piles, or how much of the surface channel is the result of contributions thereto from other sources, is not shown. We appreciate the difficulty of making clear and satisfactory proof in such cases, and have carefully searched the record to see if reliable and definite data are there found on which some award to appellant can be based. But we are unable to find such.

It is needless to say that some of the questions argued by counsel are of vast importance in this state, but we do not believe that the case, as made by the evidence, calls for an adjudication of the relative rights of appropriators of the waters of a natural stream and of owners of adjacent lands who seek to intercept on their own lands, and before the same reach the stream, waters that otherwise would come into the channel by percolation or seepage.

For the reasons given the judgment should be affirmed.

Affirmed.

GABBERT, C. J., and STEELE, J. concur.

35 Colo. 67

GREENWOOD et al. v. PEOPLE.

(Supreme Court of Colorado. Dec. 4, 1905.)

BURGLARY—INFORMATION—VARIANCE.

Evidence that defendants broke into a bank building by way of offices and apartments occupied by tenants of the bank, and not by the bank itself, which they did not enter, constitutes a fatal variance from an information charging a burglarious entry "into the banking house then and there owned and occupied by" the bank in question.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, §§ 71, 74.]

Error to District Court, Delta County; Theron Stevens, Judge.

James Greenwood and others were convicted of burglary, and bring error. Reversed.

W. H. Burnett, R. M. Logan, Bell & Catlin, and Goudy & Twitchell, for plaintiffs in error. N. C. Miller, Atty. Gen., and W. R. Ramsey, Asst. Atty. Gen., for the People.

BAILEY, J. The information in this action charges that the defendants "did feloniously, willfully, maliciously, and forcibly break and enter into the banking house then and there owned and occupied by the First National Bank of Delta, a corporation, etc." The evidence shows that the building entered was known as the First National Bank building, owned and controlled by the bank. Upon the first floor there were two rooms occupied by Porter Plumb's law offices. There was a closet in the rear of Mr. Plumb's office, which could be reached only by passing through his rooms. The remaining part of the building on the first floor was used and occupied by the First National Bank for banking purposes. In the second story of the building were rooms and offices occupied by tenants of the bank.

It is undisputed that the alleged burglary consisted in breaking into, and entering Mr. Plumb's office, from there passing into the closet, then through a hole in the closet floor to the space beneath the floor, and the removing of some brick and mortar from the partition wall. The part of the building used for banking purposes was not entered. Where a building is divided into apartments, and one of the apartments is occupied by a bank, and others by tenants, for offices and other purposes, the entire building cannot be defined as a banking house. The breaking into and entering with felonious intent, of any portion of a building not occupied by the bank for banking purposes, cannot be said to be the breaking into and entering of a banking house.

The allegations of the information not having been proven, the trial court should have directed the jury to render a verdict of not guilty. The cause will therefore be reversed.

Reversed.

GABBERT, C. J., and GODDARD, J., concur.

35 Colo. 147

GARDINER v. GARDINER.

(Supreme Court of Colorado. Dec. 4, 1905.)

APPEARANCE—APPEAL BY NONRESIDENT DEFENDANT—JURISDICTION OF MOTION.

Where a nonresident defendant in a divorce suit appealed from a decree for temporary alimony, the Supreme Court acquired jurisdiction over him with respect to all matters properly determinable on the appeal, and subsequent service on his counsel of a motion to require the payment of a reasonable sum for the support of plaintiff and her child and for attorney's fees, gave the Supreme Court authority to consider such motion.

Appeal from District Court, City and County of Denver; F. T. Johnson, Judge.

Action by Lella H. Gardiner against James W. Gardiner. From an order granting a motion requiring defendant to make certain payments for plaintiff's support and for attorney's fees, defendant appeals. Affirmed.

J. C. Helm and John R. Dixon, for appellant. J. Warner Mills and Isaac Dunn, for appellee.

PER CURIAM. Appellee commenced suit for a divorce against appellant. From a judgment for temporary alimony the defendant appealed. Counsel for appellee now move that appellant be required to pay a reasonable sum each month for the support of herself and child pendente lite, and also a reasonable sum as attorney's fees. Notice of such motion was served upon counsel for appellant. Appellant, specially appearing, by way of cross-motion moves to quash such service, for the reason that the service of notice upon his counsel does not give this court jurisdiction of the appellant, who is a nonresident of the state. In support of this motion, it is urged that the motion of appellee contemplates a money judgment, and that no such judgment can be entered in the absence of personal service on the appellant.

We do not think there is any merit in this contention. The appellant has submitted his cause to this court. The court, therefore, has jurisdiction over him with respect to all matters which can properly be determined in his appeal. Service of the notice of motion, by appellee upon his counsel, is sufficient to invest the court with authority to consider such motion, and render such order thereon as may seem proper and just.

The cross-motion of appellant is denied, and he is ruled to further plead to the motion of appellee within 15 days.

Cross-motion denied.

35 Colo. 125

TANQUARY v. HOWARD.

(Supreme Court of Colorado. Dec. 4, 1905.)

1. APPEAL AND ERROR—JOINT APPELLANTS—PROSECUTION BY ALL.—NECESSITY.

Mills' Ann Code, § 400, providing that, in all cases where a judgment or decree is rendered against two or more persons either one may in the name of all appeal or bring writ of error, being in substance the same as Sess. Laws 1879, p. 227, § 30, does not affect the rule that a joint appeal must be prosecuted by all, and where one only of joint appellants signs the appeal bond and signs for himself alone, prosecuting the appeal in his own behalf, it will be dismissed.

2. SAME—WRIT OF ERROR.

Under Mills' Ann. Code, § 388a, providing that whenever the Supreme Court or Court of Appeals shall dismiss an appeal for lack of jurisdiction to entertain the same, and it appears that the court would have had jurisdiction had the action come up on writ of error, it shall be entered as pending on writ of error, a joint appeal prosecuted by one appellant only cannot be entered as pending on writ of error

as the same objection to the prosecution of a joint appeal by less than all applies to a writ of error.

Appeal from District Court, Arapahoe County; Booth M. Malone, Judge.

Action by Henry Howard against N. Q. Tanquary and another. Judgment for plaintiff, and defendant Tanquary appeals. Appeal dismissed.

Ward & Ward and Charles Roach, for appellant. Allen & Webster, for appellee.

CAMPBELL, J. The judgment was for the appellee and against the appellant Tanquary and F. E. Carringer jointly. To this judgment they excepted and jointly prayed an appeal, which was allowed upon condition that they file a prescribed appeal bond. Carringer, the other judgment debtor, did not, by himself or any other person, sign the appeal bond. It was executed by Tanquary and for himself only. Tanquary did not pray for nor was a separate appeal granted to him. He prosecutes this appeal in his own behalf, and in his own name, without using the name of the other judgment debtor.

Section 400 of our Civil Code (Mills' Ann. Code) provides that in all cases where a judgment or decree shall be rendered against two or more persons either one may remove the suit to the Supreme Court by appeal or writ of error, and for that purpose may use the name of all of said persons, if necessary. This section, in substance, is the same as section 30, p. 227, Sess. Laws 1879, which was construed in *Diamond Tunnel G. & S. M. Co. et al. v. Faulkner*, 14 Colo. 438, 24 Pac. 548, wherein, referring with approval to its previous decisions, this court held that the permission given by this section did not affect the rule that a joint appeal by all the defendants must be prosecuted by all. *Andre v. Jones*, 1 Colo. 489; *Fuller v. S. R. Placer Co.*, 5 Colo. 123. Our Court of Appeals has announced the same doctrine in *Creswell v. Herr*, 9 Colo. App. 185, 48 Pac. 155, and, by necessary implication, in *Campbell v. Securities Co.*, 12 Colo. App. 544, 56 Pac. 88. This seems to be the general rule in the absence of a statute to the contrary. *American Digest* (Century Ed.) vol. 2, § 1811; *McIntyre v. Sholty et al.*, 139 Ill. 171, 29 N. E. 43. This cause cannot be entered as pending on writ of error under section 388a, Mills' Ann. Code, because the same objection to the prosecution of a joint appeal by one of two or more judgment debtors without joining the others applies to a writ of error.

The appeal, therefore, must be dismissed, and the cause remanded.

Appeal dismissed.

GABBERT, C. J., and STEELE, J., concur.

(29 Utah, 490)

GRAND CENTRAL MIN. CO. v. MAM-MOTH MIN. CO.

(Supreme Court of Utah. Oct. 11, 1905.)

1. MINES AND MINERALS—RIGHTS OF LOCATORS—PRESUMPTIONS.

The locator of a lode claim is presumed to own all the ore within planes drawn vertically downward to the deep through the boundary lines of such claim, as well as the surface and everything appurtenant to the claim, which presumption continues until some other locator establishes that such deposits belong to another lode having its apex in his ground, so that he is entitled to extralateral rights reserved by Rev. St. U. S. § 2322 [U. S. Comp. St. 1901, p. 1425].

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, §§ 75-77.]

2. SAME—MINING CLAIM—FINDINGS—APEX—EXTRALATERAL RIGHTS.

Where a person owns a mining claim having an apex of a vein within its limits extending through the claim lengthwise, he has, by virtue of the extralateral rights reserved under the statute, a right to follow the vein, between vertical planes drawn downward through the end lines of the location, from the apex, on the dip, to the deep, although such vein may so far depart from a perpendicular, in its course downward, as to extend outside of the vertical side lines of the surface of the location into ground belonging to the adjoining owner.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, §§ 75-77.]

3. SAME—VEIN—APEX AND STRIKE—ORE BODIES—BURDEN OF PROOF.

Where defendant, who was the owner of a lode claim, claimed ore underlying plaintiff's adjoining claim by virtue of extralateral rights, defendant was bound to show, not only that the apex and strike of the vein were within the boundaries of defendant's claim, but that between planes drawn vertically downward through the end line of plaintiff's claim and a certain parallel line the vein from its apex on its dip was continuous, that the continuity extended to and through plaintiff's ground, and that the ore bodies claimed formed a part of such vein.

4. SAME—PATENT—MINING CLAIM—PRESUMPTIONS.

A patent to a mining claim raises the conclusive presumption that there is an apex of a vein within the patented ground, but there is no presumption that such vein embraces ore without the side lines of the claim, or that the vein presumed is the one in dispute.

5. APPEAL—MINING SUIT—QUESTION OF APEX—EVIDENCE—CONFLICTING OPINIONS OF WITNESSES—PHYSICAL FACTS—FINDINGS—CONCLUSIVENESS.

Where, in the trial of a mining suit involving the question of apex and location of a vein, there is a substantial conflict in the evidence with reference to the properties in dispute, as to what physical facts exist, as well as in the opinions of witnesses drawn from the facts, the findings relating to the questions of apex, dip, and continuity of the vein, and ownership of the disputed bodies, will not be disturbed by the appellate court, unless they are so manifestly erroneous as to demonstrate some oversight or mistake which affects the substantial rights of the appellant.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3935-3937, 3983-3989.]

6. MINES AND MINERALS—SEDIMENTARY ROCK—VEIN—CRUSHED MATERIAL—MINERALIZATION.

The mere fact that sedimentary rock is broken, crushed, seamed, stained, and fissured

does neither constitute such material a vein nor an apex of a vein, where no hanging wall nor foot wall appears, where the mineralization of such crushed material is not appreciably greater than that existing generally throughout the sedimentary area, and where the same kind of crushed and brecciated material exists elsewhere and generally within that area.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 22.]

7. APPEAL—EQUITY SUITS—INSTRUCTIONS.

The verdict of a jury in an equity suit on controverted questions of fact submitted to it being merely advisory, error cannot be predicated on instructions given or refused.

8. MINES AND MINERALS—VEIN OR LODGE—DEFINITION.

Veins or lodes are lines or aggregations of metal imbedded in quartz or other rock in place, consisting of a strip of mineral-bearing rock within defined boundaries in the general mass of the mountain, which must be continuous and without interruption, bounded by country rock mineralized to no greater extent than the general condition of the vicinity.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 22.]

9. SAME—VEIN—CONTENTS—MINERAL VALUE.

Rock or matter of any kind, in order to constitute a vein or lode within the meaning of the statute, must be metalliferous and contain such mineral value as will distinguish it from the country rock, especially where no well-defined walls appear.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 22.]

10. SAME—ESSENTIAL ELEMENTS—EVIDENCE.

Under the acts of Congress the essential elements of a vein are mineral or mineral-bearing rock and boundaries, and, in case of controversy, where one of these elements is well established, very slight evidence may be accepted as to the existence of the other.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 22.]

11. SAME—EXTRALATERAL RIGHTS.

In order to entitle the owner of a mining claim to extralateral rights, it is not sufficient that the vein he seeks to follow outside the boundaries of his claim consists of rock sufficiently mineralized so that a miner can follow it with a reasonable expectation of finding ore; but it is necessary that there should be a ledge or body of mineral or mineral-bearing rock of such value as will distinguish it from the country rock or from the general mass of the mountain.

12. SAME—MINING CLAIM—LOCATION—DISCOVERY—RESERVED RIGHTS—FEDERAL STATUTES.

What may constitute a sufficient discovery to warrant a location of a mining claim may be wholly inadequate to justify the locator in claiming or exercising rights reserved by the statute.

13. SAME—DISCOVERY—INVASION—POSSESSION—ADJOINING OWNER—PRESUMPTION.

What constitutes a discovery that will validate a location is a very different thing from what constitutes an apex to which attaches the statutory right to invade the possession of and appropriate the property which is presumed to belong to the adjoining owner.

14. SAME—PROSPECTOR—LOCATIONS—POLICY OF LAW—CONFLICTING LODGE CLAIMANTS—RULES OF CONSTRUCTION.

It is the object and policy of the law to encourage the prospector and miner in their efforts to discover mineral, and therefore, as between conflicting lode claimants, the law is liberally construed in favor of the senior location; but where one claims what, *prima facie*, belongs to another, because of the apex in the

claimant's location, a more rigid rule of construction against the claimant prevails.

15. SAME—FISSURE VEIN—FILLING—VALUES OF—SPECIAL REFERENCE—DISTRICT—LOCATION.

What values the filling or material of a fissure should contain to constitute it a vein, within the meaning of the act of Congress, must necessarily depend upon the characteristics of the district or country in which the vein or lode, in any particular instance claimed to exist, is located, and upon the character, as to boundaries, of the vein itself. Values, therefore, of the filling of the vein must be considered with special reference to the district where the vein or lode is found.

16. SAME—VEIN—DEFINITION.

The definition of a vein must be considered with reference to the formations and characteristics of the particular district in which the vein is located.

17. SAME—VEIN—BOUNDARIES—FILLING—VALUES—DIFFERENTIATION—COUNTRY ROCK.

Where the boundaries of what is claimed to be a vein are not well, or not at all, defined, either at the surface or at depth, the value of the material must be so in excess of the country rock as to differentiate it from such rock; else the material cannot be held to constitute a vein.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 22.]

18. SAME—MINERALIZATION.

In the absence of defined walls and of mineralization appreciably greater than that contained in the general mass of the mountain, broken, stained, and fissured material, or crushed and brecciated matter, characteristic of the district, cannot be held to constitute a vein or lode, under the statute.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 22.]

19. SAME—FRACTURING—LIMITS—VEIN—VUG—COUNTRY ROCK.

In such case, the limits of fracturing do not constitute the limits of the vein, and, even if there be found an occasional vug or fragment of ore, yet, where it is disconnected from any ore body and so intermingled with the surrounding country rock that it cannot be regarded as continuous, it does not mark the line of the vein or lode, within the meaning of the law.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 22.]

20. SAME—VEIN—SEDIMENTARY BEDS—REPLACEMENT—MINERALIZATION—ORE BODIES—DEPOSITION OF ORE—LIMITS.

Where a vein, located in sedimentary beds of rock, is formed by replacement, and the mineralization ceases within a short distance of the ore body or ore channel, the limits of the deposition of ore are the limits of the vein; and this is so whether the vein be considered laterally or with reference to the apex.

21. SAME—COURSE—STRIKE—DIP—ORE BODIES.

The course of the vein longitudinally, as it passes through the country, is its strike; and where the dip of the vein is vertical, or practically vertical, the line of its ore bodies may mark the line of its strike.

22. SAME—LOCATION—GEOLOGICAL FEATURES.

In determining the location and strike of a vein, the geological features of the adjacent country, so far as in evidence, will be considered by the court.

23. SAME—MINING SUIT—FINDINGS OF FACT—EVIDENCE.

In a suit to determine extralateral rights appurtenant to a mining claim, evidence held to sustain a finding that the vein in question at its apex and on its northwesterly course or strike crossed the western side line of defendant's lot and wholly diverted therefrom at a

point 690 feet north of its south end line, and north of that point did not continue, either at its apex or on its strike, to or beyond a certain 1,100-foot line within the limits of defendant's boundaries, and that there was no vein or lode, having an apex or any part thereof within the limits of defendant's claim north of the southerly end line of plaintiff's claim extended easterly in its own directions and south of such 1,100-foot line, which on its dip extended to and included any of the ore bodies existing underneath the surface of plaintiff's claim south of such 1,100-foot line, and that defendant was therefore not entitled to extralateral rights with reference to any ore underlying plaintiff's ground.

24. APPEAL—TRIAL—WRITTEN OPINION—RECORD—FINDINGS.

The written opinion of a trial judge, stating the reasons for his action or judgment, is not properly a part of the record, and affords no evidence that the recitals therein contained are true or are supported by the proof, nor can such opinion qualify or limit the finding or decision.

25. SAME—ASSIGNMENTS OF ERROR—OPINION OF COURT.

The act of a trial judge in delivering an opinion, stating the reasons for his action or judgment, is not an act on which error can be predicated.

26. PLEADING—AMENDMENT—THEORY OF JUDGE.

Where, in a suit to determine extralateral rights as appurtenant to a mining claim, defendant through the entire litigation and during two protracted trials continuously based its claim to extralateral rights on the theory that the apex of the vein sought to be followed was within the limits of a certain claim owned by it, and no claim was made that the apex was in certain other adjoining claims until the theory was advanced by the trial judge in an opinion accompanying findings denying defendant's claim, which theory was not sustained by any evidence introduced, defendant was not entitled to amend to conform to the theory of the judge; there being no pretense that any additional evidence could be introduced to sustain the same.

27. PLEADING—AMENDMENT—ADDITIONAL PLEADING—VARIANCE.

When a party litigant offers to file an amendment or an additional pleading at the close of the trial without an offer of further proof, the offer to file may be properly rejected, in the absence of variance between the pleadings and proof.

Appeal from District Court, Fifth District; T. Marioneaux, Judge.

Action by the Grand Central Mining Company against the Mammoth Mining Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The plaintiff commenced this action on the 9th day of September, 1899, by filing a complaint in trespass, in the first count of which it alleged that the defendant had unlawfully mined, extracted, and removed from beneath the surface of the Silveropolis mining claim ores in quantity exceeding 6,000 tons, of the value of \$300,000, and demanded judgment for that sum; and in the second count, after having made similar allegations as to the extraction and value of ores, it asked that the defendant be restrained from further mining operations underneath the surface of that claim, pending the trial of the cause. On October 16,

1899, the defendant filed an answer and counterclaim, alleging affirmatively, *inter alia*, that the ore bodies in controversy were in a vein which had its apex in the first northern extension of the Mammoth lode, designated as "U. S. Lot No. 38." To this answer and counterclaim an amendment was filed October 22, 1900, and on November 12, 1900, the defendant filed a second amended answer and counterclaim, alleging in each a vein in lot 38, which at its apex and on its strike crossed the southerly end line of that lot, and thence at its apex and on its course extended within the side lines of the lot to a point 1,100 feet northerly from said southerly end line; that the vein, on its dip from the apex, extended to, beneath, and beyond the Silveropolis and Consort mining claims, designated, respectively, "U. S. Lot No. 135" and "U. S. Lot No. 272," both owned by the plaintiff; and that the vein included all the ores lying beneath the surface of the Silveropolis and Consort mining claims south of a plane drawn parallel to the southerly end line of lot 38 and through a point 1,100 feet northerly therefrom. By this amended counterclaim the defendant sought to have its alleged title quieted as to all ore bodies lying within the Silveropolis and Consort mining claims south of the 1,100-foot plane. Answering this counterclaim, the plaintiff alleged it was the owner of all the ore bodies in controversy by virtue of its ownership of the Silveropolis and Consort mining claims. Thereafter the court determined that the issues thus joined should be tried and decided prior to the trial of the plaintiff's action in trespass. Upon the trial of the case presented by such counterclaim and answer thereto, which commenced November 19, and ended December 31, 1900, the court found and decreed that the vein mentioned in the counterclaim at its apex and on its strike did not continue within lot 38 to the 1,100-foot line, but that the apex passed over the westerly side line of that lot and departed therefrom, at a point 700 feet north of the south end line of the lot, without again returning thereto, and dismissed the defendant's counterclaim. Afterwards, another judge presiding, as successor to the one before whom the case had been tried, the court on April 4, 1901, upon motion therefor, granted a new trial.

On November 20, 1901, the defendant filed its third amended answer and counterclaim, in each of which it, among other things, alleged that the vein and lode at its apex and on its strike crossed the southerly end line of lot 38, and thence continued northerly in that lot to the 1,100-foot line; that the apex of the vein was very broad, its width extending east of the east side line of lot 38, and overlapping portions of the Young Mammoth, Jenkins, Schey, and Bess mining claims, owned by the defendant; that

its apex likewise extended west of the west side line of lot 38, and overlapped portions of the Jenkins, Golden King, and Bradley mining claims, also owned by the defendant; that at no point south of the 1,100-foot line did the apex wholly depart from lot 38, the lode upon its course conforming to the side lines of the lot; that lot 38 was the senior location, and long preceded all the other mining claims mentioned in the counterclaim; and that the vein on its dip to the west departed from the side lines of lot 38, passed under and beyond the surface limits of the Jenkins, Golden King, and Bradley mining claims, and extended, at a depth of 700 feet under the southerly end line of the Silveropolis mining claim, further on its dip to and beyond the limits of the Silveropolis and Consort mining claims, and embraced all the ore bodies lying underneath those claims south of the 1,100-foot plane. The prayer was that the defendant's title to those ore bodies be quieted against the adverse claim of the plaintiff. To this counterclaim, the plaintiff filed an answer, alleging that it was the owner of the Silveropolis and Consort mining claims, and of all veins and ores therein or thereunder and within planes extended down vertically through the boundary lines of those claims. On the issues thus formed the case was again tried. The trial was commenced on November 21, 1901, when a jury was ordered impaneled advisory to the court to pass on certain issues, among them, in substance, the following: How far northerly toward the 1,100-foot line does the apex of the vein on its course extend in lot 38? If the apex of the vein on its course wholly departs from the limits of lot 38 before reaching the 1,100-foot line, then at what point on its course does it so depart? Does there exist, within the limits of lot 38, and between the southerly end line of the Silveropolis mining claim extended eastward in its own direction across lot 38 and south of the 1,100-foot line, any part of the apex of any vein, lode, or ledge, or any part of any vein, lode, or ledge, which vein, lode, or ledge on its dip extends to and includes the ore bodies known to exist beneath the surface of the Silveropolis and Consort mining claims south of the 1,100-foot plane? Do those ore bodies belong to or are they a part of any vein, lode, or ledge that has its apex, or any part of its apex, in lot 38?

Such were the issues upon which the cause was tried. The question of damages, under the suit in trespass for ores extracted from the ground in controversy, was not made an issue in the case presented, and no evidence was introduced upon that subject. The contention of the defendant throughout the trial was that the ore bodies in dispute lie in a vein which has its apex in lot 38, and which, on its strike and at its apex,

crosses the southerly end line of that lot, and continues within its limits to a point at least 1,100 feet north from such end line; while on the part of the plaintiff it was insisted that the vein, which at its apex and on its course crosses the southerly end line of lot 38, wholly departs from the lot at a point 695 feet north from the southwest corner thereof, where it crosses the westerly side line. In the introduction of evidence the parties assumed a wide range, both as to surface showings and indications and as to underground workings. The surface of the mining claims and the various tunnels and levels of the mines are represented by both sides with numerous maps and with a very interesting glass model by the defendant. They are of great utility in acquiring a proper understanding of this controversy, and are, in the most important parts, presented herein in the shape of diagrams. The mining ground in question is situate in the Tintic mining district, Juab county, Utah.

Diagram No. 1.

Diagram No. 1, given below, is in part a copy of Defendant's Exhibits A and K and Plaintiff's Exhibit 12, surface maps.

On this diagram are shown, so far as material here, the surface boundaries of the properties owned by the parties. The first northern extension of the Mammoth claim (U. S. lot No. 38), the Jenkins (U. S. lot No. 98), the Golden King (U. S. lot No. 92), the Bradley (U. S. lot No. 158), the Young Mammoth (U. S. lot No. 94), and the Schey mining claims are owned by the defendant; and the Silveropolis (U. S. lot 135), the Consort (U. S. lot No. 272), and the King William mining claims are owned by the plaintiff. The ground in dispute is that part of the Silveropolis and Consort mining claims lying south of the 1,100-foot line. The stipple shading on lot 38, which overlaps the claim, shows the width of the apex and course of the vein as claimed by the defendant. The lines W-U, U-T, and T-S represent the course or strike of the vein as claimed by the plaintiff, and indicate the line of stoping in the mines along the vein, claimed by the defendant to be on its dip, by the plaintiff on its strike. The point U is 695 feet from the southwest corner of lot 38, and is where the plaintiff claims the vein changes from a course N. 15° E. to a course N. 51° 30' W., true, and departs wholly from the limits of lot 38, continuing in that course to the point T, when it again changes, and thence continues N. about 10° to 15° W. in the direction of the point S. The line K-K indicates a section through the Peterson winze in the Grand Central mine, H-H a section through southern end of Silveropolis claim, E-E a plane about 150 feet north of the south end line of that claim, and F-F a longitudinal projection. Numerous open cuts, made

by the defendant for the purposes of this case and claimed by it to expose the apex of the vein, are indicated on lot 38. Tunnels, Mammoth and Grand Central shafts, and other points of more or less importance are also located on the diagram. The 1,100 and 1,700 foot lines and the southerly end line of the Silveropolis mining claim extended likewise appear thereon. Some of the principal stopes are indicated thereon, including the Cunningham of the Mammoth, where the plaintiff insists the vein wholly departs from lot 38, and the Butterfly of the Grand Central. The dykes also appear.

In determining the rights of the parties to the ore bodies in dispute, lot 38 is of principal importance. That lot or claim was patented May 16, 1873, and all the other claims herein referred to are junior to it as to location and patent. Lot 38 is 200 feet wide and 3,000 feet long, and from its southerly end line its side lines run N. 18° 55' E., which direction indicates the general course of the apex of the vein, as claimed by the defendant.

Diagram No. 2.

Diagram No. 2 is produced from Defendant's Exhibits B, C, D, F, G, H, and I, and Plaintiff's Exhibits Nos. 1, 2, 3, 6, 7, 8, and 16, maps representing portions of the mines of the parties.

On this diagram each one of the principal stopes, shown by the evidence and material to this decision, is represented and marked with a figure corresponding with the number of the level on which the stope is located. They show where, in the various tunnels and parts of both mines, merchantable ore was found. Those of most importance, in the consideration of the questions before the court, are the Gillespie, Apex, Gulf, Flanders, Burleigh, Naylor, Cunningham, Caved, Klondyke, Betsy, and Butterfly stopes. There are also designated on the diagram tunnels and drifts where no ore was found and no stoping done, being driven into barren ground in search for ore. The Mammoth and Grand Central shafts, the Tranter drift, the drift to the north end line Golden King claim 800 level, the drift connections between the Mammoth and Grand Central mines, east and west cross-cuts, Turner raise, Dago raise, O'Brien winze, Bush winze, the Condon and Golden King tunnels, and other objects, to which reference is made herein, are designated on the diagram, to show, as near as may be, their location and character, and to enable one to judge the more readily of the indications they furnish, as bearing upon the reasonableness or unreasonableness of the theories of either of the parties respecting the strike of the vein or lode, the location of the apex, its width, the dip of the vein westerly, and its continuity and persistency on its dip downward to the ore bodies in controversy.

'DIAGRAM No 1

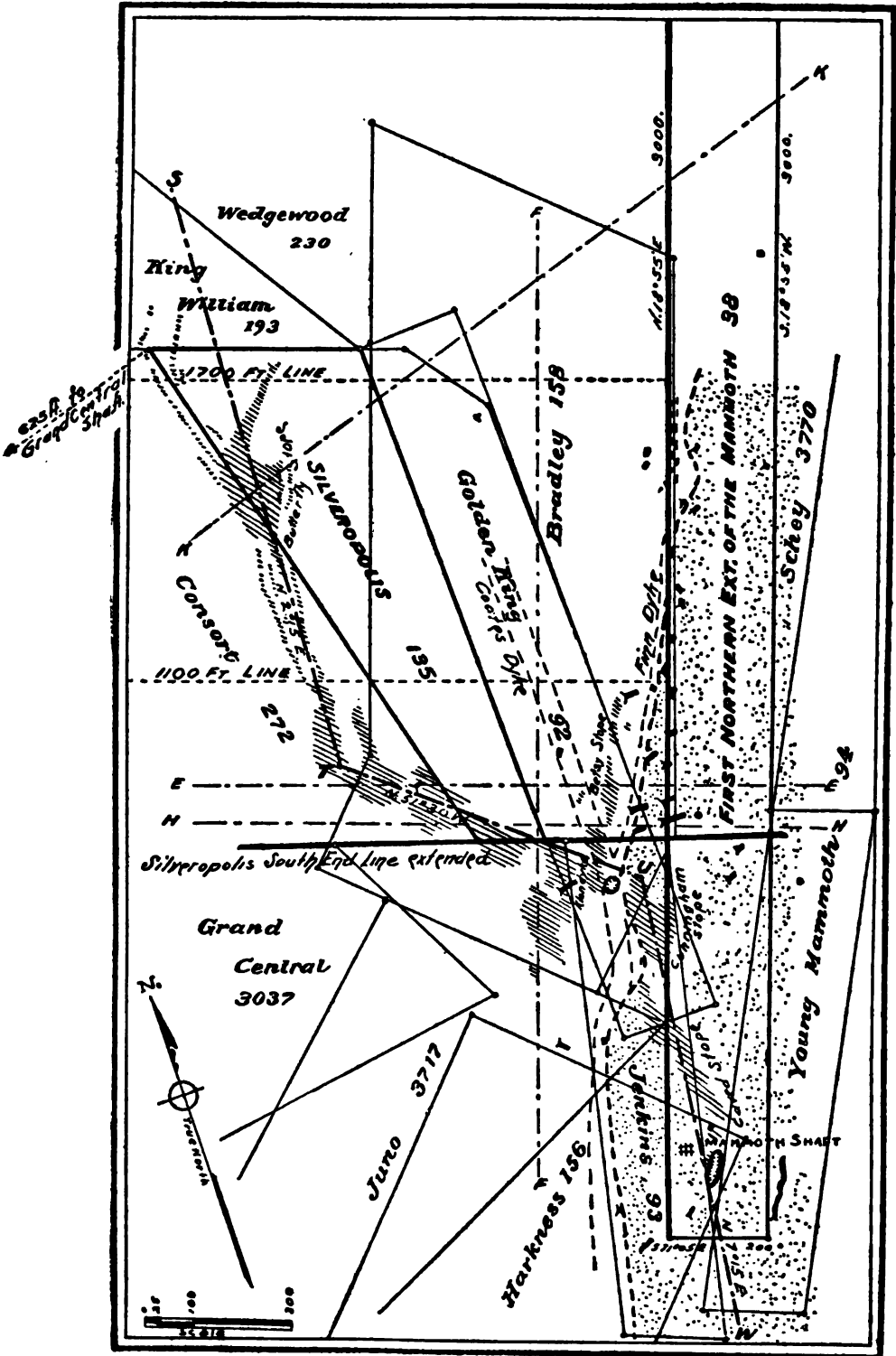


DIAGRAM No 2

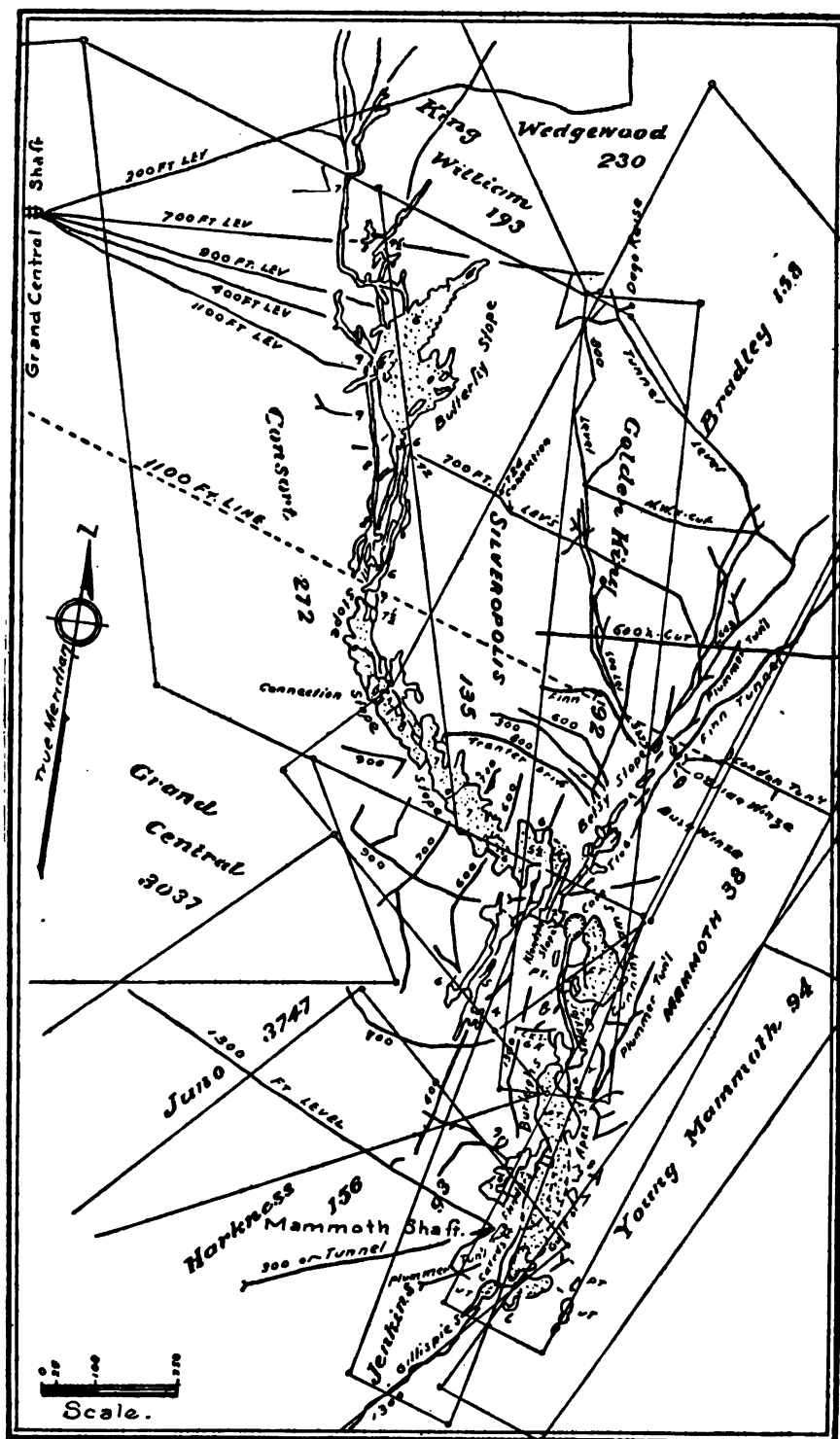


Diagram No. 3.

Diagram No. 3 is a copy of the Defendant's Exhibit E and of the Plaintiff's Exhibit 4, maps representing the 400 level in both mines.

On this diagram are represented the dykes and their junction, the Betsy stope, the Bush winze, the Hatton raise, Bucket raise, and important points around and connected with the Betsy stope country. Stations 427, 4011, 15, and 84 also appear hereon. Stations 15 and 84 represent the same point where the winze goes down to the Butterfly stope. There is evidence to the effect that on this level the vein, about 45 feet north of station 92 at the south end line of the Golden King claim, forks; the one fork passing north in the direction of the drift in line of stations a, b, c, d, e, 99, etc., and the other coursing west of north. What is called the "80-foot level" is between this and the 300 level. Here, on the 400, in connection with the 80-foot level, is where the trial judge, in a written opinion, claimed there are shown two veins, one of which he said embraced the ore bodies in dispute, and terminated at station 427, which is a little north of the Betsy stope.

Diagram No. 4.

Diagram No. 4 is a copy of Defendant's Exhibit L, section H-H, presenting a vertical cross-section of the vein and the Finn dyke.

This diagram represents a projection on plane H-H, looking north. It is intended to show a section of the vein on its dip, according to defendant's theory, as it passes from its alleged apex; a part, called the "back fissure," almost vertically to the deep, and the westerly portion thereof on its dip through the Finn dyke to the ore bodies in dispute under the Silveropolis and Consort claims. On the diagram the east portion or "back fissure" is indicated by light, the dyke by heavy, and the west vein by light stipple, shading, and the stoping by hatching. The line H-H is practically parallel with and about 25 feet north of the Silveropolis south end line extended, and the surface line and the levels and tunnels cut by the plane drawn to the 900 are indicated on the diagram.

Diagram No. 5.

Diagram No. 5 is produced from Plaintiff's Exhibits 17 and 26, maps of projections on line of stoping in both Mammoth and Grand Central mines.

This diagram represents projections of the mines of both parties. The contour of the surface along the line of projection, the different levels of the Mammoth mine down to the 1,900 and of the Grand Central to the 1,100, the different stopes, and line of stoping showing the line of greatest mineralization, are all indicated on this diagram. It presents a comprehensive view of the development and explorations of these vast properties. The

plane W-U, extends from the southerly end line of lot 38, on a course N. 7° 15' E., true, and the projection presents a longitudinal section of the vein, on its strike and dip, within the limits of lot 38 to the point U, to which point the defendant is admittedly the owner of the vein. This section shows the "east or back fissure," on its dip to the deep to be almost vertical. Here the apex of the vein is also admittedly within the limits of lot 38. The plane U-T extends from the point U, near the west side line of lot 38, where the plaintiff claims the vein departs from that lot, on a course N. 51° 30' W., true, to the point T. The plaintiff insists that the projection on this plane exposes the vein on its strike and dip, while the defendant contends that its dip only is exposed, and that the apex is still within lot 38, and its strike parallel with the side lines of that lot. The contentions of the parties are the same as to the projection on the plane T-S, the course of which plane is N. 2° 15' E., true. The dispute as to these two projections is as to whether they expose the ore bodies on the strike or on the dip of the vein.

Diagram No. 6.

This diagram represents the dykes and their junction, on the various levels down to and including the 800, with reference to the Silveropolis south end line extended, or a plane drawn vertically down through that end line. The courses of the dykes also appear.

The diagrams, thus made a part hereof, represent, although in a very condensed and diminutive form, the numerous maps in evidence, and are deemed sufficient to present, by way of illustration, the real situation and conditions of the subject-matter in controversy. They are intended to obviate extended reference to the descriptive part of the evidence, which otherwise would be necessary to a proper understanding of this controversy and of its determination. The record is so voluminous, the printed abstract thereof containing several thousand pages, as to preclude reference to the evidence, except only as to the most material points. The trial, having commenced on November 21, 1901, continued from day to day until February 1, 1902. The only issues tried were those formed by the defendant's last counterclaim and the answer thereto. The defendant introduced a vast amount of evidence for the purpose of showing that the vein or lode continued at its apex and on its course and strike within lot 38 from its south end line to and beyond the 1,100-foot line, and that the same was continuous and persistent on its dip to and beyond the Silveropolis and Consort mining claims, and embraced all ore bodies found in either of those claims lying south of the 1,100-foot plane. This evidence took a wide range, exposing the character of the open cuts, represented on diagram 1, to show

DIAGRAM No 3

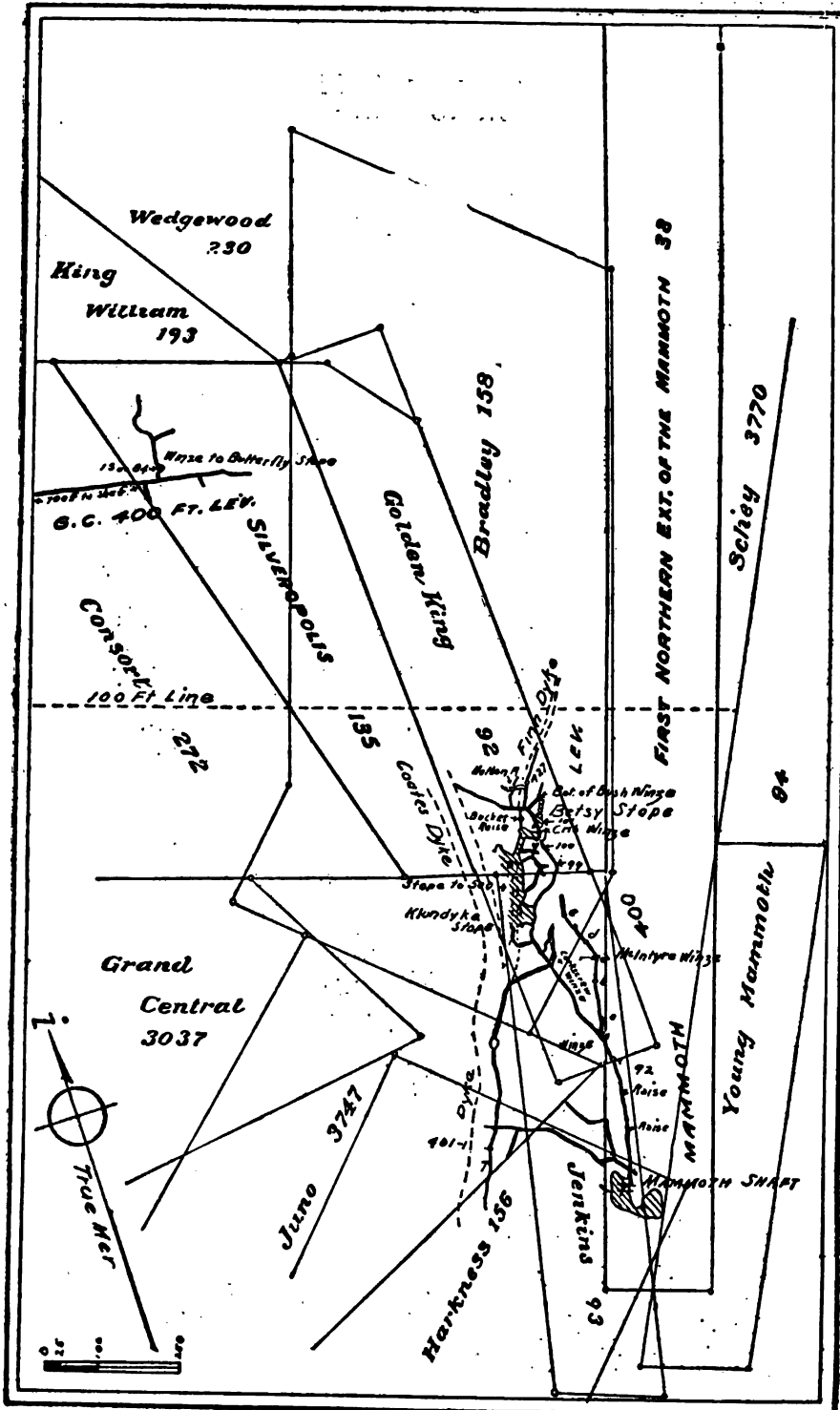


DIAGRAM No 4

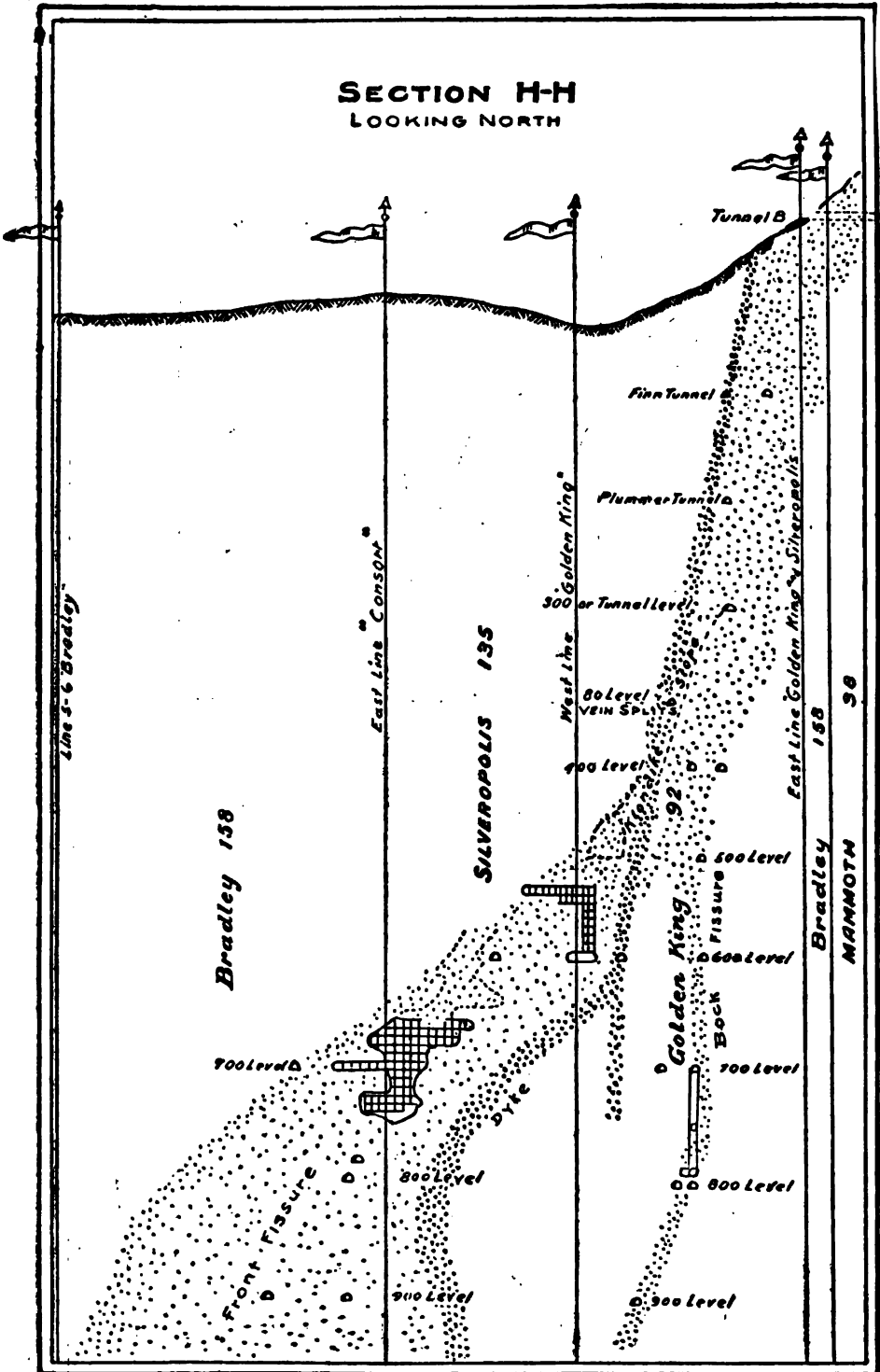
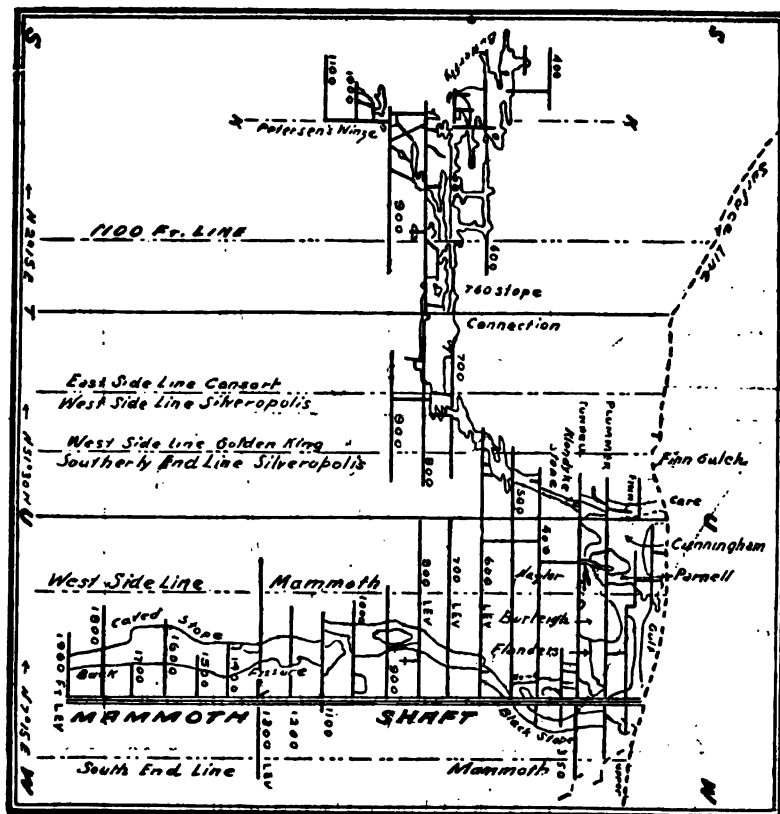


DIAGRAM No 5

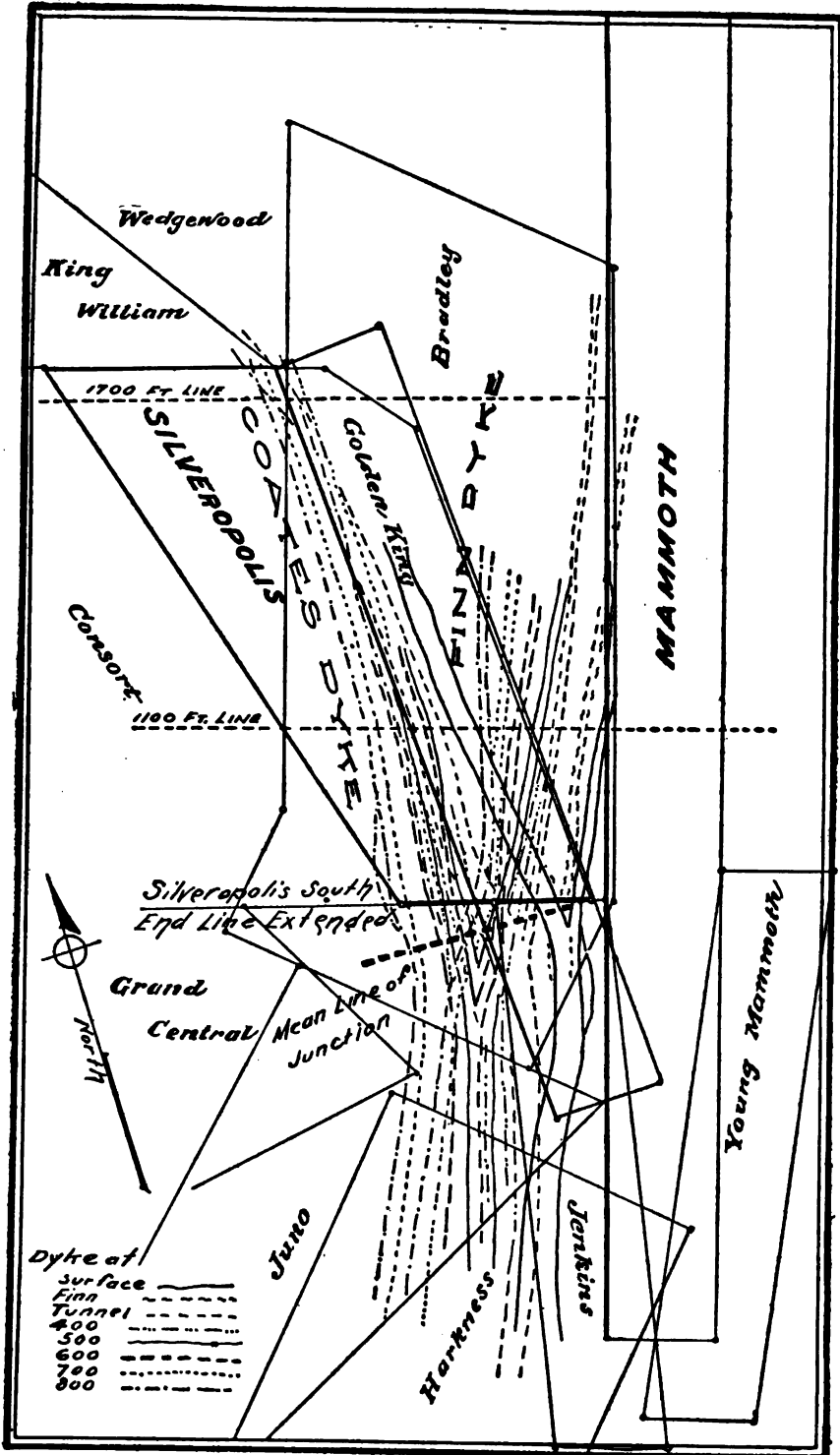


their indications of an apex, and the character of the numerous tunnels, stopes, and workings of the mines was revealed with much care and skill, in an effort to establish the fact that the ore bodies in question were embraced within a vein which had its apex in lot 38. Much evidence was introduced by the defendant to show that the vein passed through the dykes on its dip and not on its strike, that the vein consisted of a system of fissures, and that between the 300 and 400 levels one part of it, the "back fissure," passed almost vertically to the deep, and the western part passed, on its dip, through the Finn dyke, and included the ore bodies in dispute. The plaintiff introduced a vast amount of evidence to show that the vein wholly departed from lot 38 at a point about 695 feet north of the south end line of that lot, and did not continue within the limits thereof north of that point, either at its apex or on its course or strike, but from that point proceeded, on a course N. about 70° W., magnetic, in the direction of the line U-T, and thence N. 10° to 15° W., magnetic, in the direction of the line T-S. The introduction of this evidence also embraced a wide range. The effort was to show that the character of the material in the open cuts, north of the point U, was not materially or practically

different from that found generally in the limestone area either east or west of lot 38; that such material as was found in those cuts, consisting only of limestone, quartz, calcite, and earth stained with different forms of iron oxides and manganese, without any appreciable value of any of the precious metals, was not necessarily indicative of vein in that district; that the same kind of fractures and crushed material, occurring within the limits of lot 38 north of the point U, also existed in the limestone east and west of that lot; that no apex appeared on the surface of lot 38 north of the point U; that the vein in dispute; at the northern limit of the Cunningham slope, near the point U, crossed the western side line of that lot, passed through the dykes, and proceeded on its strike in the direction of the lines U-T and T-S; and that there had been faulting along the Finn dyke, which had caused either a drop in the hanging wall or a raise in the foot wall country, accounting for the difference in the elevation of the ore bodies in the two mines. The maps on both sides substantially agree in what is represented. The results of the assays of very many samples of material taken from the surface and underground workings were introduced in evidence.

On the subject of subsurface explorations

DIAGRAM No 6



the witness Akers, for the defendant, in part testified: "The highest workings, and I may add, also, the highest workings of any magnitude, within lot 38, is what is known as the 'Condon tunnel.' Its elevation is 7,209 feet above the sea level. It is run out first through country rock, the general limestone of the mountain, until it reaches this dyke. The entire cross-cut is in shattered, broken, stained, altered vein material to its face." The Condon tunnel, the witness says, goes through the same kind of vein material to the surface; also the Condon winze, which, he says, goes down from the Condon tunnel to the Finn level, 175 feet, in a streak of the vein, and then the O'Brien winze continues down in the same material to the 300 or Mammoth tunnel level. He says: "The Finn tunnel enters the surface at the point about 25 feet west of the west side line of the Golden King location, a distance of 51 feet from survey station No. 7,036." This tunnel follows practically the foot wall of the Finn dyke, and the witness says that from the foot of the Condon winze north it follows a streak of vein, and that near the foot of the winze at raise No. 7, on the Finn level, there is stoping. He further testified that the Finn tunnel from its mouth runs in as a cross-cut until it reaches the vein, and that "the most easterly workings on the Finn tunnel at a point in the Finn tunnel cross-cut where we have vein matter, it is shattered, rather broken towards its face. I can say it is within the vein, and within a few feet of it ore might be disclosed. Speaking generally, there is no working south from this point on this level, nor is there from the Finn tunnel level in the cross-cut. In those instances, from intersection on the surface, I should say that a cross-cut drifting out almost in any one along through the Finn tunnel level, in other words, would stand a stronger probability of encountering ore." He also says that "from the stope in the Finn level the Trapeze raise goes through to the surface, and is there known as 'incline No. 1,'" and that dyke is also defined in the Golden King level, is 41 feet above the Finn level, and "the Finn tunnel wall shows fractured streak altered limestone to its face." The witness Learned says that the Finn tunnel cross-cut, from where it leaves the tunnel near station 03, "going westerly through 021, 21, and 24, thence to the face, is in vein lime," and that broken lime is usually vein lime in that mine. The Plummer tunnel enters the mountain at a point 45 feet from corner No. 4 of lot 38, and Mr. Akers testifies that the tunnel is in vein and ore at the south end and to its north end shows ore in places, shattered lime, and vein matter. North of the East raise stope the tunnel runs along the east side of the dyke and shows the point called the bottom of the O'Brien winze, although that winze down to the 300 level, and, according to the statement of the witness, discloses ore.

The witness, having had his attention directed to station T on the 200 level of the Grand Central, where there is a winze and where some ore was represented on the map by coloring, testified: "Q. What was it intended to represent? A. A little detached ore streak, which, in my opinion, had no continuity in any direction. Q. Is it possible, then, to have ore bodies without continuity in any direction in this country? A. Well it might have come along some minor fracture and been a branch or stringer leading off from that fracture, forming ore at that point. Q. Does it form ore there? A. Yes." Respecting the Mammoth tunnel or 300 level, the testimony of the witness is to the effect that the workings are in ore from the shaft north to the Bush winze, at the north end of the Betsy stope; that the Bush winze starts down on the east side of the Finn dyke, and passes through the dyke 63 feet above the 400 level, and at that point "the vein branches in its downward course into the earth, the minor portion, the small portion, going down almost vertically, and the major portion passing through the dyke to the westward"; and that at the Watson winze, north of the 1,100-foot line, the vein has also passed through the dyke and ore is revealed in that winze. Further testifying, he said: "As we proceed northerly we find the vein diverging, the intersection of the dyke having been at the point, rather the plane of the crossing of the dyke and vein will always be an ascending inclination going northerly, and for that reason we have what I believe to be this portion of the vein disclosed with the Watson winze."

It will be noticed from the testimony and diagrams that north of the Bush winze the main tunnel follows the foot wall of the dyke, but there is a branch running from the winze at station 31a, and another from station 32, to the Dago raise and across the north end line of the Golden King claim, with a branch from station 184 in a westerly direction to and beyond station 186; also a cross-cut from station 36, running west to a point near the western side line of the Golden King claim and thence northerly a considerable distance. While the testimony of the witness refers to vein matter, crushed limestone, clay material, and the like, it does not show that ore of any considerable quantity was ever found in any of those northern workings beyond the Bush winze. Respecting the branches of the vein as claimed by him, the witness testified: "The foot wall of the dyke would be the hanging wall of the easterly branch of that vein, and that portion of the vein remains on this side of the dyke. The western branch of the vein is not distinctly divided in that cross-cut; hence I am unable to say whether it is between stations 107 and 28 in the drift that has been run, or whether it approaches more nearly station 107, or rather the western limit of the dyke. Q. Going west to the

foot wall of the dyke, from [station] 187 to 31A, in the face have you any ore? A. It is not commercial ore. We have shattered lime and clay. Q. Didn't you say that the only line of demarkation that you had between the ore in the east vein and the ore in the west vein is that dyke? A. I did. Q. If that is the only line of demarkation, why wouldn't you take that as a foot wall of the westerly branch? A. Because there are conditions west of that point that you name, that is crushed and shattered lime and clay filling in the mass of the country, and there is no particular portion where it is—where the crushing ceases and the solidity begins."

The workings on the 400 level extends north to within about 50 feet of the 1,100-foot line, and the witness testified that on that level the "dyke and the vein" are "closely intermixed"; that the corkscrew raise, just north of station 86, is in stoping ground; that a winze between stations 101 and 103 goes down into old crushed stopes above the 500 level; that the Bush winze extends to this level, after passing through the dyke; that the main portion of the vein is west of the dyke on the 400 level; that the Hatton raise shows mineral and vein matter from the 400 to the 500 level; that the workings of the Grand Central mine on this level are mainly above the vein, but where the drift passes off to the north at station 17 there is a showing of vein matter, and at station 15 there is a winze going to the Butterfly stope, and as to this winze he testified: "Q. Does this winze from the 400, at the top of which you have ore, go vertically down into ore in the 600 level? A. It does, sir, into what I believe to be the hanging wall of the vein there." He has discovered no foot wall on this level, but has found the hanging wall at the face of the Grand Central 400 level east of station X. On the Mammoth side "the main level," says the witness, "follows the vein foot for foot on the 400, and is quite extensively stoped to a point marked 'Raise,' distant 45 feet north of the south end line of lot 92, Golden King location, where it forks, one portion continuing approximately in the direction of the main drift, and the other diverging more to the northwest. Both of these workings show branches of a vein, and the McIntyre winze, of which we have the top on the 300-foot level, is shown." The witness also testified: "Q. Now, I draw your attention to the 80-foot level again, and ask you what you have at that level, there intermediate between the 300 and 400? A. It is on continuous ore throughout, as is also the winze marked 'Bucket raise' down to the 400. Q. How far up there do you go? A. About 30 feet. It is called the 'Copper raise.' I could see a drift leading off—an incline working, rather. It looked as though the ground had been stoped beyond. The drift running off went in a generally northerly direction on the 400 level. There is found

the stope marked the 'Betsy stope,' and also the stope marked the 'Klondyke stope'; the Klondyke stope being the larger of the two on that level. The Betsy stope is indicated upon this level as caved."

On the 500 level, the main tunnel is east of the dyke, and from station 543 north follows along and in the foot wall of the dyke. At station 537 a drift departs from the tunnel in a northwesterly direction to and beyond station 557. As to that drift the witness in part testified: "Q. What have you in that cross-cut out to its intersection with the dyke? A. We have limestone that shows very little shattering. Q. What have you as you go through the dyke? A. We have the dyke and the vein a good deal mixed there. Q. Have you any part of the vein in that cross-cut as it traverses that dyke? A. My recollection is that we have, sir. Q. Look at your notes? A. I have no notes concerning it. Q. Is it not as barren as any other portion of that dyke? A. No, sir; not in my recollection. Q. Does it carry ore? A. I can't say positively as to that. Q. Does it carry anything that will yield a trace? A. Well, my notation on that is not very clear. Q. Can you say? A. I will not say." From the workings, disclosed by the testimony of the witness and the maps relating to the 500 level, it seems the ore and mineralization decrease and the ore gradually fades out within a comparatively short distance, either north or south, from the ore bodies which would be cut by a plane drawn vertically down through the Silveropolis south end line extended. The top of the Butterfly stope of the Grand Central mine appears on this level.

On the 600 level, the workings also present the appearance of the ore fading out as one proceeds north or south from the main ore bodies. The witness says: "The Earl raise on the 600 goes up to the 500, and from there you go south entirely within ore, to a point marked station 43, and thence on; I have marked the station 43½ where you encounter the cross-cut running in a westerly direction for a distance of 80 feet, where you reach the stope, now caved. That stope is stoped out continuously through to the 800-foot level. The stope on the 600 is one of the ore bodies in dispute, and is part of the vein in dispute. The crushed stope on the 600 goes down to the 700 on plane F-F on the longitudinal projection. Q. Where do you find the apex of the vein, which you describe lying along from the 600 down to the 800, and below it? A. Within lot 38, and overlapping, both east and west, lot 38; lot 38 not being wide enough to cover the apex, in my opinion." The witness also states, as his opinion, that the back vein is a "stringer or dropper" from the main vein; that the ore bodies and vein, under the south end of the Silveropolis claim, on the 600 level, clear down to the 800 and below, are within and on either side of the side lines of

lot 38, and that the vein consists of a "series of fractures having a course generally of about N. 20° E. by S. 20° W. in the upper portion." On this level there are two parallel drifts running nearly parallel with the dyke, and at station 49 of the westerly drift there departs a west cross-cut into the Silveropolis ground, where, the witness says, it has reached the vein. At station 643 of the easterly drift there is an east cross-cut extending beyond the east side line of lot 38, and a west cross-cut extending to the west side line of lot 92. The cross-cut, the witness states, is in hard blocky lime from station 643 for a distance of 468 feet, where he claims he encountered an independent vein consisting of crushed and iron-stained material. He further states that he has not found the foot wall of the vein on this level, but believes it is about 20 feet east of station 643. The hanging wall, he says, is at or near station 5 of the Grand Central 600 level. The witness McIntyre testified that the west cross-cut was in vein material, and that these cross-cuts were made about 15 or 16 years ago. On this level the Butterfly stope has been productive of much ore. As to the ore on the 600 level, with respect to the dip and apex of the vein in which it is found, the witness Earnshaw testified: "Q. Do you think the ore in the Grand Central workings on the 600 also finds an apex in lot 38? A. I think so; yes. Q. You have no idea what angle of dip would be requisite to carry you from that 600 level into lot 38, have you? A. No, sir. Q. It [the distance] would be over 1,500 feet, would it not? A. Somewhere thereabout. Q. But still your opinion is that any work paralleling that—without knowing the distance, your opinion is that this Butterfly stope and the ore north of it on the 600 level finds an apex in lot 38? A. I think it does."

On the 700 level is the cross-cut, 600 feet in length, from station 25 on the Mammoth side to station 15 on the side of the Grand Central, in which cross-cut connection was made between the two mines at station 18, appellant's map. The witness Akers says that the material through which that cross-cut runs is dyke and fractured limestone; the witness McIntyre, that it is in barren rock throughout; and the witnesses Watson and Cox corroborate this. The witness Akers also stated he had not found the foot wall of the vein on this level, but thought the hanging wall was about 30 feet west of station 9 in the main Grand Central cross-cut. Connection between the two mines is also made near station 7 at the Bradley-Consort line, in the main drift. The witness says there are two branches of the dyke on the 700. They diverge, going north, as on the levels above and below. Referring to the main vein in the Grand Central ground, the witness, after stating that its course was "about N. 15° to 20° W.," testified: "Q. Now what is the distance between that cross-cut that is midway between 15 and 16 back to the boundary line

between the Consort and the Bradley? A. I make it 1,110 feet, sir. Q. How far northerly have you, not only what you call vein material, but actual ore? A. Why it is mineralized quite generously, I think. Q. Now, it being 1,110 feet between the points you now give, how far do we have actual ore stoped along that level? A. The stopes, sir, I could not say. I said good ore. Q. Have you in that part of the work in the Grand Central 700 fissures or a series of fissures? A. Yes, sir. Q. Could you follow them from where you have the most northerly ore clear back to the Consort-Bradley line? A. We followed them, yes. Whether that be along the central portion of the system of fractures I cannot say. Q. Now, when you get to the Consort-Bradley line, the ore makes off southeasterly as shown upon that map? A. The stopes make off southeasterly. I was going to say that the ore as far as I saw it continues southeasterly." Speaking of a series of fissures, the witness testified: "Q. Could you follow them from where you have the most northerly ore clear back to the Consort-Bradley line? A. We followed them, yes. Whether that be along the central portion of the system of fractures I cannot say. Q. And about what is the course of that line of fractures on the 700? A. N. 15° to 20° W." The testimony of the witness Learned shows that from a point north of the Silveropolis north end line, about station 15, going southerly, there is practically continuous ore on the level to near the Bradley-Consort line, a distance of about 1,110 feet, where the ore bodies change to a southeasterly direction and continue about 300 feet further in that direction.

On the 800 level is the Tranter drift, which connects the two mines. The witness Akers testified: "Q. How many branches or streaks of the vein have we on the 800 level altogether? A. Altogether there are four shown on the map. I have not been able to fix the foot wall of the entire vein anywhere on this level." But he thought he had found the hanging wall 20 feet northwest of station 24 in the King William claim, at which station, in his opinion, the vein passes "out of working to the northeast." The witness further testified: "Q. Give me the most extremely northern ore you found on the 800 level of the Grand Central, from the Consort and Bradley, and then give us the length? A. The face is in ore, but I don't know that the entire working from corner 5 to point 30 feet north of the working marked 'winze,' under the King William surface, is in ore throughout its entire length. It is substantially, however, in vein from a point which I understand to be station 8; thence north, to the working marked 'Dago winze,' I am in limestone, but would add to that that I believe the vein to be slightly to the west of that drift. Q. Passing thence north through stations 13 and 14, out to raise 15, what have you? A. I have the vein passing out of the drift, practically at station 15, going on to

raise 15. I am in vein between station 14 and 15, and the workings on to the east, and to the west; but I have no notation covering the raise at station 15, concerning which you have questioned me. From station 15 to 16 I have quartz there in the working, and ore just to the west and at the south vein, and running from station 16 to 17 I have highly silicified lime for that 30 feet, and from station 17 northerly I have vein, though I cannot say whether the ore is merchantable or not. Q. Now, when you go to the Consort-Bradley line, the ore makes off southeast, as shown on this map? A. The stope makes off." The witness Watson described the workings, including the Tranter drift, of the Mammoth 800 level, as follows: "From station 4 to station 6 it is in lime, and in cross-cut from station 4 to the west we have shattered lime, out to station 120. Then we have vein and ore, and a drift running to the south in the main or east drift. Running northerly and southerly we have vein-carrying ore. Now, along the Tranter drift, that runs from the drift I last spoke of towards the west, between stations 9 and 10, blocky lime, and somewhat softened in places, along a bedding plane. It is lime and fissured in some places in vein material, down to near station 11, and from there it is dyke material, 65 feet with the dyke, on clearly defined; and after passing the dyke material we have, as nearly as I can make it, from there on to the stope, broken lime, crushed; and now, taking the drift, we get it just before reaching the stope, that runs to the southward, that is in vein material. In that drift we have a winze and raise, and the winze goes down to the 900, and I am not positive, but I think the raise goes up to the drift, just above the 800 level." The witness says the workings to the north of the Tranter drift are through shattered and stained limestone to about station 159, where, in a drift running west, he says, there is a winze with copper ore in it, and beyond that station north to the end there is vein material. He also stated in effect that the developments in the mines had not been sufficient for him to determine whether, on any level, the workings extended easterly beyond the foot wall boundary of the vein.

On the 900 and lower levels the conditions, so far as the developments are shown, are similar to those on the 800 and 700. The diagrams indicate sufficiently the depth to which the developments in both mines extend. The testimony of witnesses for the defendant shows not only that the vein on the various levels consists of a series of fractures or fissures, some extending northerly and southerly, some northwesterly and southeasterly, and others northeasterly and southwesterly, but also that in both mines the strata or bedding planes were broken and shattered, and tilted in "every conceivable direction and to all degrees and angles of inclination."

Respecting the width or exterior limits of the vein, the witness Akers testified: "The boundaries of this vein would be the limits

of the fracturing which had occurred and been produced by the dynamic forces exerted in creating the vein. Q. And so far as that fracturing extended, so far you would claim your vein extended? A. Plus any additional width of ore or vein matter that might be produced by metasomatic change. Q. Would you claim that the limits of your vein were coincident with the limits of the fracturing? A. No, sir; not where replacement had changed the limits of the fracturing. Q. Would you claim that your vein extended at least as far as the limits of the fracturing? A. Yes, sir." The witness also stated that the vein was a "fissured section of limestone," and the witness Watson testified that, as he understood it, the vein was "bounded by the fissuring," and that "if the fissuring were all connected" and "extended 4,000 feet" he would say the vein extended that far. He could not determine from the developments on any level whether any of the workings extended beyond the foot wall boundary of the vein. From the testimony of the witness McIntire it appears the vein, as shown by the developments, on the 900 level is nearly 900 feet wide, on the 700 level 1,050, and on the 600 level 1,020 feet in width. This witness said that if, on the 700 level, a cross-cut were driven through barren limestone all the way from M, a point at the northerly workings of the Grand Central, easterly to M-4, a point at eastern limit of the vein, as fixed by him, distance 1,050 feet, and ore bodies appeared at M and M-4, he would conclude they were in the same vein.

Respecting the "back fissure," the witness McIntyre, speaking of the 800 level, says that from station A, near that end line extended through stations 153, 155, 157, and beyond the 1,100 foot line, it is in ore all the way, and is what is called the "back fissure"; and, referring to the 700 level, he said: "Q. Going again to the ore here east of station 33, at the point marked 'Raise,' and directing your attention to the ore and vein matter, which you stated you had there northerly along that drift to and beyond the 1,100-foot line, I will ask you if that is not what you call the back fissure? A. I call it the back fissure." The witness also says that on the 600 level the main drift, from station 40 to the 1,100-foot line, is in the back fissure and in vein matter; that on the 500 level the drift running from station 80, past raise from the Silveropolis south end line extended, stations 81, 82, and 588, to 542 on the 1,100-foot line, is in ore and on the back fissure; that on the 400 level the back fissure extends from the raise north of station 92, thence north through stations a, b, c, and d to the face of the drift, and thence on through station 99, being where it crosses the Silveropolis south end line, 90 feet west of the west side line of lot 38; that on the 300 or Mammoth tunnel level, the main drift runs across the Silver-

opolis south end line through stations 9 to 17, and on through stations 109 and 22, across the 1,100-foot line, is in the back fissure through the Betsy stope, and that such back fissure is 10 or 15 feet west of where the drift crosses that end line, the witness at the same time stating that the Betsy stope was extended to the 800 level since this suit was commenced, but was extended down to the 400 "a good many years ago, and below the 400 level"; that on the Plummer tunnel level, the drift, extending northerly across that same end line through the O'Brien winze near the 1,100-foot line and across that line, is "in what is called the 'back fissure' below, and it is in ore all the way" between those lines, some of it being "low grade ore, some good ore"; and that, on the Finn tunnel level, the drift running northerly from station 03 across the same end line through stations 05 to 09, and the O'Brien winze to the 1,100-foot line, is in "what is called the 'back fissure,'" and is in "low grade ore practically all the way." The witness also testified that on each of the last two levels mentioned the distance from the point where the back fissure crossed the Silveropolis south end line extended to the west side line of lot 38 is 90 feet. The witness Earnshaw indicates the location and dip of the back fissure from the Finn to the 800 level, and corroborates the testimony of the previous witness. Likewise as to other testimony for the defendant on this subject.

Speaking of the dip of the back fissure, the witness Akers said that from the workings in the mine he found the dip from the surface to the 300 level, to be "slightly to the west, approximately between 80° and vertical"; that from the 300 to the 600 level the dip of the foot wall is about 50° from the horizontal; and that from the 600 to the 800 level it had a dip of about 85° from the horizontal. The witness Earnshaw testified that the difference in elevation between the 800 and the Finn level is 688 feet; that where the back fissure crosses the Silveropolis south end line extended on the 800 level it is 135 feet westerly of the west side line of lot 38; and that on the Finn level, where the back fissure crosses the same end line, it is 92 feet west of that side line, the fissure being thus 43 feet further west on the 800 than on the Finn level, and consequently, as he says, in descending a vertical distance of 688 feet, the distance between the two levels, the angle of dip was 86° 30' from the horizontal. The testimony relating to the various levels and workings of the mines thus referred to is not materially different in character and import from the mass of testimony of numerous other witnesses for the defendant on the same subjects.

In turning to the testimony on the part of the plaintiff, to ascertain therefrom what facts and conditions are revealed by the underground workings, it will not be necessary to refer in the same detail to the

tunnels, drifts, and other workings on the various levels, since much of the evidence already referred to is not controverted. Reference to the plaintiff's evidence, therefore, will be more general. Prof. Jenny, testifying for the plaintiff, says the vein or lode, "both in its outcrop at the surface and in depth, passes wholly on its strike out of lot 38," at a point on the west side line of that lot, about 87 feet southerly from the Silveropolis south end line extended, and that the ore situated beneath the Silveropolis and Consort mining claims does not lie in any vein or lode having its apex in lot 38 north of that end line, but forms a part of a vein or lode having its apex within the surface boundaries of the Silveropolis and Consort claims. He also says the Betsy stope on the 300 level is not a part of the Mammoth vein, but "is in the back vein." Respecting the territory north of that end line extended and easterly of the line of stoping in direction of the line T-S, his testimony is to the effect that the developments on the different levels, from the Finn tunnel down to the 900 and below, show that the workings are in barren material, except the back vein or fissure, which appears to fade out before it reaches the 1,100-foot line; that the various levels are driven mostly through broken, fissured, and shattered lime rocks, in places through brecciated and stained material, and the dykes; that on the Grand Central side the sedimentary beds are as much shattered and broken as on the side of the Mammoth, except where the breaks or dykes occur; and that the vein consists of a series of fissures, having its general course in the direction of the lines W-U, U-T, and T-S, and passes through the dykes northwesterly along the line U-T on its strike, passing through the Coates dyke between the 600 and 700 levels, and through the Finn dyke at the Bench stope. Speaking of the dykes between the 600 and the 700 levels the witness said: "The two dykes are just a short distance apart on these different levels, the junction being, as I explained, just at a point slightly south, never more than 100 feet south at any point, I think of the Silveropolis end line. The junction is almost vertical. On all the levels it is inclined, going to the west. It lies under the Silveropolis south end line practically, sometimes 100 feet to the south; then on the next level they will widen out, join under the line. It goes up to the roof of lime, with very little clay material arching it over." He also states that the "inclination of the vein is 75° in that northwesterly direction" along the line U-T, from the horizontal.

Dr. Talmage, testifying for plaintiff, corroborated the testimony of Prof. Jenny, and speaking of the Finn tunnel, from station 03 north, he says: "As you go through that tunnel from its mouth to its face there are absolutely no indications of mineralization." And the witness also says that the country

through which the 200 and 400 levels of the Grand Central are driven, from the shaft easterly to where ore is encountered, consists of broken, fissured, and fractured limestone, shattered as much as in any of the workings in either of the mines, except where such workings penetrate the dykes. He speaks likewise of the Grand Central 700 level from the shaft easterly; and according to his testimony the material is much the same in the long cross-cut at station 643 and the northern workings on the Mammoth 600 level, except where the dyke material is encountered. The witness, after testifying that the strike of the vein, from the south end line of lot 38, proceeding north, is in the direction of line W-U, about N 7° W., true, to the point U, thence along the line U-T, N. 51° W., true, to the point T, thence in the direction of the line T-S, and that the boundaries of the vein "would be determined by the nature of the mineralized matter, and therefore by the limits of the ore bodies themselves, both on the sides and upward, and doubtless downward, if you went to the bottom of them," gave his reasons as follows: "My reasons are based upon the positions of the ore bodies. I followed them for great distances, from the south northerly, and have followed them on some of the levels from the northern part southerly, and I find them to be virtually as indicated here on the map. Coming from the Grand Central workings in the southerly direction, I find the ore bodies following a line which is approximately north and south. When I reach the point, or when I project the point indicated here as connection, near the letter T, as a designation of the line—of the line T-U—I find the ore bodies turning to the east and pursuing a southeasterly course until we reach the ore in the neighborhood or in the Cunningham stope, when another turn is observable and plainly apparent. The ore bodies then follow a course represented by the line W-U. Now, along that belt from the north to the south I find those ore bodies confined within a limited area, not more than a hundred feet wide in general. In examining the several workings, running northerly—I mean to say from the line T-U—I fail to find any continuation of the great ore bodies. I make this answer independent of the consideration of outcrop, having already stated that after diligent search for an outcrop on lot 38 I have failed to find it; and beneath the ground I fail to find any vein to apex or to strike, and therefore I fail to find any apex or strike of a vein."

The witness Wilson says the 200, 400, 700, 900, and 1,100 levels of the Grand Central, from the shaft easterly, are driven through broken, shattered, and fissured limestone, and that, with the exception of the dykes, "there is a correspondence in what we see in passing through the drifts," on the Mammoth 300 level, "from station 36 out to their faces." He further testified: "Q. Have you been up

the Condon winze through the works branching therefrom, and through the Condon tunnel, or what is marked on our map as Accident tunnel, to its easterly face? A. Yes, sir; I have been up in through those workings. From the easterly face westerly it is in limestone. This limestone is standing quite vertical." He also says the cross-cut on the 700 level, from station 739 to 72, in which connection is made between the mines, "is entirely unmineralized in its total length." The witness Tyler said that the limestone, through which the 200, 400, and 700 levels of the Grand Central are run from its shaft easterly, is as much broken and fractured as is the limestone in any of the northern workings in either of the mines, excepting the dykes, and that "the only portion of the Mammoth ground, of the cross-cuts in the Mammoth ground, that compare with the openings and fissured condition of the Grand Central 200 cross-cut, is a portion of the east 600 cross-cut of the Mammoth in the neighborhood of station 643, from that west to station 641. That is the triangle of ground between the two dykes and is very much fissured and broken." He also testified: "Q. Now, taking the vein in sections, subdividing it, what would you give as the strike of the various divisions? A. The average strike of the southerly portion would be in the direction of the line W-U; of the middle portion of that crossing through the Bradley fraction would be in the direction of the line U-T; that from T northerly through the Butterfly stope would be in the line, I should judge, about N. 10° or 12° W." The testimony of other witnesses for plaintiff respecting the underground workings is of similar import.

Respecting the boundaries of the vein Col. Wall testified: "As shown by the excavations, the work had extended to the limit of the ore and into the rock at various points along, showing definite and easily understood boundaries; and these boundaries could be none other, or no better described, than the limit of the ore. Wherever replacement had ceased there it was simply limestone, within a few inches, and this seemed to be true everywhere. The stopes had been extended as far as profitable, and then here and there cuts driven out until barren limestone was encountered, and all this within a distance of a very few feet from a point at which stopping had ceased; that is, from which the ores had been removed. Q. Within a very few feet you come into barren lime? A. Everywhere." And he says the width of the ore through the Grand Central is irregular, 10 to 40 feet, "in places as much as 100 feet, or even a little more." Prof. Jenny says: "I consider the limit of the vein to be the limit of the mineralization." Dr. Talmage testified: "The boundaries of this ore body or vein throughout its entire extent, in my opinion and judgment, would be determined by the nature of the mineralized matter, and therefore by the limits of the ore bodies

themselves, both on the sides and upward, and doubtless downward, if you went to the bottom. I would consider the rock there mineralized in the sense in which we are using the term, as indicating ore matter when it carries valuable metals to an amount in excess of the valuable metals carried by the country rock. Q. I will ask you if, in your examination of the works of both mines, you are enabled to find else than the limit of mineralization that could be assumed as the boundary; in other words, if we were to cut loose from the mineralization, whether you could find anything as you traveled easterly or westerly which could be taken as a limit of demarkation between the vein and the country rock? A. I know of no other boundary or limit that could possibly be set." The witness Loose testified: "Nowhere have I seen that [the ore] more than 50 feet or 100 feet wide." A number of other witnesses for the plaintiff testified to the same effect as to the limits of the vein.

The witness Jenny, speaking of the deposition of the ore in these mines by replacement, says: "In the heart of the ore bodies, where the ore was deposited at the very height of the ore-making period, where the solution and the action were most intense, we find chemically pure galena, fine grained in its structure as a piece of steel, exactly replacing the shape and form and size of the original limestone fragments; and if the stope be dusted over by the force of the explosion of shots in mining, so that it has a little dimmed the appearance of the ore, it is impossible by the eye to distinguish fragments of limestone which weigh only a few pounds from fragments of galena that you cannot lift. The rock has been converted without a change of form directly into the ore itself." There is much other testimony showing indications that the vein was formed by replacement.

The witness Brooks, after explaining the projections of the ore bodies of the Mammoth mine on the plane U-T, testified: "Q. Mr. Brooks, have you ascertained the vertical distance from the surface to the 1,900 level? A. Yes, sir; the vertical distance is 1,800 feet. Q. Have you taken the horizontal distance from the most easterly ore to the surface, and most westerly at 1,900, in the vicinity of the Mammoth shaft? A. Yes, sir; it is 100 feet from the most easterly point on the surface to the most westerly point of ore, as I surveyed it, on the 1,900. Q. Now, what is the angle of the dip? A. 86.45° from the horizontal." The witness Tyler says that, from the top of the winze on the 400 level of the Grand Central, where ore appears, to the ore cut by the plane K-K, on the 1,000 level, the westing of 95 feet is made, and that gives angle of dip, for the whole distance, of 82° from the horizontal. He also says that the vertical distance from the top of the ore above the 600 level, just

north of the 1,100-foot line, down to the ore on the 800, is 270 feet, and that the westing is 80 feet, giving, through that depth, an angle of 78° 30' from the horizontal. Prof. Jenny says in the section along the line U-T the beds course N. 70° W., magnetic, exactly with the strike of the fissures, but that the dip of the fissure is 75° to 80° from the horizontal. Numerous other witnesses for the plaintiff gave similar testimony respecting the underground workings of these mines.

Respecting the faulting along the Flinn dyke, the witness Akers stated that he should expect the faulting or interruption of the vein on its downward course was considerably over 50 feet, and possibly several hundred feet, and then said: "That is only an approximation, since the real truth as to the question of throw can never be determined. Q. If the hanging wall of the fault had gone upward, it would have been what kind of a fault? A. It would have been a reversed fault. Q. If the hanging wall had gone downward, it would have been— A. Normal fault, sir; and I don't know which it did. I know it did one or the other. It either rose or sunk; but in either case that condition of affairs would be produced. We would have a dislocation either above or below." He also testified: "Q. If the dyke fault had taken place after the vein was formed, what would you have expected of the vein in the way of faulting? A. I would have expected that vein to have been cut off, and the two ends of the vein removed from each other, so that there would be no connection whatever between them." The witness Earnshaw, speaking of the dyke, said: "It could be called vain material," that it "was crushed and fissured before the vein was formed, and that "by the secondary movements on the fissuring it has been further crushed and ground up." The witness Jenny, speaking of the Flinn break, said: "First in the movement the rocks were shattered and broken up into large pieces, many feet in dimensions, and lines of sheeting or fissuring parallel with the dyke made through the rocks and the material there adjacent to the fissure. Then, as the movement continued, these masses of rock were pulverized more and more—more and more broken. It is very irregular in width, in some places only 15 feet wide, in other places it would expand to 30, 40, or 50 feet in width. Then, where it united with the Coates dyke on the south, it is possibly 120 to 125 feet wide. The dyke appears to have grown from its eastern side towards its western. On the eastern side, which would be its foot wall, we find a heavy, tough stratum of clay. That is [due to] the grinding movement of one wall moving upon the other." He also testified: "Q. Did you find any place else, excepting at the point along the line T-U, to the north, where the ore body goes through

these dykes? A. I did not. To the south we find the great fault, which has aided in making the apex stope 100 to 150 feet wide."

Mr. Tyler, referring to faulting, testified: "I think that there has been movement, along the line of the foot wall of the Flinn break and on different parallel slips included within the Coates dyke, which has resulted in the dislocation of the ore body, in a dropping of the ore bodies lying west of the dykes, to a position anywhere up to 400 feet or so lower than that formerly occupied before the faulting took place." Speaking of the ore, slight in quantity, found in broken and shattered material near the southerly end of the drift running south along the dyke on the 400 level, at station 4011, and in explanation of the occurrence of ore there, the witness said: "I should judge it is merely another occurrence, on a very small scale, of what we find farther to the north in the stopes about the 500 and the little stoping about the 400 just north of this in the dyke; that is, in the part carried down from the ore bodies above." Speaking of ore found on the 500 level between stations 622 and 622b, the witness says: "This was a thin, comparatively thin, body or sheet of ore material, as far as I could find by passing up and down through the stopes, which lay within the fault or within the dyke, and to the west of the foot wall of the dyke; a sheet of ore in a tabular form, which lay along the dyke, partly as if it had been dragged there, and partly as if it was a mass of ore that had been carried down with the faulting and left there." Dr. Talmage, describing the occurrence of ore and condition of the dyke there, said: "I found evidence of low-grade ore. This occurs on the surface of fractured pieces of limestone. The foot wall of the dyke at station 4011 is beautifully polished, giving evidence of movement producing typical slickensides. Further evidence of fault is in the brecciated condition extending westerly from the polished foot wall" of the dyke.

The foregoing statement, and extracts of the testimony, show the character of the evidence introduced at the trial in this case. The case was thus submitted to the court and jury with evidence relating to all parts of the properties, surface and underground, in the greatest detail, and, the jury returning a verdict upon the special issues in favor of the plaintiff, the court adopted the verdict, and found, agreeably with it, that the top or apex of the vein continued, from the southerly end line of the first northern extension of the Mammoth, lot 38, to the place where the Cunningham stope at its northerly edge or end crossed in its northwesterly course the west side line of that lot, such point or place being, as found, 690 feet north of such southerly end line, and 90 feet south of the southerly end line of the Silveropolis mining claim, extended easterly in its own direction across lot 38; that at that point the vein on its strike and at its apex wholly departs from lot 38,

and does not continue within that lot between the planes drawn through the Silveropolis southerly end line so extended and the 1,100-foot line; that such apex does not continue north of such end line within the limits of lot 38; that between such planes, on that end line so extended and on the 1,100-foot line, there is no apex or part of an apex of any vein, lode, or ledge, which vein, lode, or ledge on its dip extends to and includes the ore bodies known to exist beneath the surface of the Silveropolis and Consort Mining claims, between those planes; and that the apex of the vein or lode which is in the south end of lot 38 does not continue in that lot north of the Silveropolis south end line extended. The decree is in harmony with these findings, and directs that the defendant's counterclaim be dismissed.

Notwithstanding this decision, which was substantially the same as that at the previous trial, the judge filed, separate and apart from the findings and decree, a written opinion, in which he concluded that there are two veins in the Mammoth ground; the one running from the shaft north at least to the 1,700-foot line, and the other lying to the east. In this opinion he argued that the ore bodies in controversy belonged to a vein which had its apex in the Golden King and Bradley mining claims, and could be recovered by the defendant in a proper proceeding. Thereafter the defendant asked leave to amend its counterclaim, and later to file an original counterclaim, in accordance with the expressed views of the court. These requests being refused, the defendant prosecuted its appeal.

This record presents two principal questions for determination: First. Whether the court erred in finding that the vein mentioned in the counterclaim upon which the trial was had, at its apex and on its strike, leaves lot 38 at a point 690 feet north of the south end line of that lot. Second. Whether the court erred in refusing to permit the defendant to file the amendment to its counterclaim, and in refusing to permit the filing of its proposed original counterclaim, in each of which it was alleged that the vein found at the south end of lot 38 did, at its apex and on its strike, wholly depart from that lot at the point found by the court, and that its apex beyond that point was in the Golden King and Bradley mining claims. All other questions presented are subordinate to and in support of one or the other of these two.

C. S. Zane, John M. Zane, J. W. Stringfellow, and H. L. Pickett, for appellant. Dickson, Ellis, Ellis & Schulder and Brown & Henderson, for respondent.

BARTCH, C. J., after stating the case as above, delivered the opinion of the court.

The main question, which resulted from the issues raised by the pleadings that formed the basis of inquiry and submission at the trial and which we will consider in the first instance, is whether the court erred in

finding that the vein or lode mentioned in those pleadings, at its apex and on its northwesterly course or strike, crosses the western side line of lot 38 and wholly departs from that lot at a point 690 feet north of its south end line, and north of that point does not continue, either at its apex or on its strike to or beyond the 1,100-foot line within the limits of lot 38, and that there is no vein or lode having an apex or any part thereof within the limits of lot 38 north of the southerly end line of the Silveropolis mining claim extended eastward in its own direction, and south of the 1,100-foot line, which on its dip extends to and includes any of the ore bodies existing underneath the surface of the Silveropolis and Consort mining claims south of the 1,100-foot line. This is principally a question of fact, and must be considered in view of the law of Congress respecting extralateral rights. It includes various incidental questions of importance. For its solution and determination we have volumes of testimony of men of science, of engineers, and of practical miners, concerning the location and workings of both mines, surface and underground. Men distinguished for their scientific attainments have testified not only as to the existing physical facts, but have explained how, in their opinions, by the processes of nature, the mineral was deposited where it is found, making reference in detail to the facts and physical appearances which controlled their judgments. Upon careful study of the geological facts in evidence, involving so many and such varied features, one cannot marvel that these witnesses differ in their conclusions. Aside from some statements of a few witnesses whose judgments were either faulty through want of comprehension, or warped by interest, the testimony is such as inspires confidence and warrants serious consideration. The case was prepared with a commendable degree of care and tried by eminent counsel on both sides. The maps and glass model, the researches made in the mines by witnesses for the purpose of unfolding the intricacies of nature respecting the formation and character of veins and deposition of ore, all bespeak a degree of professional skill and ingenuity commensurate with the magnitude of the interests involved. The premises are of very great value. It would be idle to say that upon the result of the case made by the counterclaim and answer depends but the ownership of the ore bodies in the Silveropolis and Consort mining claims south of the 1,100-foot line. It is plain to be seen, without demonstration, that, if the ore bodies in dispute herein are embraced in a vein having its apex in lot 38 north of the Silveropolis south end line extended, the ore bodies north of the 1,100-foot line in the same claims are parts of and belong to the same vein. The ultimate question involved is therefore not

merely the ownership of a few ore bodies of the alleged value of \$300,000, but of the ownership of ore bodies or of a vein of ore doubtless worth several millions of dollars. That such inevitable results would follow in the wake of this trial and decision was, without doubt, fully understood by both sides, as is evidenced by the exhaustive manner in which the case was tried. It will be thus observed that the question here under consideration is one of vast importance and susceptible of grave consequences to the litigants, and is entitled to receive our closest scrutiny and most careful and deliberate judgment.

In determining this question the surface of lot 38, the extralateral rights of that lot, the dip and strike of the vein, and the underground workings of the mines are important factors. The extralateral rights, upon which the appellant has founded its claim to the ore bodies in dispute, accrued to it as owner of lot 38 by virtue of the provisions of section 2322 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1425], whereby the owner of a mining claim has a right to follow, between vertical planes drawn downward through the end lines of the location, a vein having its apex within the limits of such claim on its dip to the deep, although such vein may so far depart from a perpendicular in its course downward as to extend outside of the vertical side lines of the surface location. The ore bodies in controversy, however, being located without the limits of lot 38, and underneath the surface of the Silveropolis and Consort mining claims, the appellant, notwithstanding the law of Congress, is met at the very threshold with the presumption that they belong to the respondent, the owner of those claims. Where a person, natural or artificial, owns a patented mining claim, although the statute reserves the right to locators of other mining claims to follow their veins under its surface and extract ore, he is presumed to own all the ore within planes drawn vertically downward to the deep through the boundary lines of such claim, as well as the surface and everything else appurtenant to the claim; and such presumption continues until some other locator or owner establishes the fact that he is entitled to exercise the reserved rights by virtue of the statute. "Within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as a part of some lode or vein having its top and apex in other territory. To state the proposition in other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits, until some one shall show by preponderance of testimony that such deposits belong to another lode

having its top and apex elsewhere." *Leadville Min. Co. v. Fitzgerald*, 4 Mor. Min. Rep. 380; *Con. Wyo. Gold Min. Co. v. Champion Min. Co.* (C. C.) 63 Fed. 540; *Doe v. Waterloo Min. Co.* (C. C.) 54 Fed. 935; 1 *Snyder on Mines*, §§ 766, 783, 789.

To overthrow this presumption and establish its right to enter its neighbor's ground to extract ore, the burden of proof was upon the defendant, and it was incumbent upon it to show, by a preponderance of the evidence, not only that the apex and strike of the vein were in lot 38, north of the south end line of the Silveropolis mining claim extended, and to the 1,100-foot line, but also to show that, between planes drawn vertically downward through that end line and the 1,100-foot line, the vein from its apex on its dip was continuous; that its continuity extended to and through respondent's ground; and that the ore bodies in question formed a part of the vein. In other words, the burden was upon the appellant to show by a preponderance of the evidence whatever was necessary to bring it within the terms of the statute, in order to entitle it to the disputed ore bodies, or to justify it in the extraction of ore from its neighbor's ground. *Doe v. Waterloo Min. Co.*, supra; *Leadville Min. Co. v. Fitzgerald*, supra; *Penn. Con. Min. Co. v. G. V. Expel Co.* (C. C.) 117 Fed. 509; *Con. Wyo. Gold Min. Co. v. Champion Min. Co.*, supra; *Mining Co. v. Campbell*, 17 Colo. 267, 29 Pac. 513.

We concede, as claimed by the appellant, that a patent to a mining claim raises a conclusive presumption that there is the apex of a vein within the patented ground (1 *Lindley on Mines*, § 305); but there is no presumption that it is the apex of the vein in dispute, and such presumption applies equally to the Silveropolis and Consort mining claims as to lot 38, and does not shift the burden of proof in this case as to the apex and continuity of the vein and ore in controversy. The appellant, however, insists that the evidence clearly establishes that the apex and strike of the disputed vein do in fact continue in lot 38 and beyond the 1,100-foot line, that the vein is persistent in its continuity on its dip to the ore bodies in question, that such ore bodies constitute a part of the vein, and that the court erred in its findings, inter alia, that the vein, at its apex and on its strike, wholly departed from lot 38 at the point designated, on a northwest course, because, as is claimed, the evidence is insufficient to sustain such findings. In reply to this contention, the respondent insists that as to whether the vein, claimed to include the ore bodies, at its apex and on its strike continues in lot 38 and beyond the 1,100-foot line, or whether it departs wholly from that lot, on its strike, at the point found by the court, the evidence is conflicting, and invokes the rule, long firmly established within this jurisdiction, that where in a case in equity there is a sub-

stantial conflict in the evidence this court will not disturb the findings, unless they are so manifestly erroneous as to demonstrate some oversight or mistake which affects the substantial rights of the appellant. The appellant, however, claims there is no such conflict in the evidence as to warrant the application of the rule in this instance; that the disagreement is not as to the physical facts, but in conclusions drawn from those facts, by the various witnesses, as to what kind of mineral or earthy matter constitutes an apex. Whether the conflict in the testimony of the witnesses relates to their conclusions alone, or to their conclusions and physical facts, or whether it amounts merely to a difference in the opinions of witnesses as to meaning of words—the meaning of "apex" or definition of "vein"—must, so far as possible, be ascertained by reference to the evidence.

Respecting the geological features of the country in which the properties are located, there is practically no conflict. It is shown that the mines are found in a lime belt which covers about two square miles, and is the great producing area of the Tintic district. In some places the limestone beds are upturned, large areas tilted upon edge, the beds dipping nearly vertically down; while in other places they dip at lower angles, and in special areas the dips are quite uniform; and again, though, it seems, not frequently, anticlinals exist. This limestone is surrounded on all sides, except the north, by igneous rocks. The sedimentary rocks are broken up and fractured, evidently the result of igneous intrusion. The limestone carries some iron, the different forms of iron oxide, also some manganese, and in places the limestone is crushed, crumbled, and brecciated. How these beds of organic sediment were dislocated, bent, and upturned is not free from doubt. Maybe, and most likely, these things were accomplished by some kind of volcanic action, which igneous intrusion indicates, and much fracturing may have been caused by internal shrinkage through nature's cooling processes. Whatever the cause, the disturbance is apparent from the evidence. The surface of the limestone area, wherever exposed, is marked with innumerable seams, cracks, and small fissures filled with carbonate of lime, stained more or less with iron, and sometimes manganese. Quartz, spar, and other materials, characteristic, in general, of mineral-bearing limestone areas, are present, and in places the surface material is brecciated and recemented. A trace of mineral, of one or more of the precious metals, and, in places, more than a trace, even where there is no known vein, seems also to be a characteristic of that lime belt. The witnesses for the appellant, who had examined the surface and open cuts, as well as the underground workings of the mines, testified, in general, that the fractured, stained,

and brecciated conditions appeared to such an extent upon the surface and in the open cuts of lot 38 as to furnish unmistakable evidence of the apex of a vein; that the vein was so clearly defined upon the surface, and so distinctly differentiated from the adjacent country, that its boundaries could readily be traced throughout the length of that lot and be recognized by mere observation; and that the indications showed the apex to be so wide that it overlapped the side lines of that claim.

The leading witness for the defendant, Mr. Akers, an expert of much scientific knowledge, after testifying that the Mammoth was a fissure vein, and that it was not an individual fissure, but consisted of a series or many approximately parallel fissures, or breaks, in the mountain fractures, said: "Taking this individual vein, this broad, beautifully defined fissure, that I personally have traced for a distance of between 3,000 and 4,000 feet on the surface, we find that it is clearly defined on the surface, and so clearly and distinctly differentiated from the adjacent country that I could identify all points generally along the course of that vein. I could stand at one end and, as far as the configuration or topography of the country permitted, see how that vein ran; and to guide me in the other direction, namely, the southerly, a portion of the ground not in controversy at all, I could see the vein there through extensive workings for say 1,000 or 2,000 feet." And then, after referring to the conditions of the vein, the deposition of the ore by replacement or metasomatic change, the eroding of the surface, and to geological events which, he says, transpired in the making of the vein, claiming that the first great dynamic disturbance was the crushing that resulted in the formation of the Finn dyke, and that the second great disturbance, or convulsion, consisted of the fracturing of the great mass of rock that constitutes the Mammoth vein, the witness describes the open cuts and says Grand Central cut 2 "shows stained rock." Of tunnel B he says the easterly cross-cut is in vein material, and where it encounters the northerly and southerly drifts a streak of vein appears, and that the drifts do not disclose the full size of the ore streak. The "pit," he states, "shows iron, manganese, and rhodochrosite," cuts 4a and 4b show "shattered lime," and according to his testimony and that of the defendant's witnesses generally, cuts 6 to 15 and the other cuts north of the Silveropolis south end line extended, show some dyke material, some shattered and stained limestone, and others broken and fractured matter, stained with iron or manganese, in some places, of a brecciated character, containing seams, calcite, and calcareous cement. In other words, they claim the material of the various open cuts is such as to show an unmistakable outcropping of the vein.

While the defendant's witnesses are emphatic in asserting an apex in lot 38, and clearly defined differentiation of the surface of that lot from the adjacent country, none of them attempted to locate upon the surface or fix the hanging or foot wall of the vein, north of the Silveropolis south end line extended, nor north of the point at the Cunningham stope, where the court found the vein departed from the lot; and yet, if its differentiation be so clear that, "to recognize its boundaries," one, as claimed by Mr. Akers, need but look at the surface, aside from the open cuts, the query naturally and logically arises why, in a controversy of this magnitude, its vital and decisive point the apex of the vein, its boundaries were not traced and definitely fixed within the disputed territory. Why was such a point, where such immense interests are involved, and where counsel distinguished for ability were searching every nook, every avenue, for facts favorable to their cause, left to mere conjecture, to mere inferences from disputable surface appearances? The only answer which this voluminous record affords comes from the witnesses for the plaintiff, and that answer has the support of the findings of the court. These witnesses, after looking at the same open cuts and tunnels, observing the material exposed, and after examining the same surface and the surface east and west of lot 38, some of them claiming to be familiar with practically the whole surface area of the lime belt, say with at least equal emphasis that no such differentiation exists; that there are no indications of a vein or apex on lot 38 north of the point where the Cunningham stope crosses its west side line, which is about 90 feet south of the Silveropolis south end line extended; that, apart from the dyke material, the limestone north of that point within lot 38 is not any more broken and brecciated than in the adjoining country to the east and west; that neither the calcite, the calcspar, the iron seams, the iron stains, nor the fracturing or fissuring is any more abundant within the limits of that lot north of that point than for a long distance to the eastward and westward; that wherever, in that belt, the surface of the rock is exposed, by erosion or otherwise, there appear innumerable seams, cracks, small fractures, or fissures, running in every conceivable direction, filled with calcite, stained more or less with iron, in instances containing some manganese; and that in many places the surface material is brecciated and recemented.

Dr. Talmage, a geologist and expert of eminent ability, who made his first examination of that section of country about 1884, and knew the surface boundaries of lot 38, upon further special examination of the open cuts and surface of that lot and of the country adjacent for the purposes of the trial, testified that there was "no surface evidence of an outcrop of a vein well defined farther

north," on lot 38, than "incline No. 1, just north of the Gulf stope," and, after describing the open cuts and conditions on that lot, and stating that the rock exposed in tunnel B was country limestone with cracks and fissures filled with calc spar stained with iron and manganese, he said: "From one end of the limestone area to the other I have failed to find any part of it where the limestone is exposed; that such conditions are not to be found." Mr. Tyler, also an expert of undoubted ability and of extended experience, after thorough examination of both properties, said that, outside of the dykes, the surface indications on lot 38, north of the Silveropolis south end line extended, were like those east and west of that lot, and that he found the same indications "westerly to the slopes of Eureka Peak," distant 2,500 feet, "about in the northwest corner of the King William claim."

The evidence also shows that numerous samples were taken from the various open cuts and exposures, but, with few exceptions, the assays of those samples, taken north of the Silveropolis south end line extended, revealed either nothing or but a trace in any of the precious metals, and the few exceptions yielded little more than a trace—simply such results as may be obtained, at least according to the evidence of the plaintiff, in many portions of that limestone country where no vein exists, or beyond the limits of any vein. An examination of the evidence discloses the fact that the witnesses on one side differ widely from those on the other in their statements respecting an apex at the surface in lot 38 north of the Cunningham stope, and in numerous instances as to facts and appearances. Such examination shows not merely a conflict, but that the question whether or not the surface, north of the point mentioned, discloses an apex of a vein in that lot, is answered in the negative by a preponderance of the proof on the subject. It is quite clear that the findings of the court have strong support in the testimony relating to the surface.

Do, then, the underground workings and explorations reveal the existence of a vein, which has an apex within the limits of lot 38, from the Silveropolis south end line extended north to the 1,100-foot line or beyond, and which on its dip extends to and embraces the ore bodies in dispute? Or does the vein, which, as found by the court and admitted by the parties, crosses the south end line of lot 38 and continues northerly, within the limits of that lot, to a point 690 feet from that end line, continue thence northerly parallel with the western side line of that lot, or at that point change its course or strike to and thence continue in a northwesterly course in the direction of the lines U-T and T-S, and embrace on its dip those ore bodies? On this subject the contention of the appellant is that the sub-surface explorations show that the vein at

the surface is a unit, and that its apex is in lot 38, not only at the southern end of the lot, but continues therein, on its strike, to and beyond the 1,100-foot line; that, on its dip it divides, the one, the easterly branch, going almost vertically to the deep, and the other, on its westerly dip, embracing the ore bodies in question; that the vein, through the disputed territory from the upper levels down to the lower levels, is shown on each level, and by connections from each level to the level above and below, all in the undisputed portions of the vein; and that the extent of the vein, in width, is determined by the limits of the broken, fractured, and stained condition of the sedimentary beds. The contention of the respondent is that the underground workings show that the vein departs from lot 38, in a northwesterly direction, at the Cunningham stope, as found by the court; that this is a vein formed by replacement; and that, therefore, the limits of mineralization determine the limits of the vein.

In deciding these contentions, it behooves us to look at the formations—the geological facts which, the proof shows, the development of the mines has brought to view—and see where such facts place the northerly portion of the vein, at its apex, on its strike, and on its dip, which admittedly exists in the southerly end of lot 38. Mr. Akers says the Condon tunnel contains the highest underground workings on the properties, the tunnel itself being driven through country limestone to the dyke; that the entire cross-cut is in shattered, broken, stained, and altered vein material; and that the Condon winze down to the Finn level, and the O'Brien winze to the 300 or Mammoth tunnel level, are in the same material. These are the winzes through which the appellant claims to trace the vein on its dip to the 300 level, and thence down through other works to the lower levels; but it must be remembered that the appellant's witnesses regard broken and fractured limestone, and any kind of stained and brecciated matter, as vein material, regardless of value in metal. From an examination of the diagrams in the statement of the case, and evidence of these witnesses referred to, it will be seen that the workings on the Finn, the Plummer, and Mammoth tunnels, north of the Silveropolis south end line extended, are in the same kind of material; that the main drift on each level runs along the foot wall of the Finn dyke, and no ore, in any considerable quantity, has ever been found on any of those levels in those northern workings, not even on the 300 level north of the Bush winze at the north end of the Betsy stope, in which winze, between the 300 and 400 levels, about 60 feet above the 400, the appellant claims it is shown that the vein branches on its dip, the smaller and easterly portion going almost vertically to the deep, and the major portion passing through the

dyke to the westward, although south of the winze there is ore.

Speaking of the cross-cut in the Finn tunnel, Mr. Learned says, from station 03, where it leaves the main tunnel, westerly through 021, 21, and 22, to its face, it is in broken lime, and that "broken lime is generally vein lime in that mine"; and this kind of vein material, with occasional dyke, brecciated, and stained matter, unmineralized in the sense of the federal statutes, is substantially all that is claimed by these witnesses to appear in the drifts, cross-cuts, and branches driven in that northern territory, on the Plummer, the 300, and, in fact, the lower, levels of the Mammoth, and likewise as to the drifts, branches, and cross-cuts on the various levels of the Grand Central, both east and west of the line of stoping or ore channel. It is true, Mr. Akers says the Plummer tunnel is in vein and ore at the south end, and to its north end shows ore in places, shattered lime, and vein matter; but he does not identify the places, if any, where ore appears to the north end, and north of the East raise stope the tunnel runs along the foot wall of the dyke, which is not mineralized, except in the vicinity where the main vein passes through it. The statement, therefore, does not justify an inference that ore occurs on that level north of that stope. That it occurs south thereof, and is in the main vein, is admitted. He also says that the cross-cut of the Finn tunnel level is "within view, and within a few feet of it ore might be disclosed"; but, if such be the case, it is difficult to understand, and no explanation appears in the record at all satisfactory, why those few feet, when, as shown, so much work was done by the appellant for the purposes of this case, in the hope of finding evidences of ore to establish the existence of a vein through that ground, were not driven and the ore disclosed. The witness, it seems, was unable to locate the boundaries of the west branch of the vein, where, it is claimed, it passed through the dyke to the westward, although he thought its foot wall was near station 107 on the 300, or near the western limits of the dyke.

The Mammoth workings on the 400 level extend north only to within about 50 feet of the 1,100-foot line, and Mr. Akers says the "dyke and the vein" are "closely intermixed." No ore is shown north of the Silveropolis south end line extended, except in the vicinity of and southward from the Betsy stope, which, according to the testimony of Mr. Akers and other witnesses, is in the east branch of the vein. The Bush winze extends to this level at the north end of that stope, and is within the same branch of the vein. Between stations 101 and 103, a winze goes down to the old stope above the 500 level, and the Hatton raise extends to the 500. Between the 400 and 300 levels is the 80-foot level, which appears to be in ore, as also the Bucket raise down to the 400 at or

near the north end of the Betsy stope. The points clustering near the north end of that stope are of interest and will be adverted to later herein. Some of them are openings through which witnesses of appellant claim they have traced the dip of the vein, from the Finn tunnel down to the 500 and lower levels, and there is evidence that the Betsy stope connects in ore with the large stopes to the south, where the main vein is admitted to exist. Mr. Akers claims that on the 400 level, 45 feet north of the south end line of the Golden King claim, the vein "forks; one portion continuing approximately in the direction of the main vein, and the other diverging more to the northwest." Assuming this to be correct, it follows that the one branch courses in the direction of the Betsy stope, and the other in the direction of the point where the vein is claimed to pass through the dyke, and that each fork must pass in its own direction on its strike. The witness says, on the Grand Central side, the workings on this level are mainly above the vein, but admits that at station 17 there is vein matter, and at station 15 a winze with ore at the top going to the Butterfly stope vertically into ore on the 600 level. He discovered no foot wall on the 400, but says he found the hanging wall east of station X. On the 500 level the main drift is on the east side of the dyke, and from station 543 northerly follows its foot wall. From the workings disclosed by appellant's evidence, it appears that the mineralization decreases, and the ore practically fades out, within a short distance either north or south from the ore bodies which would be cut by a plane drawn vertically down through the Silveropolis south end line extended. The drift running northwest from station 537 is in limestone very little shattered. On this level the top of the Butterfly stope of respondent's mine appears.

The workings on the 600 level also present the appearance of ore fading out as one proceeds north or south from the main ore bodies. The Earl raise extends up to the 500, and the stope on this 600 level represents an immense ore body extending down to the 800 level, and is one of the ore bodies and part of the vein in dispute. Mr. Akers says in his opinion the back vein or fissure is a "stringer or dropper" from the main vein; that the vein consists of a series of fractures, having a course generally of N. about 20° E. in the upper portions; and that the great ore bodies and vein on this level, clear down to the 800, are in a vein having an apex within and on either side of the side lines of lot 38, although he admits the distance, on an incline from the west side line of that lot to the ore of the Grand Central on the 600, would be about 1,500 feet. When we come to consider the dip of the vein, as it appears in evidence, it will be seen that this position of the witness is involved in difficulty. The west cross-cut from station 49, he says, has reached the

vein in Silveropolis ground, and the east cross-cut from station 643 is through blocky lime for 468 feet, and here, he says, encounters an independent vein, while Mr. McIntire says the west cross-cut from that station is in vein material. In fact, according to the appellant's witnesses, the northern Mammoth workings on the various levels are generally, as has been seen, in what they call vein material, consisting of fractured, seamed, and stained limestone, with occasional brecciated matter in places recemented. Mr. Akers states he has not found the foot wall on this level, but thinks it is about 20 feet east of station 643, and that the hanging wall is at or near station 5 of the Grand Central 600 level. Looking at the 700 level, the workings are extensive, much ore having been extracted from the Grand Central, but not much from the Mammoth ground, north of the Silveropolis south end line extended, except in the Bradley triangle at the Bradley-Consort line. The cross-cut, where connection between the two mines is made, is 600 feet long, and Mr. Akers says it runs through dyke and fractured lime; Mr. McIntire, that it is in barren rock throughout. Connection is also made near station 7 at the Bradley-Consort line in the main drift. Mr. Akers admits that he has not found the foot wall on this level, but thinks the hanging wall is about 30 feet west of station 9 in the main Grand Central cross-cut. There are two branches of the dyke on this level. They diverge going north, as on the levels above and below. Mr. Akers also states that the vein in the Grand Central ground has a course N. 15° to 20° W., and is in ore from the cross-cut between stations 15 and 16 back to the Bradley-Consort line, a distance, he says, of 1,110 feet; and the testimony of Mr. Learned shows not only that, from north of the Silveropolis north end line, about station 15, the ore is practically continuous for the distance of about 1,100 feet, to near the Bradley-Consort line, but that from there the ore bodies change their course and continue about 300 feet further in a southeasterly direction.

On the 800 level the Tranter drift connects the two mines. The foot wall of the vein has not been located, but Mr. Akers thought he found the hanging wall 20 feet northwest of station 24 in the King William claim, and that there the vein passed "out of working to the northeast." Reference to the evidence of the appellant in detail respecting lower levels is not deemed necessary here, because the conditions appearing on the 700 and 800 levels are not, so far as the developments show, materially different from those on the 900 and below, and it is clear, beyond question, that the vein, which embraces the ore in the disputed territory on the 700 and 800 levels, or that from the Grand Central 400 down to the 800, also includes that on the 900 and down as far as the developments extend,

within such territory, and to the deep. Speaking of the boundaries of the vein, Mr. Akers said they extended, at least, to the limits of fracturing; and Mr. Watson said, "If the fissuring were all connected" and "extended 4,000 feet," he would say the vein extended that far, but he could not determine from the developments on any level where the foot wall was. This last is an extreme view of what constitutes a vein, as also is that of Mr. McIntire, where he states that if, on the 700 level, a cross-cut were driven through barren limestone all the way from M, a point at the northerly workings of the Grand Central, easterly to M-4, a point at the eastern limit of the vein, as fixed by him, distance 1,050 feet, and ore bodies appeared at M and M-4, he would conclude that they were in the same vein. Mr. Akers expressed the general view of appellant's witnesses upon this subject.

Respecting the back fissure, Mr. McIntire, speaking of the 800 level, says, from station A, near the Silveropolis south end line extended, through stations 153, 155, and 157, to the 1,100-foot line, it is called the "back fissure." So ores he claims to occur east of station 33, at a raise and in a drift, thence to the 1,100-foot line, on the 700, and at station 40 to that line on the 600, and in a drift running through stations 80, past raise on Silveropolis south end line extended, 81, 82, 583, to 542, are all in the back fissure. He says on the 400 level the back fissure extends from the raise north of station 92, thence north through stations "a," "b," "c," and "d" to the face, and thence on through station 99, being, where it crosses the Silveropolis south end line extended, 90 feet west of the west side line of lot 38, and that, on the 300 level, the main drift, run across that south end line through stations 9 to 17, and on through 109 and 22 across the 1,100-foot line, is in the back fissure through Betsy stope, and that the fissure is 10 to 15 feet west of where the drift crosses the end line; the witness at the same time stating that the Betsy stope was extended to the 800 level since this suit was commenced, but was extended down to the 400 and below a good many years ago. He also says the drift on the Plummer through the O'Brien winze, and the one on the Finn level, running northerly from station 03, across the same end line, stations 05 to 09, and the O'Brien winze to the 1,100-foot line, are in the back fissure, and the latter in low-grade ore practically all the way. On each of these last two levels the distance from where the back fissure crosses the end line mentioned to the west side line of lot 38 is 90 feet. Speaking of the dip of this fissure the witness Akers says, from the surface to the 300 level he found it to be "approximately between 80° and vertical," from the 300 to the 600 about 50° from the horizontal, and from the 600 to the 800 about 85° from the horizontal. Mr. Earnshaw says the difference in elevation between the 800 and the

Finn level is 688 feet; that the point where the fissure crosses that end line extended on the 800 is 135 feet westerly of the west side line of lot 38; that point of crossing on the Finn level is 92 feet west of that side line, making a westing of 43 feet; and that the angle of dip is $86^{\circ} 30'$ from the horizontal.

The evidence to which reference has thus been made is believed to be fairly characteristic of the vast amount of proof on the part of the appellant respecting the underground workings, and from this review of the proof it may be seen that wherever the workings may extend, whatever material the witnesses may claim to have found in them exposed, whatever streaks of vein and vein material may have been disclosed, the fact stands out clear that the ore is always found near the line of the great ore bodies, whether they be on the strike or on the dip of the vein, northwesterly beyond the Cunningham stope—a question yet to be determined. Upon such review and an exhaustive examination of this voluminous testimony, it must be admitted that the boundaries of the vein, an apex in lot 38 north of the north end of the Cunningham stope, a strike and dip that would carry the vein to and include the disputed ore bodies, have, to say the least, been permitted to remain in doubt and obscurity, and this, notwithstanding that the mountain to the north has been literally punctured, on each level, with drifts and cross-cuts, raises and winzes, in search for ore and material that would establish the existence of such a vein north of that point.

Before referring to the testimony on the other side, it may be observed that the witnesses for the respondent do not differ from those of the appellant as to the existence and character of the vein in the south end of lot 38 to the north end of the Cunningham stope, the location and character of the ore bodies in dispute, including the Butterfly and Betsy stopes, the existence and location of the dykes, nor as to the workings on each level; but they are not always in harmony as to what the workings on the different levels disclose.

Prof. Jenny, a scientific expert of much experience, says the vein or lode, "both in its outcrop at the surface and in depth, passes wholly on its strike out of lot 38" at a point, on the west side line of the lot, about 87 feet southerly from the Silveropolis south end line extended, and that the ore situated beneath the Silveropolis and Consort mining claims forms a part of a vein or lode having its apex within the surface boundaries of those claims, and that the Betsy stope is in a part of the back fissure. Respecting the territory north of the end line mentioned, and easterly of the line T-S, his testimony is to the effect that the developments on each level, from the Finn tunnel down to the 900 level, and below, show that the workings in those northern parts are in barren material, except the back vein or fissure, which appears

to practically fade out before it reaches the 1,100-foot line; that the various levels, in that section, are driven mostly through broken and fissured lime rocks, in places through brecciated material and the dykes; that, on the Grand Central side, the sedimentary beds are as much broken, stained, and fractured as on the side of the Mammoth, except where the dykes occur; that the vein consists of a series of fissures, has its general course in the direction of the line W-U, U-T, and T-S, and passes through the dykes northwesterly along the line U-T on its strike, through the Coates dyke between the 600 and 700 levels, and through the Finn at the Bench stope; that the dykes, and their junction, between those levels, are almost vertically beneath the south end line of the Silveropolis claim and their dip westerly 75° to 80° from the horizontal; and that the "inclination of the vein is 75° from the horizontal, in that northwesterly direction" along the line U-T. He considers the "limit of the vein to be the limit of mineralization." Speaking of the Finn tunnel, Dr. Talmage says that, "as you go through that tunnel from its mouth to its face, there are absolutely no indications of mineralization," and, referring to the 200 and 400 levels of the Grand Central, that they are driven from the shaft easterly to where ore is encountered, through broken, fissured, and fractured limestone, shattered as much as in any of the workings of either of the mines, except where they penetrate the dykes. He speaks likewise of the 700 level from that shaft easterly, and says the material in the long cross-cut at station 643 and in the northern workings on the Mammoth 600 level is much the same, except the dyke. He states that the strike of the vein, from the south end line of lot 38, is in the direction of the line W-U, about N. 7° W., true, to the point U, thence along the line U-T, N. 51° W., true, to the point T, thence in the direction of the line T-S, and that the boundaries of the vein "would be determined by the nature of the mineralized matter, and therefore by the limits of the ore bodies themselves, both on the sides and upwards, and doubtless downwards, if you went to the bottom of them," and says, along the lines indicated, the ore bodies in general are not more than 100 feet wide, and that from the line U-T northerly he failed to find in the workings any continuation of the great ore bodies. Mr. Wilson says the 200, 400, 700, 900, and 1,100 levels of the Grand Central, from the shaft easterly, are driven through broken, shattered, and fissured limestone, and that, with the exception of the dykes, "there is a correspondence in what we see in passing through the drifts" on the Mammoth tunnel level "from station 36 out to their faces." He states that the Condon winze and the workings therefrom are in limestone and stained material, but not connected with a vein or ore, and that the cross-cut on the

700 level, from station 739 to 72, in which connection is made between the mines, "is entirely unmineralized in its total length."

The foregoing testimony is fully corroborated by that of other witnesses for the respondent. In fact the proof of the respondent in general shows that, apart from the ore bodies or ore channel and dykes, the limestone, as revealed by the workings, is as much broken, stained, fractured, and fissured on the Grand Central side as on that of the Mammoth, and that the developments on the various levels north of the ore bodies along the line U-T, and east of those along the line T-S, disclose no more mineralization than may be found in places all over that limestone country. Mr. Tyler says the east 600 cross-cut of the Mammoth, from station 643 to 641, which is in the triangle between the dykes and very much fissured and broken, is the only portion of the cross-cuts in the Mammoth ground that compares with the openings and condition of the Grand Central 200 cross-cut. Speaking of the boundaries of the vein, Col. Wall, an expert quite familiar with the formations in the region of those mines, says they are the limits of the ore; that, as shown by the workings, limestone appears everywhere within a few inches or feet of the ore; and that the width of the ore through the Grand Central is irregular, 10 to 40 feet, "in places as much as 100 feet, or even a little more." The testimony of the respondent is clear that the vein was formed by replacement or metasomatic action, and the leading witness for the appellant admits that to some extent it was so formed. Mr. Brooks says the vertical distance from the surface to the 1,900 level is 1,800 feet and the angle of dip over 86° from the horizontal. Mr. Tyler says that from the top of the winze on the 400 level of the Grand Central, where ore appears, to the ore cut by the plane K-K on the 1,000 level, the westing of 95 feet is made, giving an angle of dip of 82° from the horizontal, and that the angle of dip from the top of the ore above the 600, just north of the 1,100-foot line, down to the 800 level, is 78° 30' from the horizontal. Prof. Jenny says in the section along the line U-T the beds course N. 70° W., magnetic, exactly with the strike of the fissures, and that the dip of the fissures is 75° to 80° from the horizontal.

In addition to the great mass of testimony of both parties respecting the underground explorations in these mines, it is shown that very numerous samples were taken from the material found in the drifts, cross-cuts, and workings, on the various levels, north of the Silverpolls south end line extended; but, excepting those from the vicinity of the back fissure and the line of stoping or ore channel, the assays in evidence, like those from the surface samples, indicate no mineralization not common generally throughout that limestone area. The evidence on both sides relat-

ing to the surface and to the underground explorations, to which reference has been made, is deemed to fairly show the conditions and geological facts of those portions of the properties which will be affected, either directly or consequentially by this decision, and also of those portions, not affected by the result hereof, which have an important bearing upon what is involved. There is a mass of testimony, however, relating to ground and objects of some importance, which has been given due consideration, but to which specific reference is impracticable.

It is apparent from the testimony referred to, as well as from all the evidence, that there is, to say the least, some conflict, not only as to the conclusions of the witnesses drawn from the physical facts, but as to the facts themselves—as to what things actually exist and may be seen upon the surface and in the mines. As instances: The witnesses for the appellant, looking at the open cuts, say vein material is exposed; the witnesses for the respondent, looking at the same cuts, say country rock. The former say the broken, stained, and fractured rock is peculiar to lot 38, and shows the outcropping of a vein; the latter, that such rock is found everywhere in the lime belt, wherever exposed by erosion or otherwise. The former say the occasional breccia, the calcite seams, and stains of iron and manganese are characteristics of lot 38, where they claim the apex is; the latter say they are characteristics of the whole limestone area. So the former, looking at the formation, on the various levels, along the line U-T, say the ore is on the dip; the latter, observing the same formation, it is on the strike. The former say the Flinn tunnel, north from the foot of the Condon winze, follows a streak of the vein; the latter, it is barren material. Likewise the former say the workings north of the line U-T are in vein lime and vein material; the latter, in barren country rock. In many places on the different levels in the northern workings, where the former see vein material, the latter see nothing but limestone. Such are, in substance, some of the differences in the statements of the witnesses, whether of facts or conclusions from facts. Nor is it surprising that conflict exists. It is a usual feature in such a suit—of such ordinary occurrence, and so often of such grave character, that the advisability of trying a mining suit before a jury may be doubted. Nor can it be attributed wholly to partisan zeal or personal interest. The high character of the witnesses, in general, in this case forbids this. Science has not yet unfolded all of nature's intricacies, and in all probability never will to such an extent that the fallible human mind can fully grasp them, though indications may be revealed. To look at a mountain is one thing, but to look into the inner recesses of the earth, through surface indications, is another. Every geologist, every miner, knows that, in determining the

contents and actual conditions of a mountain by surface indications, even with extensive workings, which, after all, constitute but slight explorations compared with the whole mass, such difficulties are necessarily and invariable encountered as to produce differences of opinion between persons looking at the same material—considering the same physical facts. Inductive reasoning has not attained such a high state of perfection as to lead all men, viewing the same parts, to the same conclusion as to the whole. This is especially true when the investigation of a portion of a thing is attended with great difficulties. In cases of stratified rocks, where the beds are regular, it is comparatively easy to determine the location of a vein, its strike and dip; but where, as in this instance, the beds are broken, tilted, and fractured, and, in places fissures running in all directions, the investigation of one part may lead to very erroneous conclusions as to the formation and contents, in general, or as to the location and course of a particular section or ledge; a small part of its location and course only being definitely known. Every one who has ever attempted to trace, either by surface indications or underground workings, or both, a vein through an eruptive country, or, as here, through sedimentary beds, broken and tilted, with fractures running in every conceivable direction, where anticlines and synclines exist, and the regular dip of the formation in places is obliterated, knows that the investigation is not only laborious, of slow progress, and attended with innumerable difficulties, but is liable, in the end, to be attended, even among the most candid, with antagonistic theories, erroneous conclusions, doubt, and uncertainty. This is strikingly illustrated, in this case, in the fact that for more than a quarter of a century the Mammoth mine was operated by experienced miners, vast amounts of ore extracted from the vein in the southerly end of lot 38, the mountain to the north perforated with expensive, but profitless drifts, along and through the dyke, and cross-cuts to the east and west, and yet it could not have occurred to the operators, from the indications and physical facts disclosed by the operations, during all those years, that the vein had, between the 300 and 400 levels, split and the major portion passed through the dyke on its dip to the west; for, so far as shown by the record, no attempt was ever made to follow that alleged western portion of the vein on the inclination, or to trace it in the direction of the ore bodies in dispute, or into the disputed territory, until after those ore bodies were struck in the Grand Central ground by the respondent in 1897, although the Mammoth shaft had been sunk hundreds of feet below those ore bodies; and even now, as we have seen from the review of the evidence, with drifts and cross-cuts, on different levels, extended and driven, the surface of lot 38 dotted with open cuts and exposures, as appears from the diagrams and testimony,

all for the purposes of this trial, not only the appellant's operators and miners, but its experts appear to be unable to trace or locate the hanging and foot walls of the vein, either at the surface or at depth. Under such circumstances, it need not be marveled that the witnesses, looking at the same things and same characteristic features, did not see them alike, or draw the same conclusions from them.

Suppose, however, notwithstanding there is a conflict in the evidence, we assume, without deciding, that such conflict relates, as is insisted by the appellant, only to the opinions of witnesses as to what the physical facts show, and that the rule, invoked by the respondent, should not, under the circumstances, be enforced, the question then is, was the court justified, under the evidence, in holding that the vein departed, at the point designated in the findings, from lot 38 on a northwesterly course, and did not return to that claim north of that point? In determining this question it becomes important to consider the nature and principal characteristics of this vein, and, in connection therewith, some prominent geological features disclosed by the evidence. Before doing this, it will be well to notice that the appellant contends that the vein consists of a series of parallel fissures in limestone, the ore being mixed up with broken, shattered rock; that the vein is so constituted both at the surface and at depth; and that the limits of the vein are coextensive with the limits of the broken, crushed, seamed, and fissured limestone. Upon this theory it is insisted that, while the broken, stained, and shattered material carries little of the valuable metals on and near the surface, it is vein matter and evidence of vein, and that the court erred in charging the jury that the apex of a fissure vein is the highest point at which vein matter is found, and "by vein matter in this connection I mean rock or earth containing mineral in quantities appreciably greater than is found in the general mass of the mountain." Whether or not this instruction is erroneous we need not stop to determine. This being a cause in equity, the verdict of the jury upon the controverted questions of fact submitted to it was but advisory to the court, and therefore error could not be predicated upon instructions given or refused. The judge had the undoubted right to disregard the verdict or special findings, or consider them in whole or in part, or determine for himself the special issues submitted, as he chose. "It was therefore a proper exercise of authority for the judge in this case to examine the evidence in the case for himself and determine the questions at issue between the parties according to the weight of evidence, notwithstanding the proceedings taken with the jury and the verdict returned; and having, in exercise of that authority, made and filed his written decision, in which the facts found corresponded with the verdict of the jury,

error cannot be predicated on his findings, if they are sustained by the evidence, notwithstanding the previous instructions to the jury; for, having the right to disregard the verdict, he had also the right to disregard the instructions to the jury that rendered the verdict. It is true that the decision of the court and the verdict of the jury were in harmony; but the decision of the court is the judgment of the court, and this judgment was warranted by the evidence or it was not. If it was not, a new trial should be granted. If it was, it cannot be reversed, except upon other grounds." *Sweetser v. Dobbins*, 85 Cal. 529, 4 Pac. 540; *Schneider v. Brown*, 85 Cal. 205, 24 Pac. 715; *Riley v. Martinelli*, 97 Cal. 575, 32 Pac. 579, 21 L. R. A. 33, 33 Am. St. Rep. 209.

In determining the question before us, however, whether the finding of the court was warranted by the evidence, it is important to consider what constitutes a vein or lode. It will hardly be contended that, merely because rock is broken, crushed, shattered, and even fissured, it constitutes a vein within the meaning of the laws of Congress. All miners of any experience, as well as men of scientific research, know that such occurrences may be found in the most barren country. Something more is necessary to dignify that kind of material with the character of a vein or lode. The material, whatever else may be its condition, must be metalliferous—must contain some kind of mineral of value, so as to distinguish it from the country rock; and especially is this true where there are no well-defined walls. This is so in the case of a contact, as well as of a fissure. Where it is barren for a considerable distance, barren in its continuity, it is deprived of the character of a vein. But wherever a vein has at any time existed, with continuity of ore which by some subsequent convulsion or volcanic action may have been interrupted, the character of the vein or deposit is not changed. *Stevens v. Williams*, 1 Mor. Min. Rep. 557. Fissure veins have many characteristics. They are the fillings of fissures or openings of the country rock, of all kinds of rock of all ages, contain different kinds of material, in some respects corresponding with, in others differing from, the country rock; the most common material being quartz. The fissures have selvages and slickensides, and the gangue material is generally easily distinguished from the country rock. Fissure veins are simple or banded, according to structure as to minerals. Some continue in the same direction; others are irregular and change their courses. Some have a continuity of ore, while others are barren in places, and still others are faulted. The appellant, as we have seen from the testimony, claims the vein in dispute is continuous in the same direction; the respondent, that it changes its course and is faulted. The books tell us that vein-making fissures have been formed, by

contraction on drying, as in argillaceous stratum, or on cooling from fusion, or from heat attending metamorphism; by subterranean movements, pre-eminently those which have attended mountain making; by the disruptive or expansive action of vapors resulting from volcanic action; and by corroding vapors, or by solutions from the deep, which sometimes enlarge the fissure, especially where the rock is limestone. Dana, *Manual of Geology*. Fissures formed through volcanic action, and enlarged by corroding solutions and vapors, are deep-seated, and frequently contain large cavities. That the vein in question was so formed by such action and solutions or vapors appears from the testimony, as we have already observed. It will be perceived that to define the word "vein," that represents a thing of so many and varied characteristics, is a matter attended with difficulty. Especially is this true if such definition, in view of the statutes which deal with mineral-bearing veins only, is to convey an accurate idea of the thing itself.

Mr. Justice Field, in the *Eureka Case*, 4 Sawy. 302, Fed. Cts. No. 4,548, said: "It is difficult to give any definition of the term, as understood and used in the acts of Congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode, in the judgment of geologists. But to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock." In *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 6 Sup. Ct. 481, 29 L. Ed. 712, the Supreme Court of the United States adopted a definition of vein given by Mr. Justice Hallett in the same case, as follows: "To determine whether a lode or vein exists, it is necessary to define those terms; and, as to that, it is enough to say that a lode or vein is a body of mineral, or mineral-bearing rock, within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries. With either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries

may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals and in small quantities, it is called a lode or vein." So, in *United States v. Iron Silver Min. Co.*, 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571, Mr. Justice Field said: "By 'veins or lodes,' as here used, are meant lines or aggregations of metal embedded in quartz or other rock in place. The terms are found together in the statutes, and both are intended to indicate the presence of mineral in rock." *Cheesman v. Shreeve* (C. C.) 40 Fed. 787; *Hyman v. Wheeler* (C. C.) 29 Fed. 347; *Leadville Min. Co. v. Fitzgerald*, 4 Mor. Min. Rep. 380.

In all these definitions, as will be noticed, the essential elements of a vein are mineral or mineral-bearing rock and boundaries, and no doubt that, when one of these elements is well established, "very slight evidence may be accepted as to the existence of the other." It would seem, therefore, that where one claims extralateral rights under the acts of Congress, because of a vein existing and apexing in his ground, but which has no well-defined boundaries, he, when his claim is controverted, must, in order to exercise such rights, show a ledge or body of mineral or mineral-bearing rock of such value as will distinguish it from the country rock, or from the general mass of the mountain. The material must in texture and value be such as to show the existence of a vein, and the mere fact, as has been stated, or proof of the fact, that the rock is broken, shattered, and fissured, and mixed with calcareous substance, though it may show a conglomerate mass, does not establish, in the sense of the statutes, a vein. When, however, the walls or boundaries are well-defined, the vein differentiated from the adjacent country, and the kind of material mentioned constitutes the filling, evidence of slight value in mineral will, it seems, be sufficient.

It is insisted for the appellant, however, that "a lode, within the meaning of the statute, is whatever the miner can follow with a reasonable expectation of finding ore"; that, though he sees no ore, yet, if he sees gangue and vein matter, he discovers the lode; and that whatever material would be sufficient to render valid a location thereon would be sufficient evidence of apex to justify one in following therefrom downwards, beyond the side lines of the location, in the same kind of material, to and beneath the surface of his neighbor's property. We do not thus interpret the law. What may constitute a sufficient discovery to warrant a location of a claim may be wholly inadequate to justify the locator in claiming or exer-

cising any rights reserved by the statutes. What constitutes a discovery that will validate a location is a very different thing from what constitutes an apex, to which attaches the statutory right to invade the possession of and appropriate the property which is presumed to belong to an adjoining owner. The question of a sufficient discovery of a vein, or of the validity of a notice of location, upon which the cases cited by the appellant on this point are authority, is substantially different from one relating to the continuity of a vein on its dip from the apex, and which tests the rights of the undisputed owner of the surface to what lies underneath and within his own boundaries. It is the object and policy of the law to encourage the prospector and miner in their efforts to discover the hidden treasures of the mountains, and therefore, as between conflicting lode claimants, the law is liberally construed in favor of the senior location; but where one claims what prima facie belongs to his neighbor, because of an apex in the claimant's location, a more rigid rule of construction against the claimant prevails, and, as we have already observed, he has the burden to show, not merely that the vein on its dip may include the ore bodies in the adjoining ground, but that in fact it does so include them. Until he establishes such fact beyond reasonable controversy, he has no rights outside his side lines in another's ground. "In determining what constitutes such a discovery as will satisfy the law and form the basis of a valid mining location, we find, as in the case of the definition of the terms 'lode' or 'vein,' that the tendency of the courts is toward marked liberality of construction where a question arises between two miners who have located claims upon the same lode or within the same surface boundaries, and toward strict rules of interpretation when the miner asserts rights in property which either prima facie belongs to some one else or is claimed under laws other than those providing for the disposition of mineral lands, in which latter case the relative value of the tract is a matter directly in issue. The reason for this is obvious. In the case where two miners assert rights based upon separate alleged discoveries on the same vein, neither is hampered with presumptions arising from a prior grant of the tract, to overcome which strict proof is required. In applying a liberal rule to one class of cases and a rigid rule to another, the courts justify their action upon the theory that the object of each section of the Revised Statutes, and the whole policy of the entire law, should not be overlooked." 1 *Lindley on Mines* (2d Ed.) § 336. The Supreme Court of Montana, in *Fitzgerald v. Clark*, 17 Mont. 100, 42 Pac. 273, 30 L. R. A. 803, 52 Am. St. Rep. 665, observed: "When it is said that a location may be sustained by the discovery of mineral deposits of such value as to at least justify the exploration of the lode in the expectation

of finding ore sufficiently valuable to work, it is a very different question from telling a jury that the geological fact of the continuity of the vein to a certain point may be determined by what a practical miner might do in looking for some hoped-for continuity. *Migeon v. Mont. Cent. Ry. Co.*, 77 Fed. 249, 23 C. C. A. 156; *Bonner v. Melkle* (C. C.) 82 Fed. 697; *United States v. Iron Silver Min. Co.*, 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571.

Reverting to the characteristic of a vein or lode, appearing from the definitions above quoted, that its filling must consist of a body of mineral or mineral-bearing rock, what value such material should contain is a matter not devoid of difficulty, and no standard of value applicable to all such cases has yet, and probably never will be, devised. It must necessarily depend upon the characteristics of the district or country in which the vein or lode, in any particular instance claimed to exist, is located, and upon the character, as to boundaries, of the vein itself. If the country rock, or the general mass of the mountain outside of the limits of the vein, is wholly barren, slight values of the vein material, as before stated, would seem to satisfy the law; but if, on the other hand, the rock of the district generally carries values, then undoubtedly the values in the vein material, where the boundaries of the vein are not well or not at all defined, either on the surface or at depth, should be in excess of those of the country rock, else there can be no line of demarkation, nor, where the rock is generally broken, shattered, and fissured, anything to separate it from the adjacent country. Values, therefore, of the filling of a vein, must be considered with special reference to the district where the vein or lode is found. It is likewise as to a definition of a vein or lode. In *Migeon v. Montana Cent. Ry. Co.*, 77 Fed. 249, 23 C. C. A. 156, it was said: "The definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found." *Bonner v. Melkle*, supra. Now, weighing and considering the evidence, which we have already examined, in the light of the foregoing definitions, adopted and announced by the most eminent tribunal in this country, and bearing in mind the characteristics of a vein to which we have adverted, the conclusion seems inevitable that no vein that will satisfy the demands of the law has been shown to exist north of the north end of the Cunningham stope, or north of the Silveropolis south end line extended, within the limits of lot 38, which from its apex on its dip extends to and includes the ore bodies in question.

Looking again at the surface of lot 38, through the evidence, we see, it is true, outside the dykes, broken, shattered, and fractured rocks, seams filled with calcite, or

calcareous matter, in places brecciated material, and stains of different oxides of iron and occasionally of manganese; but what we conceive to be a decided preponderance of the evidence shows that these same conditions of the rock and earth appear in the same manner and to about the same extent throughout the limestone area north of that end line, except in the vicinity of the line of stoping and of the dykes. The evidence respecting the surface, considered all together, conveys the idea that generally the portion of the country referred to, including lot 38 north of the Cunningham stope, presents substantially the same appearance, except in the vicinity of the dykes, the back fissure, and ore bodies, and that wherever the rock is exposed, by erosion or otherwise, its broken, fractured, and seamed condition is visible. So, as we have seen from the review of the evidence, the same similarity of appearances and conditions of rock and material exists beneath the surface on the various levels in both mines. In fact, we feel warranted in the conclusion that it is established by the overwhelming weight of the evidence that the easterly portion of the Condon tunnel; the northerly portion of the Finn tunnel level, including both of its westerly branches; the Grand Central 200 level, from its easterly face back to station T; the northerly portion of the Mammoth tunnel level, including the three westerly or northwesterly branches and the Dago raises; the branch westerly from station 106 on the Mammoth 400, and the Grand Central 400 level from its easterly face back to the winze; the workings on the 500 level from about station 584 north; the northerly workings on the Mammoth 600 level, including the east and west cross-cut from station 643, and the new cross-cut running westerly from station 15 into Silveropolis ground; the northerly portion of the Mammoth 700 level, including the long connecting cross-cut, and the Grand Central 700 from its easterly face back to station 22; and the Tranter drift and northerly workings on the Mammoth 800 level—are all outside of any vein such as the law contemplates, but are in country rock, except instances where such workings run along or cross the dykes and are in dyke material. According to the decided preponderance of the evidence, therefore, even though whatever conflict therein exists be regarded as relating to the opinion of witnesses merely, the section of country lying west of the west side line, or, rather, west of the east side line, of lot 38, and north of the ore bodies cut by the plane H-H, or lying along a plane drawn vertically down through the line U-T, or north of the plane E-E, and east of the stoping along and in the direction of the line T-S, is practically barren of mineral, although the rock, in general, is much broken, shattered, and fractured, with fissures running in all directions. The same barren con-

dition of that section of ground also appears from the assays of the samples taken from the surface and the workings at depth.

It is true, the appellant claims the open cuts and the workings at depth are substantially all in vein material; but, as we have seen, in the judgment of the appellant's witnesses, broken, shattered, and fissured limestone, or crushed and brecciated matter, no matter how barren, constitutes vein material, although such matter and conditions exist, without any defined boundaries, many hundreds of feet to the east and west of lot 38, in fact throughout that limestone area, so far as it was examined by witnesses, and with no more mineralization than is contained in the general mass of the mountain for more than 1,000 feet to the east and west, or through the limestone belt. Is it not difficult to perceive how such material, in the absence of both a hanging and foot wall, can be regarded as a vein? Are not the essential characteristics of a vein or lode absolutely wanting? In the absence of the very elements which constitute a vein, as defined by the highest court of our country, how can we hold a vein exists? There appears to be no mineralization in excess of that contained in the country rock; the existence of no body of mineral or mineral-bearing rock in any opening or fissure established. No witness, save Mr. Akers, attempted to locate the foot wall of the vein, and he, as we have noticed, at but one place, about 20 feet west of station 643 on the 600 level. In judgment only; for his evidence is not direct or satisfactory as to the fact. Several witnesses at a few points attempted to fix the hanging wall; but in each instance the testimony respecting it seems to point to an arbitrary location, for the fracturing, which they claim to be the limits of the vein, extends far to the west of the places pointed to as the hanging wall. We doubt if the most careful scrutiny of a scientific expert on mines could, from the description of the material in evidence, locate what, in the judgment of those witnesses, is the hanging wall. It seems to exist in opinion only. Nor does the fracturing stop at the Grand Central ore bodies. It is shown in evidence to extend, at least as far west as the Grand Central shaft, more than 1,000 feet beyond where that wall was attempted to be located. No court would be justified in holding that, in such a formation as this, the limits of fracturing constitute the limits of the vein. Such a holding would be alike unreasonable and impracticable. It would convert practically all that whole limestone area into a vein—a vein thousands of feet wide, the like of which, we venture to say, no geologist or miner has ever known. Even if there be found an occasional vugg or fragment of ore, yet, where it is disconnected from any ore body and so intermingled with and surrounded by country rock that it can-

not be regarded as continuous, it does not mark the line of a vein or lode, within the meaning of the law. *Bunker Hill & S. M. & C. Co. v. E. St. Ida. M. & D. Co.* (C. C.) 134 Fed. 268; *Cheesman v. Shreeve* (C. C.) 40 Fed. 787; *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 6 Sup. Ct. 481, 29 L. Ed. 712.

Upon very careful scrutiny of the evidence, we are of the opinion that the court did not err in rejecting the theory that the limits of fracturing constituted the limits of the vein, nor in holding that the vein existing in the south end of lot 38 did not continue in that lot north of the north end of the Cunningham stope. Where, then, and in what direction, does the vein proceed on its strike from that stope, and where are its boundaries or limits? That the Mammoth vein was formed by replacement—by replacing the limestone, molecule for molecule, with mineral through the thermal and chemical waters, or corroding vapors or solutions, ascending from the deep through the fissure or series of fissures constituting the lode—and that, where the ore appears, the fissure or opening was widened and large cavities created and filled with ore, through metasomatic action, appears manifest from the evidence. The acid and corrosive solutions acting upon the limestone corroded it or dissolved it, and the limestone thus precipitated the ore by depositing it out of the solutions. Thus, evidently, the ore bodies were built up particle by particle by dissolving the limestone and precipitating the ore, or by replacing the limestone with ore. It appears in evidence that great masses of ore are found in which the original bedding planes can yet be traced, these planes not having been obliterated by the metasomatic change. These things are not denied by the witnesses for the appellant, but, on the contrary, its leading witness admits that there are evidences of metasomatic change in the Mammoth vein, although he says he has heard or read of no mines in limestone where the process of replacement was so limited as in these mines. It also appears in evidence, as has been observed, that in running from an ore body into limestone anywhere barren rock will be encountered within a few inches or a few feet of the ore. In other words, the limit of the ore everywhere is practically barren rock or barren material. This clearly appears from the testimony of Col. Wall and of Mr. Loose. According to the decided weight of the evidence, the mineralization practically ceases everywhere within a short distance from the ore bodies. The vein and ore bodies, going northerly from the Mammoth shaft, rarely reach a width of 100 feet. This condition of things exists all along the fissure northerly through the great ore bodies to the Cunningham stope, thence through the ore bodies in the direction of the lines U-T and T-S. It is the same on each side of where the vein passes through the dyke, and the country in the vicinity of the dykes.

where the vein penetrates them, is very much crushed and shattered. The direction of the ore channel and ore bodies will readily be observed from the diagrams. It will be noticed that the ore channel, although irregular and changing its course at the Cunningham stope and at the Bradley-Consort line, is continuous clear through from the Mammoth shaft to north of the Butterfly stope, a distance of more than 2,000 feet, and more than 1,400 feet, as we have seen before, in the northwesterly direction from the Cunningham stope, and doubtless the course of a vein longitudinally, as it passes through the country, is its strike. That the vein has well-defined boundaries and strike from the south end line of lot 38 to the north end of that stope, a distance of about 700 feet, is not controverted; but from there on in the northwesterly direction, although the same conditions continue to exist, the appellant insists that the ore bodies are on the dip, and not on the strike, of the vein. But why not on the strike? What facts are there established by the evidence that show the ore bodies on the dip and not on the strike? We must confess our inability, upon most careful scrutiny of the mass of evidence, to find anything to warrant us in sustaining the contention of the appellant. The character of the fissure, the processes that evidently controlled in the deposition of the ore, the characteristics of the vein where it is not in dispute and those where it is in dispute, including the continuity of the ore in the line of the channel, the barrenness of the rock as you recede from the ore, the dip of the vein and of the back fissure, yet to be adverted to, the similarity of the earth and rock throughout the limestone area outside of the ore bodies and dykes, some prominent geological features yet to be noticed, all militate against the contention and point unerringly, it seems, to the line marked by the ore channel as the location and strike of the vein, and to the limits of the deposition of ore as the limits of the vein.

Reverting to the geological features, just mentioned and before referred to, we will first notice the dip of the vein and back fissure, and here the appellant in its contention encounters a serious obstacle; for in vain will the record be searched for a degree of inclination that would carry a vein from lot 38 to the ore bodies in dispute. The vein and ore bodies, wherever explored, occupy almost a vertical position. As we have shown by a review of the evidence, at the Mammoth shaft the vein and ore go to the deep so nearly vertical that on the 1,900 level, a distance of 1,800 feet, the westing is but 100 feet, and the dip over 86° from the horizontal. The dip of the back fissure is shown to be about the same from the Finn tunnel to the 800 level, a distance of 688 feet; the Finn tunnel being 92 feet, and the 800 level 135, west of the west side line of lot 38, making a westing of but 43 feet and a dip of $86\frac{1}{4}^\circ$. So we have seen that, on the Grand Central side, from top of the winze on the 400 down

to the 1,000 level, the dip is 82° from the horizontal, and that along the line U-T, where the ore bodies in dispute occur, the dip is 75° to 80° degrees from the horizontal. Now, considering the dip of the veins, as thus shown in both mines, in connection with the long distance, apparent from the surface maps, intervening between the west side line of lot 38 and the ore bodies and vein on the Grand Central side, is it not clear, without further demonstration, that no dip is shown that could carry a vein from lot 38 to the controverted ore bodies and vein in the Grand Central mine? Such certainly seems to be the fact under the proof. But Mr. Earnshaw, one of the appellant's witnesses, it is claimed, followed the vein from the Condon tunnel, through the Condon winze and other openings, down to the 800 level. While it no doubt is true that he went down through the various openings, as he says, consisting of winzes, raises, and drifts, to that level, still that does not show a tracing of a vein apexing in lot 38 on its dip to the ore in controversy. The Condon winze and other openings to which he refers, including the Betsy stope, as has already been shown, are in or connected with the back fissure, which extends north from the Cunningham stope; and the ore bodies in controversy manifestly are not in that fissure, and consequently such tracing shows no continuity of a vein, on its dip, that includes them.

The back fissure is a geological feature of much importance. Mr. Akers, as previously shown, states that the main vein forks, on the 400 level, north of the south end line of the Golden King claim, and the easterly portion continues northerly on the east side of the dyke. If this be true, then this fork must constitute the back fissure, which appears to be feathering out north of the Betsy stope near the 1,100-foot line. Through this fissure the Betsy stope and the various openings mentioned are connected with the main vein at or near the Cunningham stope, and doubtless form a part of it. It is clear, from the testimony and maps or diagrams, that practically all the ore, north of the Silveropolis south end line extended, which has been referred to in evidence, was either in or connected with the back fissure, or was in the broken and crushed country in the vicinity of the junction of the dykes, and where the fork, which Mr. Akers says diverges to the northwest, passes through the dykes. The Betsy stope is admittedly in the back fissure, north of that end line, on the east side of the Finn dyke, and the great Klondyke stope is immediately west and to the south of the Betsy stope in the crushed country referred to. That the various ore deposits, including those stopes found immediately to the north and south of the main ore channel, were made by the mineral solutions rising through the main fissure, we entertain little doubt. This position is supported by the fact that, as one proceeds north or south from

the ore channel in that vicinity a comparatively short distance, the ore depositions cease. Nowhere in that ground, so far as shown, has ore in considerable quantities been found remote from and disconnected with the main ore channel. So in the same way may be accounted for and explained the splitting of the vein, and the westerly branch passing through the Finn dyke, which the appellant claims occurred between the 300 and 400 levels, and about the 80-foot level on the plane H-H. Whatever appearances of ore may exist there, they were doubtless caused by the dynamic disturbance in the formation of the fissure, the breaking through the dyke, and the ore depositing solutions or vapors; for nowhere else along the dyke, so far as appears from the evidence, has there been discovered a similar occurrence. It will be observed that the only place where ore in any considerable quantity and unmistakable vein matter are found in connection with the dykes is in the immediate vicinity of the ore channel where it passes through them. Yet, if the appellant's theory that the vein passes through the Finn dyke on its dip were well founded, we would expect to find evidences of it passing through it at other points along its strike. It seems perfectly intelligible that, when the mineral-bearing solutions ascended from the deep and circulated through the main fissure or series of fissures, they were, by pressure or other of nature's processes, forced through the crushed and shattered rock and loose brecciated material, and that by metasomatic action of the solutions the mineral was deposited as far as the rock or material was thus physically prepared for the passage of those solutions. The evidence shows that the rock, at the junction of the dykes and where the vein passed through them, was so prepared, and this accounts for the strong mineralization in that vicinity, and for large ore bodies, in places, like those of the Betsy and Klondyke stopes, leading out from the main fissure or ore channel.

The appellant contends, however, that the vein from the Cunningham stope to the Bradley-Consort line cannot be on its strike, because along the line U-T the vein is not coursing on a horizontal plane, but is descending at an angle of about 70° from the horizontal. Answering this contention, the respondent insists that the downward course of the ore from the Cunningham stope, in the direction of the line U-T, is due to faults, along the dykes or breaks, by which the country, on the hanging wall side of the Finn dyke, has been successively dropped and the vein thereby faulted. This leads to a consideration of one of the most interesting and significant geological features disclosed by the evidence, although frequent reference thereto has already been made throughout the discussion herein. We concur with witnesses in the criticism that the word "dyke," applied either to the Finn or

Coates occurrence, is not an appropriate term. It is an inappropriate name, applied to what might with propriety be termed a faulting fracture. Those occurrences are not intrusions of igneous rocks or matter between sedimentary beds, characteristic of dykes; but, according to the testimony, the fractures are filled with minute angular fragments of sedimentary bed rock—limestone and clay—brecciated material, in places, recemented with calcite. The term "dyke," however, having been employed in the record and briefs, has been and will be retained herein for convenience in referring to either of the fractures.

The Finn dyke has a course N. about 15° to 20° E., and the appellant claims the foot wall of the dyke is coincident with the hanging wall of the vein in controversy; but, as we have seen, no vein has been established along the dyke, except the back fissure, which seems to fade out near the 1,100-foot line. The Coates dyke courses nearly north and south with a dip almost vertical—a little inclined to the west. The Finn has a dip to the west of 80° to 85° from the horizontal, and is irregular in width, ranging from 15 to 40 or 50 feet, and where it unites with the Coates dyke the lime breccia is probably 120 to 125 feet wide. On the different levels the two dykes are close together. Their junction is practically vertically under the south end line of the Silverpolls claim, although it sometimes varies to 100 feet to the south. At or near this junction, practically on the line T-U, the vein and ore, as we have seen, pass, the respondent claims on the strike, the appellant on the dip, through the dykes. The Finn dyke marks the boundary between two great masses or beds of fissured lime rocks—vast geological blocks. The indications disclosed by the evidence are that it has grown wider with successive movements, through succeeding ages, and that it is confined to the limestone. There appears to be nothing to indicate that it extends deeper into the earth than the limestone, if so deep; there being no indication of disruption or expansive action of vapors or of corroding solutions resulting from volcanic action, except in the locality where the vein passes through it. In places the particles composing the filling of the fracture are recemented, and in others the material is crushed and loose, especially so at and in the vicinity of the junction, and where the vein penetrates the breaks. Except where the ore channel passes through them, the dykes are not mineralized. That they were originally formed premineral, and that there has been a faulting of the country along the Finn break, witnesses on both sides appear to agree. They also agree that there were subsequent movements which resulted in further crushing and grinding up the material of the dyke, and in either raising the foot wall country, along the course of the break, or dropping the hanging wall country. There

is a disagreement among the witnesses, however, as to whether the faulting occurred anterior or subsequent to the formation of the vein and ore bodies. In the opinions of the expert witnesses for the respondent the faulting occurred subsequent to the deposition of the mineral, and resulted in a dislocation and dropping of the ore bodies, on the west side of the Finn dyke, to a position down anywhere to 400 feet below that occupied before the faulting took place. While in the judgment of the witnesses for the defense the faulting was premineral, the appellant's leading experts admit, not only that subsequent to the formation of the dyke movements occurred along the break resulting in faults, but Mr. Akers says he would expect the faulting to be considerably over 50 and possibly several hundred feet; but whether the throw was up or down, in his opinion, could not be determined. There are indications disclosed by the testimony, however, that strongly tend to show that the throw, or possibly a succession of throws, were down and not up. Such are the indications near the southerly end of the drift, running south along the dyke on the 400 level, at station 401i, where Mr. Tyler says ore, slight in quantity, was found in broken and shattered material, and had the appearance of having been dragged down from the ore bodies above. Dr. Talmage says low-grade ore occurred at that station on the surface of fractured pieces of limestone, and that there is evidence of movement producing typical slickensides. Similar conditions appear on the 500 level between stations 622 and 622b, and on the 700 level, where Mr. Tyler says the ore had not gotten entirely through the dyke, was in a broken condition, and indicated that it was mixed up with the dyke material, showing more or less translation. There is also testimony showing that, where the vein went through the dyke, the ore was crushed, loose, oxidized, and rarely recemented. Evidently the dyke grew wider, and its material became more crushed and powdered, with each successive movement of the mountain masses along the original line of fracture, and the conditions shown by the evidence to exist fairly indicate, not only that faulting occurred along the line of break since the deposition of mineral, but that the hanging wall side, including the ore bodies west of the dyke, was successively dropped to a greater or less extent, thereby changing the relative elevations of the ore bodies existing east and west of the dykes. The difference in the elevations of the ore bodies would likewise be largely accounted for if the foot wall country was raised, and the hanging wall country not depressed. The importance of this most significant geological feature in the consideration of these vexed questions is thus apparent; for, if the difference in the elevation of the ore bodies be accounted for by a depression of the hanging wall or raising of the foot wall country,

and we think the conclusion that one or the other of these throws occurred is but a logical and reasonable deduction from the indications in evidence, then it is too clear for argument that no dip of a vein has been shown which could possibly extend from an apex in Mammoth ground, north of the Silveropolis south end line extended, and intercept the ore bodies in dispute.

The position that faulting occurred after the deposition of ore, and that the vein was faulted, obscured, practically lost, by the movements along the dyke, is also in harmony with the conduct of the appellant during all the years of operation in the mine; for while, many years ago, the Cunningham stope was worked down to the 300 and the Betsy down to the 500 level, both stopes lying immediately east of the Finn break, the great Klondyke stope, on the 400 level, lying immediately west of the Betsy stope but a little farther south, in the crushed material of the breaks, was not disturbed until a comparatively short time before the commencement of this litigation. It is true, several of appellant's witnesses say there is continuous ore from the Betsy and Cunningham stopes to the Klondyke, and that the latter stope was not worked at the time of operations in the former stopes because the ground was considered dangerous; but is that the real reason why the operations were not extended to that vast ore body? Was not the ground, when that ore body was in fact discovered and the ore extracted, just as dangerous as during all the years from the time of the operations in the Cunningham and Betsy stopes? Is it not a reasonable inference, from the circumstances, that the faulting of the country along the Finn dyke and the consequent dislocation of the vein, had so obscured the ore that it never, during that long period of time from the operations in the other stopes until after the discovery of the ore to the west by the respondent, occurred to the operators of the Mammoth mine or to its experienced miners that ore existed west of the dyke? It does seem unreasonable that an intelligent management would permit this vast deposit of ore to remain unexplored, untouched for so many years, the very time during which the shaft was being pushed to the depths far below, and the mountain masses, on various levels, punctured with drifts and cross-cuts in search for ore, if it had known or believed that ore existed west of the dyke. We are impelled to the conclusion that, with all the developments, the Mammoth operators entertained no thought that ore existed in that vicinity until after the discoveries made by the respondent within its territory. Nor is it shown that before such discovery it ever occurred to the management of the appellant, or to any of its agents, that an apex and vein existed in lot 38, north of the Cunningham stope or of the Silveropolis south end line extended, which, or any part of which,

on its dip, passed through the dyke and continued down in ore west of the break.

To further show the improbability of the existence of such a vein, take the circumstance that the two lines, the line of apex, claimed by the appellant to continue parallel with the side lines of lot 38, or N. about 18° E., and the line of stoping, from the Silveropolis south end line extended, running N. 10° to 15° W., which, proceeding north, are constantly diverging; could it be claimed, with any degree of plausibility, that, after a point had been reached where the divergence had resulted in a distance of a mile or more between the lines, that a vein extending from that line of apex, on its dip, yet intercepted any ore that might exist, at such northern point, on the Grand Central 400, or 500, or lower levels extended? Surely there is not, in this voluminous record, even in the most extravagant statements of witnesses as to what constitutes a vein, any testimony showing a dip of any vein, or even of a bedding plane, which would make such a thing possible. Outside of this circumstance and the fact that all the prominent geological features, as we have seen, point with entire unanimity to the location of the Mammoth vein, on its strike, as being practically as represented by the stoping along the lines W-U, U-T, and T-S, and indicating that the vein passed through the dykes on its strike and not on its dip, there is yet another circumstance tending to show that such is the location and strike of the vein; and that is, that on the Mammoth side the production of ore has been nearly all from the vein south of the north end of the Betsy stope, having yielded in dividends more than \$1,000,000 and for expenses about four-fifths of that sum, while on the Grand Central side the ores marketed amounted to more than \$1,800,000 and those developed at the time of this trial and yet remaining in the mine to \$600,000, showing by comparison that the vein retains its great producing character throughout its northerly and northwesterly course for a distance of nearly half a mile. Thus, upon careful review and extended discussion of the testimony relating to the underground workings and explorations, and upon deliberate consideration of the main geological features disclosed by the evidence, it seems clear that this great ore channel was formed by the mineral solutions from the deep coursing through a fissure or series of fissures, deflected from a northerly course at the Cunningham stope to a northwesterly course, and then again, near the Bradley-Consort line, to a more northerly course; that the channel and deposition of ore along its entire length resulted from the same causes and the same processes of nature; that the vein passed through the dykes on its strike and was faulted; and that the ore bodies in controversy are on its strike, and not on its dip, and belong to the owners of the Silveropolis and Consort mining claims. It follows in-

evitably that the findings of the court were but proper deductions from the proof, and, being sustained by the great weight of the evidence respecting both the surface and underground workings, this judgment must be affirmed, unless there was error in the refusal to permit the filing of the proposed amendment to the counterclaim, and the proposed original counterclaim, in each of which it was alleged that the vein departed from lot 38 as found by the court, but that it passed into and continued at its apex and on its strike in the Golden King and Bradley mining claims.

In passing to this branch of the case, it may be observed that the offer to amend the pleadings was occasioned by the action of the trial judge in filing a written opinion in the cause, aside from the findings, wherein, among other things, he said: "My conclusion is that there are two veins in the Mammoth ground, one running from the shaft out north, and extending as far as the 1,700-foot line at least, and the other to the east. North of the extended south end line of the Silveropolis these two lodes come so close together that the ores from one have mingled with the ore from the other and destroyed the line of demarkation between them above the 80-foot level, so that the top of the back vein, apexing in the Bradley and Golden King, as is practically conceded, is the top of the front vein. But the front vein, as I have already stated, extends no farther north than the station marked 427 on the map of the 400-foot level." It would seem almost needless to say that, if this conclusion of the judge and some of the views expressed in his opinion were sustained by the evidence, his refusal to permit the amendment to be filed would unquestionably have been a gross abuse of discretion and reversible error; for, with a judgment in this suit in favor of the respondent, it would be idle to say, as was said in his opinion, that "in a proper proceeding the defendant should be decreed to be the owner of the ore bodies in dispute under the Silveropolis and Consort mining claims." This suit was itself "a proper proceeding" in which to determine and adjust the rights of the respective parties to those ore bodies, and a final judgment herein would undoubtedly be a bar to another suit between the same parties involving the same subject-matter. Can it be doubted that the affirmance of this judgment will bar another action involving the same controversy between these parties? Certainly this decision will become the law of the case, and will prevent further litigation as to any matter adjudicated herein. If, however, there were any evidence to support or justify the expressions of the judge—evidence to the effect that there were two veins, one of which apexed in the Golden King and Bradley claims, and on its dip included the ore bodies in dispute—then the amendment should have been allowed, not because of his opinion, but because of

variance between the pleadings and the proof. But, as may be seen from the review and discussion of the evidence on the other branch of the case, there is no proof whatever of such a state of things. Nor did the appellant at any time, during either one of the long trials, claim the existence of such a vein in those claims; nor did the skill of the men of science, or of the experienced miners who testified, after critical examination of the 400 and of the various levels, detect a vein of that character. Under the proof, a vein apexing in the Golden King and Bradley claims and embracing the ore bodies in dispute can only exist in imagination, and the claim of the judge that it did in fact exist was but the result of an erroneous and mistaken view of the underground formations—of the geological facts in evidence. His written opinion, however, is not properly a part of the record, and affords no evidence that the recitals therein contained are true, or warranted by the proof. A trial judge may in any case give a written opinion or not, as he chooses; but this court is not bound by any reasons he may assign for his action or his judgment. Nor is his act in delivering such an opinion one upon which error can be predicated, although counsel may cite the document in argument. Nor can such opinion qualify or limit the findings of fact or decision. *White v. Merrill*, 82 Cal. 14, 22 Pac. 1129; *In re Kingsley*, 93 Cal. 576, 29 Pac. 244; *Pearson v. G. N. Ry. (Minn.)* 95 N. W. 1113.

Nor can the opinion thus filed herein be made the sole basis for amendment of the pleadings, where, as here, there is no variance between the pleadings and proof, and no offer of further proof under the proposed amendment. That there was no variance is clear, because the contention on each side was fairly within the scope of the pleadings, and all the evidence was introduced in support of one or the other of these contentions, and corresponds with the allegations in the pleadings, and because the facts in evidence show no apex or vein in the Golden King and Bradley such as is claimed by the judge to exist. Not only was there no offer of further proof, but counsel for appellant in their brief insist there was no further evidence to present, that the "evidence as to the physical facts on both sides was complete," and that "every level, every drift, every opening, every ore occurrence, had been gone into in the greatest detail." They also say: "It appears from the record that the trial occupied as much as 70 days; that the sole question was as to where the apex of the vein was, and that all the evidence as to that question was offered, and that the investigation was full and complete; and the plaintiff was informed by defendant, before any evidence was offered, that if the proof should be that the apex was in the Jenkins, the Golden King, and the Bradley, the defendant would ask the court for leave

to amend the complaint to make it conform to the proofs. It is apparent from all the evidence that the defendant on the trial inquired and investigated as fully and as thoroughly, by all legitimate means, where the apex of the vein in dispute was, as it would have done had the apex of the vein been alleged in defendant's counterclaim to be in the Golden King and Bradley claims; and it cannot be urged, in view of the evidence, that the plaintiff should have been surprised by the amendment, had leave to file it been granted." It is thus apparent that the proposed amendment and original counterclaim were not offered for the purpose of introducing further proof, nor to conform to the proof as it was understood to be by the parties, but for the manifest purpose of having the pleadings conform to the opinion of the judge, regardless of what the proof in fact showed; and this, after the court had rendered its decision. If, under the circumstances, the court had permitted the filing of the proffered amendment and original counterclaim, its action would have been wholly unwarranted and a palpable abuse of discretion. If any one could know whether there was a vein in the Golden King and Bradley, extending north to station 427 of the 400 level, the defendant, after 30 years of operations and the large amount of work done preparatory for those protracted trials, ought surely to have been aware of it, and framed its pleadings accordingly. It could not take its stand upon an apex in lot 38, and, having trusted to fortune in that position, after trial and judgment, change to new ground, at the mere suggestion of a discovery of a vein by the trial judge, with no evidence to warrant the suggestion, no variance between the proof and pleadings, and no offer of further proof, under the proposed amendment and new pleadings, seek a recovery upon such change of base. We can perceive neither equity nor justice in such a proceeding, under such circumstances, where years of time have already been consumed in the litigation, and where the battle has already been fought twice over, necessarily at enormous expense to the litigants, with the ability of eminent counsel and of skilled and learned witnesses, and has resulted at the end of each trial in practically the same judgment. As to the formations and indications upon the surface and on the various levels, including the 400 level, as to the physical facts in evidence, the appellant had no more knowledge after than before the suggestion of the judge was made; and the formations, where this vein was claimed to be, all the prominent geological facts revealed by the evidence, the inferences drawn therefrom by the learned scientists and experts, and the long years of operations without discovery of such vein, render that opinion not only vulnerable, but show that it was not founded in fact, and, as we have seen, it cannot become the basis of amendment.

If such amendments, under such circumstances, were sanctioned, the ingenuity of counsel would not fail in pointing out, upon each successive defeat, a new avenue leading to another experiment, until the bankruptcy of the litigants would finally end the controversy. In *Warner v. Godfrey*, 186 U. S. 365, 22 Sup. Ct. 852, 46 L. Ed. 1203, the complainant filed his bill in equity to set aside a conveyance on the ground of actual fraud, and, being defeated, obtained leave to amend his bill, claiming the same relief, but upon the ground of constructive fraud. The trial court found that the charges of actual fraud were unfounded, and in this the appellate court of the District of Columbia concurred, but held that "from another point of view, made clear by the testimony, though it may not be specifically presented by the pleadings," acts constituting "legal or constructive fraud," the plaintiff was entitled to prevail, reversed the decree dismissing the bill, and directed the lower court to permit an amendment. The bill was amended accordingly, and a decree entered in favor of the plaintiff. Then on appeal to the Court of Appeals this decree was affirmed, and thereafter an appeal taken to the Supreme Court of the United States. That court held it error to permit the amendment, and, speaking through Mr. Justice White, said: "It would be highly inequitable to permit a litigant to press with the greatest pertinacity for years unfounded demands for specific and general relief, however much confidence he may have had in such charges, necessitating large expenditures by the defendants to make a proper defense thereto, and then, after the submission of a cause, when the grounds of relief actually asserted were found to be wholly without merit, to allow averments to be made by way of amendment, constituting a new and substantive ground of relief." 1 Ency. Pl. & Pr. 584-586; *Gubbins v. Laughtenschlager* (C. C.) 75 Fed. 615; *Metropolitan Nat. Bank v. St. L. Dispatch Co.* (C. C.) 88 Fed. 57; *Marshall v. Golden Fleece M. Co.*, 16 Nev. 156, 180; *Page v. Williams*, 54 Cal. 562; *Richard v. Hupp* (Cal.) 37 Pac. 920; *Chicago etc. Ry. Co., v. Third Nat. Bank*, 134 U. S. 276, 10 Sup. Ct. 550, 33 L. Ed. 900; *Shawyer v. Chamberlain*, 113 Iowa, 742, 84 N. W. 661, 86 Am. St. Rep. 411.

This suggestion of the trial judge, that there was a vein apexing in the Golden King and Bradley that embraced the disputed ore bodies, was a new theory in the case. So far as the record shows, during all the years the mine had been operated, such a vein had remained undiscovered. Nor had such a theory ever suggested itself to any of the eminent counsel or experts during either of the trials. The judge himself says that the conclusions which he has "deduced from the testimony differ widely from the views of both parties to the cause." He asserts that this vein exists and terminates in its course northward at station 427 of the 400 level, and that the ore bodies underlying the Silveropolis and

Consort mining claims south of the plane drawn through station 427, parallel to the Silveropolis south end line, are within such vein. Now, if that plane be extended westerly across those claims, it will cut an ore body or ore channel which, on the 700 and 800 levels, as has before been shown, is continuous for more than 1,300 feet, and then, if this vein terminates at station 427, to what vein, it may be asked, are we to refer the portion of that ore channel which is north of where it is cut by that plane? To what vein does the great Butterfly stope belong? The answer is plain. It is simply an unfounded, impossible theory, under the evidence, and furnishes no excuse for an amendment to the pleadings. The ore lying north of this imaginary plane and the ore lying south thereof all is in the same vein, and that vein extends from the south end of lot 38, on its strike, northerly and northwesterly along the line of ore bodies to and beyond the Butterfly stope. This seems to be the only rational theory, and the fact is established by the evidence beyond reasonable controversy, and is in harmony with the conduct of the appellant for more than a quarter of a century; for if, after operations have been conducted by it and its predecessors for more than 30 years, and after all the preparations for these protracted trials, the appellant is yet so uncertain as to where the apex of the vein, through which it claims the ore bodies in dispute, is that at the mere suggestion of the trial judge, without proof to warrant the suggestion, it is willing to abandon its former position, that the apex is in lot 38, and change it to the Golden King and Bradley, showing that it is yet unable to say where, in fact, the apex is, then surely its theory would form an unsafe basis upon which to found a judgment. Upon careful examination of this subject, we entertain no doubt that the proffered amendment was made, as the record discloses, not to conform to the proof, but, as we have said, to conform to the views expressed by the judge in his written opinion; and the court, therefore, under the facts in evidence, properly refused to permit it to be filed. It is a wholesome rule that one shall not be permitted to litigate his case by piecemeal, and one necessary to the proper administration of justice. If a litigant occasionally suffers through its enforcement in a proper case, his misfortune must be attributed to his own want of foresight or lack of diligence. A court cannot set aside the well-established principles of the law, even where hardship may result from their application. A fortiori, will it refrain from doing so where the litigant receives apparently no injury. Such seems to be the case at bar. The appellant, having founded its claim to the ore bodies in its neighbor's ground upon reserved or extralateral rights, has received no injury by its failure to establish a vein in its own ground which would warrant a recovery, and therefore cannot complain of the judgment against it; for it still owns all of its

possessions. By this decree the appellant has been deprived of none of its property, although, if it had been successful, it would have acquired an immense fortune in its neighbor's land.

Not unmindful of the grave responsibility that attaches to the final decision of a case of such magnitude and importance, we have examined with commensurate caution the voluminous mass of evidence, in extended and deliberate discussion have announced our views upon the various questions involved, and have come to the inevitable conclusion that the appellant has shown no right of recovery under its counterclaim and no right to amend its pleadings.

The judgment must therefore be affirmed. It is affirmed, with costs.

MCCARTY and STRAUP, JJ., concur.

(30 Utah, 86)

LARKIN v. SALT AIR BEACH CO.

(Supreme Court of Utah. Dec. 26, 1905.)

1. JUDGES—TERMINATION OF TERM—BILL OF EXCEPTIONS—POWER TO SIGN—STATUTES—VALIDITY.

Rev. St. 1898, § 3290, providing that a judge may settle and sign a bill of exceptions after he ceases to be judge, is not in violation of Const. art. 8, § 5, limiting the term of office of district judges to four years.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, § 157.]

2. WITNESSES—CROSS-EXAMINATION—SCOPE.

Where, in an action against the operator of a bathing resort for the alleged wrongful death of a patron while bathing in the lake, a witness testified on direct examination that he was familiar with the lake, that he had been there hundreds of times in storms, had had some experience, and had not seen much danger, and did not know that his experience on the lake was very perilous, plaintiff was entitled to cross-examine him fully with reference to his prior statements and acts, tending to show that the lake to his knowledge was dangerous.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 942.]

3. SAME — IMPEACHMENT — CONTRADICTORY STATEMENTS.

Where, in an action for the death of a bather while bathing at defendant's resort, a witness for defendant, on cross-examination, denied having made statements contradictory to his testimony in chief, in which he denied that the lake was perilous, plaintiff was entitled to introduce evidence that the witness on former occasions had made statements contradictory to and inconsistent with his testimony with reference to the danger attending bathers at the resort; a proper foundation having been first laid on cross-examination for the introduction of such impeaching evidence.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1209.]

4. NEGLIGENCE—DANGEROUS PLACES—BATHING RESORTS—CARE REQUIRED.

Where defendant maintained a public bathing resort on a lake, to which persons were invited to bathe for an admission fee charged, defendant was bound, in the exercise of ordinary care, to keep some one on duty to supervise bathers and to immediately rescue any apparently in danger, and to make prompt and reasonable efforts to recover any of such patrons on being informed that they were missing or in danger.

5. SAME.

Where defendant maintained a bathing resort to which the public was invited for an admission fee, but took no steps to mark safety limits or to provide for the rescue of bathers, and, on being notified that intestate was in danger of drowning and was missing, sent no one in search or to his relief until several hours had elapsed, defendant was guilty of such negligence as warranted a recovery for decedent's death.

6. SAME—CONTRIBUTORY NEGLIGENCE.

Intestate and two companions started to bathe at defendant's resort, and while within the territory where people generally were invited to bathe, and without knowledge or notice of danger, floated into an unmarked dangerous place, from which deceased was unable to escape, both because of his inability to swim, the subsequent exhaustion of his companion, and the action of the wind, which suddenly arose and drove both deceased and his companion out into the lake and finally against an island, where deceased was drowned. *Held*, that deceased was not guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 296.]

Bartch, C. J., dissenting in part.

Appeal from District Court, Salt Lake County; S. S. Stewart, Judge.

Action by Anna M. Larkin against the Saltair Beach Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought by plaintiff, Anna M. Larkin, to recover damages for the death of her son, Roy E. Larkin, alleged to have been drowned in the waters of Great Salt Lake at the bathing resort of the defendant. The negligence complained of is that the defendant failed to provide suitable guards or life lines, or to establish or erect notices indicating the depth of the water in and about said beach, or to provide suitable and proper persons to superintend bathing in said waters, or to provide persons or appliances to rescue bathers from drowning when in danger, or to provide a person or persons and to have such person or persons present on behalf of said defendant to search for and recover any of its bathers, bathing in said waters, when in danger, and that in consequence thereof the said Roy E. Larkin was drowned while bathing in said waters. The defendant answered, denying the allegations of the plaintiff's complaint charging negligence, and alleged contributory negligence on the part of Roy E. Larkin.

The facts in the case, as disclosed by the evidence, are about as follows: During the summer season of 1903 the defendant conducted a bathing resort known as "Saltair Beach," situated on the east bank of the Great Salt Lake, a distance of about 14 miles from Salt Lake City. It is admitted the defendant generally invited the public to accept the facilities for bathing at said resort for hire. The resort consisted of a large pavilion and bathrooms erected on piling set out some distance in the lake. The bathrooms commenced at the pavilion, and extended about 700 feet in a northwesterly

direction into the lake. There was no water under the pavilion itself, and none for some distance out to the west. At the point where the bathhouses ended the water was about 6 inches deep, and the bathers were usually conveyed from this point by means of a raft operated by the defendant to a pulley frame or "float stand" about 1,000 feet out in the lake from the bathhouses, and at a point where the water was about $3\frac{1}{2}$ feet in depth, and 300 feet further out in the lake in a westerly and northwesterly direction the water was $5\frac{1}{2}$ feet deep. The plaintiff at the time of the suit had been a resident of Salt Lake City for seven years and was without means of support other than her own efforts and the assistance of her three children. The eldest, aged 20 years, was in poor health; Roy, the deceased, was 14 years old; and the youngest was 8 years of age. Roy was kind and obedient to his mother, and was a boy of good habits. For three years he had been employed, and had given his earnings or wages of \$5 per week to his mother. On July 23, 1903, plaintiff and deceased, in company with several of their friends, went to Saltair Beach, leaving Salt Lake City about 2:20 o'clock in the afternoon, and arriving at the resort at about 2:55 p. m. Soon after they reached defendant's pavilion the deceased and two other members of the party, Ross Wells and Miss Pomeroy, purchased bathing tickets, each paying therefor the sum of 25 cents. They thereupon went to the bathrooms provided by defendant and proceeded to bathe in the waters of defendant's resort. They waded out through the shallow water from the end of the pier or bathrooms parallel with the cable to the float stand, and when the party had reached that point they lay down in the water and proceeded to float, forming what the witnesses call a "chain." Ross Wells, who was a good swimmer and who had frequently bathed at defendant's resort, was in the lead, and supported deceased by his feet, which were placed under the arms of the latter. Miss Pomeroy, who was also able to swim and was familiar with the resort, followed with the feet of deceased under her arms. Roy Larkin, the deceased, could not swim, and had never been in bathing at defendant's resort before. There were about 50 or 60 people bathing in the vicinity of the float stand when the party arrived there. When the deceased and his associates commenced bathing a slight breeze was blowing, and they gradually floated out into the lake into deeper water. There were no notices indicating the depth of the water or other danger signals in the lake. Ross Wells testified that when about 185 feet northwest from the float stand (and within the radius of where the patrons of defendant's resort usually bathed), the wind had increased in velocity and was blowing off shore; that he tried to put his feet on the bottom or bed of the lake, but because of

the depth of the water was unable to do so; that he then suggested to his companions, the deceased and Miss Pomeroy, that they again form the chain and start back for the pavilion; that in attempting to reform the chain Miss Pomeroy was quite badly strangled, the water being heavily impregnated with salt, and soon after the deceased was struck in the face by a wave, and he also was partially strangled; that they finally reformed the chain, endeavored to return to the pavilion, but, in spite of their efforts, the high wind carried them out further into the lake; that when he (Wells) found they were losing ground he made signals, and called to two men who were bathing in that vicinity for help; that the parties (presumably not understanding the meaning of the signals or his call for help) waved their hands to him in reply, and paid no further attention to his cry of distress; that it was finally agreed that Miss Pomeroy should try and make her own way back to the pavilion and notify the people of the danger that Wells and Larkin were in. The evidence also shows that Miss Pomeroy, after a severe struggle of about an hour and a half, arrived at the pavilion in an exhausted condition. Larkin being unable to swim or float without assistance, Wells, with the double weight, was unable to make any headway toward the pavilion, and he and his companion were gradually carried out further into the lake by the wind, which was rising and increasing in velocity, making the water very rough. Darkness came on, and the lights at the pavilion went out, and the boys were carried by the wind and waves over in the vicinity of a large island in the lake known as "Antelope Island," which is about six miles from the pavilion at defendant's resort. Wells let himself down many times in attempts to reach the bottom, but because of the depth of the water was unable to do so. He continued to float, and keep himself and Larkin on the surface of the water, until about 3 or 4 o'clock that night, when he became exhausted, his lower limbs were seized with cramps, and he was unable to longer continue the struggle. He gave some instructions to Roy Larkin, whom he had been supporting all this time, respecting the position in which he, Larkin, should keep his body in order to float and drift with the waves, with the hope that Larkin might be driven ashore alive. At this juncture Wells gave up in despair, and Larkin drifted away from him. Immediately after they parted Wells touched bottom, showing that they, without realizing it, had drifted into shallow water. When Wells discovered that he could touch bottom he looked in the direction of Larkin, who had, in the meantime, turned over and was out of his reach. About this time Wells, so he testified, became unconscious, and when he regained consciousness the sun was shining and he was lying on the shore of Antelope Island with his feet

and legs extending into the water of the lake. He was soon thereafter found by a searching party and taken to the pavilion. A few days thereafter Roy Larkin was found dead on the shore of the same island, his body lying at the water's edge. Ross Wells testified that, while he did not anticipate danger by floating out into the lake, yet, had he known the depth of the water at the point where he discovered it was over his head, 185 feet away from the raft, he would not have gone there that day. There is but little, if any, conflict in the testimony respecting the foregoing facts.

The evidence introduced by the plaintiff tends to show that when Miss Pomeroy returned to the pavilion she at once informed plaintiff and the mother of Ross Wells of the danger the boys were in; that plaintiff, immediately upon receiving the information, dispatched a man with a boat to look for the boys; that the party thus sent went out to a gasoline launch, which was anchored about 300 or 400 feet out in the lake beyond the float stand, got upon it, and, not seeing the boys, returned to the pavilion; that in the meantime plaintiff and the mother of Ross Wells hunted up the manager of the resort and informed him of the situation the boys were in, as reported by Miss Pomeroy, and requested him to send a man with a boat to rescue them; that the manager stated to them that there were no seaworthy boats at the resort, and tried to persuade them that their boys were not in danger; that thereupon plaintiff returned to the pier, and when the party returned who had been sent to look for the boys she again sent him out to resume the search; that no attempt was made by the manager of defendant's resort to rescue Ross Wells and his companion, the deceased, until after dark, although they were repeatedly requested so to do by the plaintiff and the mother of Ross Wells. One F. D. Halm was called as a witness by plaintiff, and testified that he was at Saltair Beach on the day in question and learned through a relative of Mrs. Wells that the boys were lost, and that in pursuance of this information he went to the manager an hour or more before sundown and informed him of the danger they were in and asked the manager to give the matter some attention. The testimony of plaintiff's witnesses respecting the time the manager of the resort was informed of the danger the boys were in, and the alleged indifference and neglect on his part in sending out a searching party, was denied by the manager, who was called and testified on the part of defendant.

The issues of fact were submitted to a jury, who returned a verdict for plaintiff, and assessed her damages at \$6,500. To reverse the judgment entered on the verdict the defendant prosecutes this appeal.

Richards, Richards & Ferry, for appellant. C. S. Price and W. M. McCrea (W. H. King, of counsel), for respondent.

McCARTY, J., after stating the facts, delivered the opinion of the court.

Respondent has filed in this court a motion to strike from the files in the case the bill of exceptions. It is claimed that no proper bill of exceptions was ever settled, for the reason that the bill of exceptions was signed and settled on the 2d day of March, 1905, by Hon. Samuel W. Stewart, judge of the district court, before whom said cause was tried, and that on said 2d day of March, 1905, he was no longer judge of said district court, his term of office having expired before that date, and that therefore he was without authority to settle and sign the bill. Section 3290, Rev. St. Utah 1898, among other things, provides that: "A judge, referee, or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge, referee, or judicial officer." But counsel for respondent contend that this provision of the statutes is in contravention of section 5, art. 8, Const. Utah, which, so far as material here, provides that: "The term of office of the district judges shall be for four years" and that the effect of the provision of the statute referred to is to extend the judicial functions of a judge of the district court beyond the period of his constitutional term of office. This question has been before the courts of other states, and, while some of the decisions hold that a judge has no power to settle and sign a bill of exceptions after the expiration of his term of office, we think the weight of authority and the better reasoning is in favor of the doctrine which holds that a judge who has tried a case may settle and sign a bill of exceptions after he ceases to hold the office. The reason for the rule is apparent. The bill recites the exceptions taken and is a narrative of what occurred at the trial, and the judge who tries a case and is familiar with all of the proceedings is better able to settle a bill of exceptions and thereby preserve to the parties to the action their substantial rights than would be his successor, who might have no personal knowledge of what occurred at the trial. The Constitution of Colorado and that of Wyoming have provisions similar to that of our own state limiting the term of office of district judges to a specified number of years, and the courts of those states have held that a district judge may settle a bill of exceptions after his term of office expires in cases tried before him while holding the office. *Stirling v. Wagner*, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128, is a well-considered case, in which the authorities are reviewed at length, and, in the course of the opinion, the court, speaking through Chief Justice Groesbeck, observes: "The bill merely recites what occurred at the trial which is not of record, and is a mere narrative or historical account of those events. In some states, by consent of the parties, the clerk of the court may sign the bill, in others, where the judge is dead or disabled, two attorneys may allow and sign, while in others,

in case of grave disputes; the bill may be settled by the testimony of bystanders or members of the bar. * * * When allowing a bill, the court does not pronounce a judgment; it merely states that the exceptions taken in the bill actually occurred during the progress of the trial." The Supreme Court of Colorado, in the case of *Water Supply Co. v. Tenney* (Colo. Sup.) 40 Pac. 442, after referring to the conflict of authorities on this question and citing a number of decisions from the states which have adopted and adhere to the contrary rule, cite, with approval, the case of *Stirling v. Wagner*, supra, as well as decisions from other states which uphold and declare the same doctrine therein announced, say: "We think those authorities which recognize the power of the judge to settle a bill after he ceases to hold the office are grounded upon the better reason, and that the rule is more consonant with the liberal spirit of the code in observing the substantial rights of the parties to an action and disregarding technicalities. It saves expense to litigants, and avoids waste of time, yet preserves to the parties their substantial rights equally as well as does either of the methods." The settling and signing a bill of exceptions being purely a matter of procedure, we have no hesitancy in holding that the Legislature may, by statute, regulate such procedure, and especially in view of the fact that there is no constitutional provision which either limits or prohibits such legislation. Section 9, art. 8, Const. Utah, provides in part as follows: "From all final judgments of the district courts there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the court below, and under such regulations as may be provided by law." It will thus be seen that the Legislature is not only not prohibited from prescribing rules and regulations governing the appellate procedure in this state, but is expressly authorized to "provide by law" how appeals shall be taken. And the settlement of a bill of exceptions by a district judge in certain cases after the expiration of his term of office is one of the "regulations provided by law." The motion to strike the bill of exceptions from the files is therefore overruled.

David L. Davis, one of defendant's witnesses, on direct examination testified that he was, and had been for many years, familiar with the waters comprising defendant's resort; that "the first few hundred feet of the bottom of the lake is nearly dead flat, and then beyond that the pitch is a little more; a gradual pitch. There are no jump-offs; just about as gradual as you can make it. I never found any holes; never observed anything of that sort. It is impossible to have a hole remain long, for the sand would fill it up. That is my observation. * * * Have been in storms there hundreds of times. I have had some ex-

perience. I do not know that it has been very perilous. I have not seen much danger. It [the wind] does not produce any perceptible change upon the bottom of the lake." On cross-examination he testified in part as follows: "It is * * * possible that I said that Mrs. Larkin said, 'Is the lake dangerous?' and I said in reply to her, 'Yes, it is dangerous, and particularly in a storm.' Q. And then didn't you say that, 'It is a dangerous place there, because there are holes and bars, and the water gets deep in places, and there are no nettings or guard lines, and I have had time and again to bring in people with my gasoline launch, and the company hasn't as much as paid for a gallon of gasoline for me?' A. I don't remember saying a thing like that. I did not mention this part that I had always picked up bathers there because it was dangerous. Q. Did you not state at that time and place [referring to a conversation between witness and one M. P. Wells] that as a result, that is, of the sands shifting and bars being formed from one to two feet and a half in 24 hours, making holes, and by reason of the rough water and the waves, bathers at Saltair got into danger, and that you and your son had picked up between 13 and 15 persons? (This question was objected to as irrelevant, immaterial, and incompetent. Objection overruled.) A. No. I didn't make any statement just that way. Part of it would be like that. I will explain that, owing to the shifting of the current in and off-shore wind many bathers got into danger on account of being drifted out, and that my son had picked up many that were in apparent danger. The shifting sands would not be included in my statement." Witnesses were called and testified in rebuttal, over the objections of defendant, to having heard the witness Davis make the statements to which his attention was called by the foregoing examination and which were denied by him. The action of the court in overruling the objections interposed to this testimony is now assigned as error. Davis, having testified on his direct examination that he was familiar with the lake, that he had been there hundreds of times in storms, that he had had some experience, that he had not seen much danger, and did not know that it (his experience on the lake) was very perilous, plaintiff had a right to cross-examine him fully on this branch of the case. This testimony tended to show that the part of the lake comprising defendant's bathing resort was practically free from danger to its patrons who bathed therein, and was evidently introduced for that purpose, and also for the purpose of neutralizing and overcoming the effect, if any, produced on the minds of the jury by the evidence introduced by plaintiff which tended to show that at times, and under conditions as they existed at the lake when the unfortunate circumstance under consideration occurred, bathing

in the waters of the resort is dangerous, and extremely so to those who happen to get into deep water. We are therefore clearly of the opinion that, in view of the testimony given by this witness in his direct examination, the cross-examination referred to was not carried beyond the scope which the authorities uniformly hold may be taken in the cross-examination of witnesses generally. Nor do we think the court erred in permitting plaintiff to introduce evidence tending to show that the witness Davis had on former occasions made statements contradictory to and inconsistent with his testimony given at the trial, which statements he denied making; his attention on cross-examination first having been specifically invited to the time, place, and circumstance of each conversation in which it is claimed they were made. This testimony was admissible for the purpose of impeaching Davis. Counsel for appellant contend, however, that the questions did not relate wholly to matters of fact, but in part call for the conclusions of Davis, and were therefore incompetent, and could not properly be used as a basis to impeach him. By an examination of these questions and answers it will be seen that the matters covered by the questions which counsel claim are objectionable (that bathers got into danger, etc.) were answered by Davis in the affirmative. It was only those alleged statements of his respecting material facts in the case that he denied. As to these statements plaintiff was entitled to introduce proof, and because the questions asked for the purpose of impeachment referred to some statement not denied by Davis is not a ground for reversal.

At the conclusion of the evidence the defendant requested the court to instruct the jury to return a verdict in its favor. The refusal of the court to give this instruction is assigned as error. It is urged on behalf of appellant that it does not appear from the record that the death of Roy E. Larkin was due to any negligent act or omission of defendant. The undisputed evidence in this case shows that the bathing season at this resort is limited to about three months in each year and that during the year (1903) when Larkin was drowned 50,000 of the patrons of this resort went in bathing, and it is admitted that there were no notices placed in the lake indicating the depth of the water, nor signs of any kind to advise the bathers of the limits of the resort within which they could bathe with safety; neither did it keep at the resort a person with the necessary appliances to rescue bathers from drowning when in danger. In fact, the only supervision exercised by defendant over its patrons who bathed in its resort, as shown by the evidence of its general manager, J. E. Langford, was to invite and carry them out on the raft to "deep water." From that time on the bathers were left to shift for themselves, and, as stated, no means of res-

cue was provided by defendant, in case any of them, through lack of information, inadvertence, or otherwise, got into water beyond their depth, or a storm arose, or their situation was otherwise rendered perilous. And there is abundant evidence in the record which tends to show that an agent of the company had notice an hour or more before sunset of the peril that deceased and his companion, Ross Wells, were in, and that no effort was made by defendant to rescue the boys until about 9 o'clock that night. It is well settled that the owners of resorts to which people generally are expressly or by implication invited to come are legally bound to exercise ordinary care and prudence in the maintenance and management of such resorts to the end of making them reasonably safe for the visitors. And when the business is that of keeping or carrying on a bathing resort, the authorities hold that the proprietors or owners thereof are not only required to exercise that same degree of care and prudence with respect to keeping the premises in a reasonably safe condition, which the law imposes upon keepers of public resorts generally for the protection of their patrons, but the law imposes upon them the additional duty, when the character and conditions of the resort are such that because of deep water or the arising of sudden storms, or other causes, the bathers may get into danger, of having in attendance some suitable person with the necessary appliances to effect rescues, and save those who may meet with accident. Not only is it the duty of the owners of bathing resorts to be prepared to rescue those who may get into danger while in bathing, but it is their duty to act with promptness, and make every reasonable effort to search for, and, if possible, recover those who are known to be missing.

In the case of *Brotherton v. Manhattan Beach Imp. Co.*, 50 Neb. 214, 69 N. W. 757, the decedent, with a companion, was bathing in defendant's resort. The companion started to come in and discovered that Brotherton, decedent, was still in the water; thereupon he went back and looked for him among the bathers, but did not find him. He then went and notified the employees of defendant company of Brotherton's absence. No effort was made to recover Brotherton, and he was drowned. In the course of the opinion the court said: "We think it is a reasonable inference that persons of ordinary prudence, conducting a bathing resort frequented by 10,000 people a month, should, in the exercise of ordinary care, keep some one on duty to supervise bathers and rescue any apparently in danger; and, if not, that certainly it is a reasonable inference that persons so situated should, on ascertaining that a person last seen in the water is missing—without a moment delay—exert every effort to search for that person in the water, and not merely advise a youthful companion of the missing person to search on the land,

and coolly watch the result of such search. We think, in this aspect of the case, and in this only, the evidence presented an issue which should have been submitted to the jury, and for that reason the peremptory instruction was erroneous." In *Dinnihan v. Lake Ontario Beach Co.*, 8 App. Div. 509, 40 N. Y. Supp. 764, the decedent held a ticket entitling her to bathe in the waters of the lake adjacent to the beach. She was drowned in a deep pool near to a toboggan slide, constructed by defendant in the water. The court in that case held, that "the learned trial judge correctly instructed the jury that the defendant was bound to be active and exercise vigilance to keep the ground, whereon it invited its patrons to bathe, from becoming dangerous, that this duty was an active one, and that the defendant could not escape liability by showing simply that it did nothing to produce the hole. These instructions laid down the rule of law applicable to the liabilities of keepers of bathing beaches." 21 A. & E. Enc. Law (2d Ed.) 471, 472; *Thompson, Com. Law Neg.* §§ 994, 998; *Cooley on Torts*, § 606; *Boyce v. U. P. Ry. Co.*, 8 Utah, 353, 81 Pac. 450, 18 L. R. A. 509; *Hart v. Washington Park Club*, 157 Ill. 9, 41 N. E. 620, 29 L. R. A. 492, 48 Am. St. Rep. 298; *Richmond, etc., Ry. Co. v. Moore*, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258; *Thompson v. Street Ry. Co.*, 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323; *Sebeck v. Platdeutsche Volkfest Verlen*, 64 N. J. Law, 624, 46 Atl. 631, 50 L. R. A. 199, 81 Am. St. Rep. 512; *Conrad v. Clauve*, 93 Ind. 476, 47 Am. Rep. 388; *Peckett v. Bergen Beach Co.* (Sup.) 60 N. Y. Supp. 966; *Breeze v. Powers*, 80 Mich. 172, 45 N. W. 130; *Dunn v. Brown County Agr. Soc.*, 46 Ohio St. 93, 18 N. E. 496, 1 L. R. A. 754, 15 Am. St. Rep. 556; *Francis v. Cockrell*, 5 Law Rep. Q. B. 184.

Applying the foregoing principles of law to the facts in this case, we are not warranted in holding, as a matter of law, that the defendant was free from negligence. Neither are we prepared to say that the death of decedent was due to his own negligence. There is abundant evidence in the record to support a finding that when decedent and his companions first discovered they were in water beyond their depth, and the storm had overtaken them, they were about 185 feet from the float stand, and were entirely within the radius of territory in which the patrons of the resort usually bathed. Miss Pomeroy testified that, when she started to return to the pavilion to notify the people of the danger the boys were in, they were about 180 feet northwest of the float stand. F. A. Olson, a witness for the plaintiff, testified that he bathed in this resort quite frequently during the bathing season of 1903; that he walked and bathed around the float stand, and that about 75 yards to

the north, and the same distance to the west and northwest of this stand, he could not touch bottom; that the water at these points was over a person's head. J. E. Langford, the then general manager of the resort, who was called as a witness by defendant, testified that to his personal knowledge, the people, invitees of defendant company, bathed from 200 to 300 feet to the north and northeast from that point. He further stated, quoting his own language: "Some of them [referring to the bathers] bathed 1,000 feet west; some of them north and northeast. The company knew they were bathing there, and knew the depth of the water. * * * Three hundred feet from the pully frame west and northwest the depth of the water was 5½ feet, possibly 6." It is therefore conclusively shown that a point 185 feet in any direction from the float stand would be entirely within the territory of the resort where the people, men, women, and children, usually bathed with the knowledge and consent of the defendant company. It cannot be held that decedent was guilty of contributory negligence, so long as he and his companions remained within the territory to which they, and the people generally, were invited to bathe, unless they, with knowledge or notice of the danger, put themselves in a position of peril, which was not shown or attempted to be shown at the trial. The undisputed evidence shows that when decedent and his companions discovered they were in danger they made every effort in their power to return to the pavilion.

It is urged by appellant that the condition of the premises, such as the lay and character of the bed of the lake, the depth of the water, etc., as testified to by defendant's witnesses, demonstrated that the deceased and his companions must have been out into the lake far beyond the limits within which the patrons of the resort usually bathed. These, however, were questions of fact for the jury to determine, and the jury having found adversely to the defendant on these, as well as all other issues of fact in the case, the verdict cannot be disturbed, there being ample evidence in the record to support it. There are other errors assigned, but we think they are without merit, and therefore deem it unnecessary to discuss them.

We find no reversible error in the record. The judgment, is therefore affirmed, with costs.

STRAUP, J., concurs.

BARTCH, C. J. I concur in denying the motion to strike the bill of exceptions from the files; but, upon the grounds that the charge of the court was erroneous, misleading to the jury, and prejudicial to the defendant, and that certain opinion evidence was improperly admitted over the objection of the defense, I dissent from the affirmation of the judgment.

SNYDER v. PIKE.

(Supreme Court of Utah. Dec. 20, 1905.)

1. APPEAL—RULINGS IN FAVOR OF APPELLANT—REVIEW.

Where respondent has no cross-appeal and does not assign cross-assignments of error, the court on appeal cannot review a decision in favor of appellant.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3573-3580.]

2. VENUE — STATUTORY PROVISIONS — VALIDITY.

Rev. St. 1898, §§ 2928-2932, fixing the place of trial in civil actions, and section 2933, providing that, if the county in which the action is brought is not the proper county, it may be tried therein, unless defendant when he appears demands trial in the proper county, are not a violation of Const. art. 8, § 5, providing that all civil business arising in a county must be tried therein, unless a change of venue is taken.*

3. COURTS—DISTRICT COURTS—JURISDICTION.

The jurisdiction of the district court conferred by Const. art. 8, § 7, providing that the district court shall have original jurisdiction in all matters civil, is the power to pass on the subject-matter of the controversy without reference to whether it has jurisdiction of a particular case.†

4. MORTGAGES—FORECLOSURE—VENUE—JURISDICTION.

Under Rev. St. 1898, § 2928, providing that actions for the foreclosure of mortgages on real estate must be brought in the county where the same is situate, and section 2933, providing that, if the county in which the action is commenced is not the proper county for trial, the action may be tried therein, unless defendant at the time he appears and answers demands that the trial be had in the proper county, the district court has jurisdiction of a suit to foreclose a mortgage of real estate situate in another county, in the absence of a demand for a change of venue to the proper county.

5. VENUE—OBJECTIONS—WAIVER.

A defendant failing to avail himself of the provisions of Rev. St. 1898, § 2933, authorizing a defendant to demand that a cause commenced in a wrong county shall be transferred to the proper county, or otherwise failing to challenge the jurisdiction of the court on the ground that the suit was not brought in the proper county, waives the objection, and cannot attack the judgment collaterally.

Appeal from District Court, Emery County; Jacob Johnson, Judge.

Action by C. Beldin Snyder against W. R. Pike. From a judgment for plaintiff, defendant appeals. Reversed.

The record in this case presents substantially the following facts: The Copper Globe Mining Company, a corporation, was, in 1899, the owner of certain mining claims situate in Emery county. On September 29, 1899, it gave to W. R. Pike a mortgage upon said claims to secure a debt of \$2,000 evidenced by a promissory note of even date, due and payable to Pike six months thereafter at the First National Bank of Provo, Utah, in United States gold coin, with interest at the rate of 1 per cent. per month both

before and after judgment. The mortgage was duly recorded May 31, 1900. The Copper Globe Mining Company had its principal office and did its business at Provo, where its officers resided, and where all the business in connection with the note and mortgage was had and transacted. On October 15, 1900, Phillips and Childs obtained a judgment against the Copper Globe Mining Company in the district court of Emery county for the sum of \$200, interest, and costs. An execution was issued on the judgment in December, 1900, and the said mining claims of the Copper Globe Mining Company were levied upon and sold by the sheriff of Emery county on February 4, 1901, at which execution sale Phillips and Childs became the purchasers for \$261, and a certificate of sale of the mining claims mentioned was issued to them by the sheriff on the last-mentioned date. On April 18, 1901, Pike brought an action in the Fourth judicial district court of Utah county on his said note, and for foreclosure of his mortgage against the Copper Globe Mining Company. Phillips, Childs, and J. R. Wren & Co., a corporation, which was also a judgment creditor of the said mining company, were made defendants. Summons was personally served upon each of the defendants. J. R. Wren & Co. filed a general demurrer to the complaint, but afterwards withdrew it and consented that default might be taken against it, which was done. Phillips and Childs neither answered or otherwise pleaded to the complaint, and default of each was duly entered. On March 29, 1902, foreclosure proceedings on Pike's complaint were had before the Fourth judicial district court sitting at Provo, and the court made its findings and entered a decree directing a sale of the mortgaged premises for the payment of the indebtedness due Pike, which the court found to be \$3,214.60. In pursuance of the order of sale made by the court, the sheriff of Emery county, on May 14, 1902, sold said mining claims, at which sale Pike became the purchaser for the sum of \$3,305, being \$3.55 less than the aggregate amount of the judgment, interest, and costs. The sheriff, on the last-mentioned date, issued and delivered to Pike a certificate of sale of said mining claims, which was duly recorded. On November 16, 1901, Childs and Phillips conveyed by quitclaim deed said mining properties to Snyder, the plaintiff herein. On November 4, 1902, Snyder, for the purpose of redeeming said property from mortgage foreclosure sale, delivered to the sheriff a bank certificate of deposit, payable in gold coin, for the sum of \$3,504.33, on the Provo Commercial & Savings Bank at Provo City, Utah, and also made proof to the sheriff that he (Snyder) was a redemptioner and had the right to redeem. The sheriff accepted and received the bank certificate of deposit and gave Snyder a certificate of redemption. The last day on which redemption could be had from the mortgage fore-

*Gibbs v. Gibbs, 73 Pac. 641, 26 Utah, 382; Fields v. Dalsey Gold Min. Co., 73 Pac. 521, 26 Utah, 373; Sherman v. Droubay, 74 Pac. 348, 27 Utah, 47.

†White v. Railway Co., 71 Pac. 593, 26 Utah, 346; Fields v. Dalsey Gold Min. Co., 73 Pac. 521, 26 Utah, 373.

closure sale was November 14, 1902, and on the 14th or 15th day of that month Pike, at Castle Dale, in pursuance of the certificate of sale held by him, demanded of the sheriff the money or a sheriff's deed for said mining claims, as called for by the certificate of sale. The sheriff tendered Pike the bank certificate of deposit left with him by Snyder for redemption, but Pike refused to accept the certificate of deposit upon the ground that it was not legal tender, and informed the sheriff that, unless the amount required to be paid for redemption was paid in money, he would, on Monday following, which was the 16th or 17th day of November, demand a sheriff's deed. On the following Monday (November 16th or 17th) Pike demanded of the sheriff a deed, and the sheriff, not having anything but the bank certificate of deposit, which was again refused by Pike, and not being able to make a tender of money, executed and delivered to Pike a sheriff's deed to the mining claims in question, and returned the bank certificate of deposit to Snyder at Provo. On October 2, 1903, Snyder brought this action in the district court of Emery county to quiet title in himself to the mining claims in controversy. The case was tried and duly submitted, and the court found and adjudged, in substance and effect, that the tender of the bank certificate of deposit made by Snyder as redemptioner to redeem said mining claims was not a tender or payment of lawful money of the United States, and therefore not a redemption of the property. But the court further held and adjudged that the Fourth judicial district court did not have jurisdiction to foreclose the mortgage referred to because the mining claims were situate wholly within Emery county, and that all proceedings of the mortgage foreclosure were void, and that therefore the sheriff's deed delivered to Pike under and by virtue of said proceedings and order of sale was also void. The court further adjudged that Snyder was the owner and entitled to the possession of the mining claims in question, subject to Pike's mortgage lien. From that part of the judgment holding that the Fourth judicial district court was without jurisdiction to foreclose the mortgage, and that Snyder was the owner and entitled to the possession of the property in controversy, Pike has appealed to this court.

Powers & Marioneaux and Edward Pike, for appellant. M. M. Warner and D. D. Houtz, for respondent.

MCCARTY, J., after making the foregoing statement of the case, delivered the opinion of the court.

The two main or principal questions submitted to and determined by the lower court were: First, did the Fourth judicial district court, sitting at Provo, Utah county, have jurisdiction of the subject-matter

to foreclose Pike's mortgage? And, second, if so, did Snyder, as a redemptioner, make such a tender of payment of money as, under the law, operated as a redemption of the property in question from the mortgage foreclosure sale? The court found the issues involving the first proposition in favor of Snyder, and held that the district court sitting at Utah county was without jurisdiction; and the second point in the case was decided in favor of Pike, who has appealed. Snyder has no cross-appeal, nor has he cross-assignments of error; hence we cannot review the decision of the trial court on this question. And we are not prepared to say, even if the findings of the court on this point were properly before us for consideration, that the trial court erred in holding that the tender of payment by Snyder of the bank certificate of deposit was not such a tender of payment as the law requires. Therefore the only question presented by this appeal is: Did the trial court err in holding that the district court of Utah county was without jurisdiction to foreclose the Pike mortgage?

The sections of the Revised Statutes of Utah of 1896, relating to the fixing of the place of trial in civil actions, so far as material to the determination of the question involved, provide as follows: "Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial as provided in this Code. * * * For the foreclosure of all liens and mortgages on real property." Section 2928, c. 7, Code Civ. Proc. Sections 2929 to 2932, inclusive, provide where other kinds of actions not enumerated in section 2928 shall be tried; and section 2933 of the same chapter, which was in force at the time suit for the foreclosure of Pike's mortgage was commenced, but which has since been repealed, provided that: "If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein unless the defendant at the time he appears and answers or demurs files an affidavit of merits and demands in writing that the trial be had in the proper county." Respondent contends that under section 2928 suits for the foreclosure of mortgages can be brought only in the county where the mortgaged premises sought to be foreclosed are situated, and, as the mining claims in question are wholly within Emery county, the district court of Utah county exceeded its constitutional powers and acted without jurisdiction; and that the mortgage foreclosure sale of the mining claims was and is a nullity. Appellant, on the other hand, insists that section 2928 is in conflict with section 5, art. 8 of the Constitution, wherein it provides that "all civil and criminal business arising in any county must be tried in such county unless a change of venue be taken as provided by law." While the deci-

sions of this court construing and defining the meaning of this clause of the Constitution are not harmonious, it is sufficient to here state, without entering upon a discussion of the subject, that the more recent cases wherein the question was before this court hold the provisions of the statute fixing the place of trial in civil cases are not in conflict with said section of the Constitution. *Gibbs v. Gibbs*, 26 Utah, 382, 73 Pac. 641; *Fields v. Daisy Gold Min. Co.*, 26 Utah, 373, 73 Pac. 521; *Sherman v. Droubay*, 27 Utah, 47, 74 Pac. 348. And after a further consideration of this jurisdictional question, I fail to see any reason why the ultimate conclusion arrived at in those cases should be disturbed.

Appellant's next contention is that, conceding section 2928 to be valid, the district court of Utah county had original jurisdiction to foreclose the mortgage, and, if respondent desired to have the cause tried in Emery county, where the mortgaged premises are situated, it was incumbent upon him to file an affidavit of merits and demand in writing that the cause be transferred as provided by Section 2933, *supra*. Section 7, art. 8, of the Constitution, provides that "the district court shall have original jurisdiction in all matters civil and criminal not excepted in this Constitution and not prohibited by law." It must be conceded that under this provision of the Constitution the district court of Utah county had jurisdiction of the subject-matter of the action; that is, jurisdiction to hear and determine actions generally which are brought to foreclose mortgages on real property. For the term "subject-matter of the action" has a well-defined and understood meaning. As stated by appellant, in his brief "it is not whether the court has jurisdiction of the particular case, but as to whether it has jurisdiction of the class of cases to which the particular case belongs." This is not only in accord with the rule announced in the case of *White v. Railway Co.*, 25 Utah, 346, 71 Pac. 593, and *Fields v. Mining Co.*, *supra*, but is in harmony with the doctrine as declared by the authorities generally. Works, in his treatise on Jurisdiction, on page 333, says: "A court may have jurisdiction to pass upon title to real estate, or to foreclose mortgages generally. Therefore it has jurisdiction of such a subject-matter. And the sole question under the statutes we are considering is whether a court, having such jurisdiction, shall try the question of title, in the particular case out of the county where the land lies. The decisions are to the effect that the only question in such a case is as to the place where it shall be tried, and that this is a matter of personal privilege that may be waived." *Brown on Jurisdiction*, § 10, says: "The subject of the controversy does not relate to the particular case before the court, but whether the court has power to try an issue involving the same subject." In the case of *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 120, the court say: "Juris-

diction of the subject-matter is power to adjudicate concerning the general questions involved, and is not dependent upon the state of facts which may appear in the particular case arising, or which is claimed to have arisen, under the general question. One court has jurisdiction in criminal cases, another in civil cases; each in its sphere has jurisdiction of the subject-matter. Yet the facts and the acts of the party proceeded against may be the same in a civil as in a criminal case. * * * We conclude that jurisdiction of the subject-matter is the power lawfully conferred to deal with the general subject involved in the action." *Bailey on Jurisdiction*, § 4; 17 A. & E. Enc. Law (2d Ed.) 1060, and cases cited in note 4. *State ex. rel. Egan v. Wolever*, 127 Ind. 306, 26 N. E. 762; *McCoy v. Able*, 131 Ind. 419, 30 N. E. 528, 31 N. E. 453; *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431; *St. Louis, etc., Ry. Co. v. Lowder (Mo.)* 39 S. W. 799, 60 Am. St. Rep. 565. Section 2928, Rev. St. Utah 1898, referred to, provides where the jurisdiction thus conferred by the Constitution shall be exercised when the subject-matter of the action is the foreclosure of a mortgage on real property, and when read and construed with section 2933, which was in force at the time of the commencement of the foreclosure suit in question, leaves no doubt as to the jurisdiction of the district court of Utah county to hear and determine the cause; there being no demand on the part of the defendants, or either of them, to have the action transferred to the "proper county" as provided by said section 2933. In *Works on Jurisdiction*, p. 126, the author says: "Statutes usually provide specifically where all actions belonging to certain designated classes shall be brought. At common law, the venue must be laid in the proper county in local actions, or the court is without jurisdiction. But this rule has been materially modified in many, if not most, of the states, by statutory provisions to the effect that, where the action is brought in the wrong county, the defendant must, within a designated time, demand that the same be transferred to the proper county, or the court in which it is brought shall have jurisdiction." *House v. Lockwood*, 40 Hun, 532; *Fletcher v. Stowell (Colo.)* 28 Pac. 326; *West v. Walker*, 77 Wis. 557, 46 N. W. 819; *Walker v. Stroud (Tex. Sup.)* 6 S. W. 202.

Respondent cites and relies upon the case of *Sherman v. Droubay*, *supra*, in support of his contention that the district court of Utah county was without jurisdiction to foreclose the Pike mortgage. In that case, suit was commenced in Salt Lake county to foreclose a trust deed on real property situated in Tooele county, which trust deed was given to secure a note made payable in Salt Lake city and county. The defendant appeared and challenged the jurisdiction of the court, and, furthermore, section 2933, *supra*, had been repealed before the action was com-

menced. The case is therefore clearly distinguishable from the action brought to foreclose the Pike mortgage in two particulars. In the case of *Sherman v. Droubay*, the defendant appeared and challenged the jurisdiction of the court to try the case in Salt Lake county; in the case of *Pike v. Copper Globe Min. Co.*, neither the defendant company, nor Snyder's assignors, who were also made defendants, appeared and made any objections whatever to the jurisdiction of the court, or appealed from the judgment therein rendered, as was done in the case of *Sherman v. Droubay*; and without deciding what effect, if any, the repeal of section 2933 had on the question of jurisdiction or place of trial generally, it is sufficient to observe that the defendants in the foreclosure proceedings of the Pike mortgage, having failed to avail themselves of its provisions, or to otherwise challenge the jurisdiction of the court, waived it, and cannot now be permitted to successfully assail the judgment collaterally. The provisions of the Minnesota statute relating to the place of trial of civil actions are substantially the same as the statute of this state; and in the case of *Gill v. Bradley*, 21 Minn. 15, which was an action involving an interest in real estate which was situated in McLeod county, the action was brought in Hennepin county. The defendant demurred to the complaint, on the ground that the court had no jurisdiction of the subject of the action, and cited section 38 of the Minnesota statute (Gen. St. 1866, c. 66 [Gen. St. 1894, § 5182]), which is the same as section 2928 of our own statute. The court says: "This being an action for the determination of a right or interest in real estate, McLeod was the proper place of trial; but, by section 42 it is provided that, if the county designated for the place of trial in the complaint is not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expires, demands in writing that the trial be had in the proper county. * * * This provision shows two things: That the district court of the designated county has jurisdiction in a case like this at bar, unless a written demand for trial in the proper county is made before the time of answering expires." The Supreme Court of South Carolina, in *Trapier v. Waldo*, 16 S. C. 276, a case in which this same question was involved, said, in construing a statute of that state relating to the "place of trial," the provisions of which are almost identical with the sections of the statute under consideration: "It would seem that these regulations were prescribed exclusively for the benefit of the parties to the suit and that parties outside of the record have no rights in the matter, as cases of all kinds are allowed to be tried in any county by consent of the parties, or by the order of the court. In the case before us no demand in writing was made that the trial should be had in

Georgetown county [where the mortgaged premises were situated]. Indeed, all the defendants who were in the state resided in Charleston [county], and doubtless, it was more convenient for both clients and lawyers that the case should be there heard." The court, in that case, held that the county in which an action was brought had jurisdiction to try the case, no demand for a change of place of trial having been made—Citing *Marsh v. Lowry*, 26 Barb. 197; *Woodward v. Hanchett*, 52 Wis. 482, 9 N. W. 468.

I am of the opinion that the district court of Utah county had jurisdiction to foreclose the Pike mortgage, and that the trial court in this case erred in holding otherwise. In conclusion, I might add that the result arrived at in this case, namely, that the district court of Utah county had jurisdiction to foreclose the mortgage, is in accord with all the decisions of this court in which section 5, art. 8, Const., has heretofore been construed.

The judgment is reversed, with directions to the district court to set aside that portion of its findings and decree holding that the court was without jurisdiction and quieting the title to the mining claims in controversy in Snyder, and enter judgment in favor of W. R. Pike quieting and confirming the title in him as against Snyder. Costs to be taxed against respondent.

BARTCH, C. J., concurs in the result.
MORSE, District Judge, concurs.

KRUGER v. ST. JOE LUMBER CO. et al.
(Supreme Court of Idaho, Nov. 29, 1905. On Rehearing, Dec. 31, 1905.)

1. ACTIONS—JOINDER OF CAUSES.

Under the provisions of section 4169, Rev. St. 1887, the plaintiff may unite several causes of action in the same complaint, when such causes belong to one only of the classes enumerated in said section.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, §§ 378-547.]

2. SAME.

Such causes of action must affect all of the parties to the action.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Actions, § 511.]

3. PLEADING—SEPARATE CAUSES OF ACTION.

Each of said causes of action must be separately stated.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Pleading, § 113.]

4. SAME—SEVERAL DEFENDANTS.

Where several persons are made defendants, the complaint must contain allegations sufficient to charge them jointly.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; R. T. Morgan, Judge.

Action by Paul C. Kruger against the St. Joe Lumber Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Edwin McBee, for appellant. A. A. Crane, for respondents.

SULLIVAN, J. This is an appeal from a judgment in favor of the defendants, who are respondents here, dismissing an action brought to recover damages for injuries to the person and property of the appellant. An injunction was prayed for enjoining the respondents from trespassing upon certain lands of appellant described in the complaint, and from cutting and removing timber from said lands, and from using a private road of plaintiff, and a logging chute thereon, and from obstructing a boat landing on said land fronting on the Coeur d'Alene Lake. A demurrer to the complaint was sustained. The grounds of the demurrer were (1) that there was a defect and misjoinder of parties defendant; (2) that several causes of action against different individuals have been improperly joined; (3) that the complaint was ambiguous, unintelligible, and uncertain; (4) that the complaint did not state facts sufficient to constitute a cause of action. The plaintiff thereafter declined to amend, and stood on his complaint, and the court entered judgment dismissing said action. This appeal is from the judgment.

The complaint contains but one count, and the several causes of action attempted to be plead are not separately stated therein. Appellant seeks to recover damages as follows: (1) For stumpage value of logs cut on plaintiff's land, \$270; (2) for injury and damages to crops and private road way, \$20; (3) for injury and damage to plaintiff's land by tree tops left thereon, \$50; (4) for injury and damage to plaintiff by reason of an assault, \$250; (5) for injury and damage suffered by plaintiff resulting from blockading said landing, and preventing the plaintiff from using the same and from obtaining a market for his timber and logs, and by loss of time caused by reason of the obstruction of said landing, \$1,250; (6) for loss of time of plaintiff for one year by reason of the destruction of timber which could have been marketed, had the landing been unobstructed, \$350; (7) for loss of time to plaintiff resulting from inability to use said landing, \$150—and prays for a permanent injunction and for damages aggregating \$2,525, and for costs of suit. It will be observed that the appellant seeks in this action to recover damages for waste committed on appellant's land, damages for personal injuries, damage for injuries to his property, and damage for loss of time, etc.

The Legislature has provided what causes of action may be united in the same complaint by the provisions of section 4169, Rev. St. 1887, which section is as follows: "The plaintiff may unite several causes of action in the same complaint, where they all arise out of: (1) Contracts, express or implied; (2) claims to recover specific real property, with or without damages for the withhold-

ing thereof, or for waste committed thereon, and the rents and profits of the same; (3) claims to recover specific personal property, with or without damages for the withholding thereof; (4) claims against a trustee by virtue of a contract, or by operation of law; (5) injuries to character; (6) injuries to person; (7) injuries to property. The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to the character or to the person." The provisions of that section are too plain to require construction or interpretation. Under its provisions the plaintiff may unite several causes of action in the same complaint, where all of such causes belong to either one of the seven classes therein mentioned, and is prohibited from uniting in the same complaint causes of action arising under different classes or not coming within any one of said classes.

The several causes of action mentioned in the complaint come or fall within the second, sixth, and seventh classes mentioned in said section, to wit: (2) Claims for waste committed on real property; (6) injuries to person; (7) injuries to property. In the complaint before us (1) damages are demanded for an assault upon the appellant; (2) for injury to growing crops; (3) for trespass in cutting appellant's timber; (4) for injury to appellant's land; (5) for obstructing appellant's boat landing; (7) for loss of dead timber, and time, etc. Under the provisions of said section an action for waste on real property cannot be united with an action for damages for an assault; and an action for injuries to property cannot be united in the same complaint for damages for injuries to the person. Said section provides that causes of action united in the same complaint must all belong to only one of said seven classes, and must affect all of the parties to the action, and must be separately stated. As said causes of action belong to different classes, they cannot be united in the same complaint, and, as each of said causes of action are not stated separately, the complaint fails to comply with the requirements of said section. Whatever may be the liberality claimed for our present practice act, it certainly cannot be extended to such a misjoinder of causes of action as this complaint contains; and the allegations of the complaint fail to allege or show the relations of the defendants to each other in the commission of the acts complained of.

The judgment of the lower court is affirmed, with costs in favor of the respondents.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

On Rehearing.

PER CURIAM. Plaintiff has filed a petition for a rehearing in this case which we have examined with care, but we do not find that it contains any question not considered by the court in rendering the original opinion herein, and the petition will therefore be denied; and it is so ordered.

STATE v. MILES.

(Supreme Court of Idaho. Jan. 30, 1906.)

1. CRIMINAL LAW — APPEAL — DISMISSAL — SERVICE OF BRIEF AND MANUSCRIPT.

Where it is shown that the transcript and brief of appellant has not been served on the adverse party or his attorney, as required by the rules of this court, the appeal will be dismissed on motion.

2. SAME—SERVICE ON ATTORNEY GENERAL.

On an appeal by the defendant in a criminal case, the state is an adverse party, and the Attorney General of the state is the attorney for the state on said appeal, and the brief of appellant and transcript of the record must be served on him, as required by the rules of this court.

(Syllabus by the Court.)

Appeal from District Court, Bannock County; Alfred Budge, Judge.

Dan Miles was convicted of burglary, and appeals. Motion to dismiss for failure to serve copy of transcript and brief on Attorney General. Appeal dismissed.

William H. Puckett, for appellant. J. J. Guheen, Atty. Gen., and Edwin Snow, for the State. Hawley, Puckett & Hawley, amici curiæ.

SULLIVAN, J. The appellant in this case was convicted of the crime of burglary, and sentenced to a term of five years in the state penitentiary.

The Attorney General moved to dismiss the appeal (1) on the ground that no copy of the transcript of the record was ever served upon the respondent or its attorney and no written evidence of such service had been filed, as provided in paragraph 9 of rule 27 of the rules of this court (32 Pac. xi). As to that ground of said motion, paragraph 9 of rule 27 of the rules of this court provides that in all cases where an appeal is perfected transcripts of the record (showing the date of filing and the undertaking on appeal) must be served upon the adverse party and filed in this court within 60 days after the appeal is perfected, and written evidence of the service of the transcript upon the adverse party must be filed therewith. The appellant failed to comply with the provisions of that rule.

The second ground of the motion is that no copy of the transcript after the same had been printed was ever served upon the respondent or its attorney, as provided by paragraph 10 of rule 27 of said rules. Paragraph 10 of rule 27 provides that after the transcript is printed a copy thereof shall be

served upon the adverse party or his attorney. That rule has not been complied with by the appellant.

The third ground of the motion is that no copy of the brief of appellant has ever been served upon the respondent or its attorney as provided by paragraph 3 of rule 6 of said rules (32 Pac. vii). Paragraph 3 of rule 6 of this court provides that the brief of appellant, in both civil and criminal cases, must be served within 10 days after the filing of the transcript, which was not done in the case at bar.

In the case at bar a printed transcript was prepared by the attorney of the appellant, and it was the duty of the appellant or his counsel to serve both the transcript and his brief on the Attorney General at the time and in the manner required by the rules of this court. Paragraph 3 of rule 6 has been amended since this appeal was taken and requires the appellant in criminal cases to serve his brief both on the county attorney and the Attorney General. Counsel for defendants in criminal cases on taking an appeal should see to it that the rules of this court are complied with in regard to the service of both transcript and brief. The Attorney General is by law charged with the duty of representing the people of the state in cases in this court in which the state or the people is a party. Subdivision 1 of section 250, Rev. St. 1887, as amended by Laws of 1901, p. 163, provides: "It is the duty of the Attorney General: 1. To attend the Supreme Court and prosecute or defend all causes to which the state or any officer thereof, in his official capacity, is a party; and all causes to which any county may be a party, unless the interest of the county is adverse to the state or some officer thereof acting in his official capacity. * * *" It has been repeatedly held in other states under statutory provisions similar to the one above quoted that the Attorney General, or some one acting by his authority, is the sole and exclusive representative of the people in the Supreme Court. *People v. Pacheco*, 29 Cal. 210; *Stewart v. State*, 24 Ind. 142; *State v. Fleming*, 13 Iowa, 443; *People v. Swift*, 59 Mich. 529, 26 N. W. 699; *People v. Burt* (Mich.) 16 N. W. 378; *People v. Navarre*, 22 Mich. 1.

In a criminal case in which the defendant appeals, the state is the adverse party, and the Attorney General is the attorney for the state in all such appeals, and is charged with the duty of looking after and attending to the state's interests, and a copy of the transcript and brief of the appellant must be served on him, as required by the rules of this court. In this case there has been such an utter violation of the rules of this court in that regard that the motion to dismiss the appeal must be granted, and it is so ordered.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

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WHITE v. BANK OF HANFORD et al.
(Sac. 1,251.)

(Supreme Court of California. Jan. 27, 1906.)

1. VENDOR AND PURCHASER—CONTRACTS—OPTIONS.

An instrument reciting that plaintiff has an option to purchase certain land with all growing crops for \$10,200, to be paid \$250 cash and the balance on or before August 15, 1903, otherwise the cash payment was to be forfeited, and declaring that the \$250 was a part payment on the land, etc., constituted a mere option to purchase; there being no mutuality of obligation on the part of plaintiff.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 3723.]

2. ESCROWS—ACTION AGAINST DEPOSITORY.

Plaintiff had an option to purchase certain land for a price specified, to be paid on or before August 15, 1903. On July 28th plaintiff entered into a formal agreement with S. for the purchase of the land; he paying the earnest money which had been paid by plaintiff for the option and agreeing to pay the remainder on or before the date specified. On July 29th the grantors of the option deposited a deed with defendant bank in escrow, to be delivered on terms strictly complying with the option; but neither plaintiff nor S. ever tendered the balance of the purchase price of the land. *Held*, that plaintiff, being in default, was not entitled to enforce a delivery of the deed, either against the bank or the vendors.

Department 2. Appeal from Superior Court Kings County; M. L. Short, Judge.

Action by S. J. White against the Bank of Hanford and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

F. B. Brown and Dixon L. Phillips, for appellant. Frank McGowan and E. Westlake, for respondents.

HENSHAW, J. Defendants Johannsen and Battenfeldt entered into an agreement with plaintiff, White, in the following language: "Armona, July 24, 1903. This is to certify that Sandy J. White has an option of purchase of our half section of land, being the south half of section 29, township 19 south, of range 21, containing 320 acres, together with all the growing crops of every kind, for the sum of \$10,200 to be paid as follows, to wit: \$250 cash down, the balance of \$9,950 to be paid on or before August the 15th, 1903, and if said sum is not paid at said date then the above sum to be forfeited. We agree to pay S. J. White \$1,000 as his commission, and when sale is made said White is to buy one stack of hay at \$175, said \$175 to be taken out of said commission. We agree to give an abstract of title and also to give possession within thirty days from date if sale is made. Said \$250 is receipted as part payment upon said land, also one and one-half share of McCrary Side Ditch stock to go with said place when said sale is completed." That this agreement amounted to an option to purchase, and no more, the simple reading of it demonstrates. Two hundred and fifty dollars was the consideration for the option, which was to be forfeited in case

a purchase was not made, but which was to be applied as part of the purchase price in case of sale. Commission in the sum of \$1,000 was provided for, as in the ordinary real estate broker's contract. There was no mutuality of obligation, in that the agreement nowhere imposed any liability upon White to make the purchase. The rights of White under this contract are precisely as appear upon the face of it—the right to complete the purchase and compel the execution of a deed by Johannsen and Battenfeldt upon performance of the terms of the agreement, within the time limited by it. Upon the other hand, the correlative duties of Johannsen and Battenfeldt were no other than appear upon the face of the agreement—to make the deed upon demand of White and a tender by him within the time specified in the contract. *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Treat v. De Cella*, 41 Cal. 202; *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. 758; *Grant v. Ede*, 85 Cal. 418, 24 Pac. 890, 20 Am. St. Rep. 237.

Upon the 28th of July of the same year plaintiff, White, entered into a formal agreement with defendant W. A. Sage for the purchase and sale of the Johannsen and Battenfeldt land; Sage paying \$250, and agreeing to pay the remainder of the purchase price on or before August 15th, the same date fixed for performance in White's agreement with Johannsen and Battenfeldt. The contract provided that, in the event of Sage's failure to comply with the terms of his agreement, White was released from all obligations to convey the property, and Sage forfeited all right thereto. This agreement, as has been said, was entered into between Sage and White. It was not pretended that this contract was executed in the name of, or on behalf of, Johannsen and Battenfeldt. Johannsen and Battenfeldt, on the 29th of July, made their deed of grant, bargain, and sale to W. A. Sage and J. W. Sage, grantees, conveying the property covered by the agreement, and deposited the deed with the defendant the National Bank of Hanford, with written instructions as follows: "Herewith we hand you deed from ourselves to J. W. Sage and A. W. Sage of Humboldt County, California, for all of the south half of section 29, Tp. 19 S., range 21 E., Mt. D. B. & M., and a bill of sale of the live stock, and other personal property now on the premises. Upon the payment to you of the sum of \$14, 175.00 in cash and the assumption of the mortgage held by you of \$9,000.00 on or before the 15th day of August, 1903, and not otherwise, and the said cash payment to be made for our account, you are hereby authorized to deliver all such papers to S. J. White or order." It will be noticed by the terms of these instructions that the escrow papers were to be delivered to plaintiff, White, and it is not disputed that the terms of delivery prescribed by Johannsen and Battenfeldt in their written instructions

to the bank were strictly conformable to their agreement with White. At this point the proceedings seem to have lagged. Sage did not tender the money to White, nor demand the deed, and White, upon the other hand, never tendered the purchase price of the land to Johannsen and Battenfeldt, and is irremediably in default in that regard.

In his complaint plaintiff sets up all these matters, and conceives that he is entitled to the following relief, which he prays for: "That the defendant First National Bank of Hanford be enjoined and required to deliver unto said W. A. Sage the said bill of sale, the said deed, and the said release of mortgage, and that at the same time the said W. A. Sage be enjoined and required to pay unto the said First National Bank of Hanford the sum of \$28,550, together with interest thereon at the rate of 7 per cent. per annum, from the 15th day of August, 1903, until judgment and decree is duly had and rendered herein for and on behalf of this plaintiff, the said Bank of Hanford, the said L. L. Johannsen, and W. H. Battenfeldt; and the said First National Bank of Hanford, upon the payment of said last-mentioned sum do pay immediately out of said fund unto this plaintiff the sum of \$6,875, and interest thereon from the 15th day of August 1903, at the rate of 7 per cent. per annum, the said Bank of Hanford the sum of \$9,000, and the remainder unto said L. L. Johannsen and W. H. Battenfeldt." The court sustained a demurrer to this complaint, and plaintiff declining to amend, judgment passed for defendants, and this appeal is taken.

The mere statement of the case, as above given, proves the soundness of the court's ruling. Plaintiff being in default, under the terms of his argument with Johannsen and Battenfeldt, which agreement, as we have seen, gave him a mere option of purchase until August 15th, had no right or claim of any kind whatsoever against defendants Johannsen and Battenfeldt. As plaintiff had no right to compel a conveyance of the land by Johannsen and Battenfeldt, he had equally no right in equity to compel Sage to pay money for land to which Sage never could get title. If plaintiff has in any way been injured by any default of Sage (a matter which in no sense do we decide), there is open to him a legal action for damages.

The judgment appealed from is affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

148 Cal. 511

STEWART v. DOUGLASS et al.
(L. A. 1485.)

(Supreme Court of California. Jan. 19, 1906.)

1. PLEADING — SUSTAINING DEMURRER — AMENDMENT—DISCRETION.

When a demurrer is sustained to a complaint, it is within the discretion of the trial court either to allow an amended complaint

to be filed, or to give judgment forthwith in favor of the defendant.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 575-583.]

2. APPEAL — PLEADING — AMENDMENT — DISCRETION—REVIEW.

An order denying plaintiff's motion for leave to amend his complaint after the sustaining of a demurrer thereto will not be interfered with on appeal, unless an abuse of discretion is shown by the record.

3. PLEADING—AMENDMENT AS OF RIGHT.

The right to amend after the filing of a demurrer is absolute only when it is exercised before the demurrer is argued and submitted to the court for decision, as provided by Code Civ. Proc. § 472.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 656.]

4. TRUSTS — CONSTRUCTIVE TRUST — MINING CLAIMS—LOCATION.

Where plaintiff by his own labor and expense discovered a mine, but before making a location thereon under the mining laws disclosed the location to defendant in consideration of and reliance on an agreement or understanding between them that the mine, when located, should be their joint property, and defendant, in pursuance of such understanding and the agreement to locate the mine in the joint names of plaintiff and himself, subsequently located it in his own name and that of another without plaintiff's consent, such facts were sufficient to raise a resulting trust in favor of plaintiff with respect to a half interest in the mine.

5. SAME—ENFORCEMENT—PLEADING.

In an action to enforce an alleged resulting trust of a half interest in mining claims, the complaint alleged that in an interview plaintiff said that, if the claims were taken up, plaintiff would be entitled to a half interest therein, to which defendant agreed, and that plaintiff relied on such statements and representations, and in consequence of such reliance conducted defendant to the mines, showed him their situation, and in pursuance thereof defendant wrongfully located the mines in the name of himself and another, and refused to allow plaintiff any interest therein. Held, that the complaint sufficiently alleged that the disclosure of the mines was procured by means of a previous agreement, to which defendant was a party, to the effect that, if the mines were located, they should be so located that plaintiff should be entitled to a half interest therein.

Department 1. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by John Stewart against Nelson G. Douglass and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

E. Edgar Galbreth and Barstow & Variel, for appellant. Titus & Shaw, Valentine & Newby, Patterson Sprigg, and Henderson, Wright & Schoonover, for respondents.

SHAW, J. The court below sustained a demurrer to the fourth amended complaint, denied the application of the plaintiff to file a fifth amended complaint, and thereupon rendered judgment dismissing the action. From this judgment the plaintiff appeals.

It was not error for the court to refuse to allow further amendments to the complaint. When a demurrer is sustained to a complaint,

It is within the discretion of the court either to allow an amended complaint to be filed, or to give judgment forthwith in favor of the defendant. The appellate court will in every such case sustain the action of the court below, whatever course it may take, unless it is made to appear by the record that there has been an abuse of discretion. The plaintiff merely asked leave to file an amended complaint, and, so far as the record discloses, did not show that there were any allegations of fact omitted from the complaint to which the demurrer had been sustained, which, if inserted therein, would in any respect change its legal effect, nor make any statement whatever of the grounds or reasons for making the application for leave to amend. There was clearly no abuse of discretion shown. *Kleinclaue v. Dutard* (Cal. Sup.) 81 Pac. 516, 518. The right to amend after the filing of a demurrer is absolute only when it is exercised before the demurrer is argued and submitted to the court for decision. Code Civ. Proc. § 472.

The principal question in the case is the sufficiency of the facts stated in the fourth amended complaint to constitute a cause of action to enforce a resulting or constructive trust. The plaintiff, by his own exertions and explorations, discovered, upon vacant government land in the county of San Diego, a valuable mine of certain mineral known as "lepidolite," a variety of mica, and sent samples thereof to a glass manufacturing company in New Jersey to be tested. The defendant Douglass was the secretary of said company, and, so far as appears, a stranger to the plaintiff. He immediately wrote to plaintiff, saying that he expected to be in California in the then ensuing month of February, 1898, asking plaintiff to be silent about the discovery until he, Douglass, could get to California, and stating that there might be something to their mutual advantage in said mineral deposits. In April, 1898, Douglass called on plaintiff in Los Angeles, and plaintiff then informed him of the discovery and of the nature and extent, but not the location, of said deposits. Douglass said that, if the mineral proved valuable for glass manufacture, his company would build a glass plant in Los Angeles, but that "it would be better for plaintiff and Douglass if they would retain the ownership of the mines themselves and sell the mineral to the glass company." The circumstances which it is claimed are sufficient to create the trust in favor of plaintiff are then alleged as follows: "That said defendant was informed at said time, that he (plaintiff) had a stone location on a part of said mineral property, being the property known as the 'Mission' claim, but plaintiff stated to said defendant that, if the claims were taken up as mining claims, that he (plaintiff) would be entitled to an undivided half interest therein, and to this the defendant then agreed, and stated that he understood that, and that that was satisfactory to

him. The plaintiff believed the statements and representations made to him by said defendant Douglass, and relied on said statements and representations and had full confidence in said Douglass and his said representations, and in consequence of such reliance he (plaintiff), on April 6, 1898, told said defendant of, and went with him to, and showed to him, said defendant, said ledges or lodes of lepidolite mineral herein described, and it was then and there concluded, understood, and agreed by and between said defendant Douglass and plaintiff, in consideration of the premises, and in accordance therewith, and of the consent of plaintiff then given thereto, that said defendant Douglass would without unnecessary delay, locate, or cause to be located, both of said ledges or lodes of lepidolite mineral as mining locations or mining claims, in the names of plaintiff and said defendant, Douglass"—so that plaintiff would appear to be the owner of an undivided half thereof. It is further alleged that Douglass did locate the deposits as mining claims, but that, instead of locating them in their joint names as he agreed to do, he located one in his own name and the other in the name of the defendant Rosalind O. Butterfield, who it is averred, had full knowledge of the agreement. Defendants realized some \$30,000 from the proceeds of minerals mined therefrom, and upon due demand have refused to convey to plaintiff any interest in the mining claims, or to account for the moneys received. It is not alleged that the plaintiff furnished any money or paid any of the expenses of surveying the claims, marking the boundaries, making the locations, or of working the mines, nor that he in any way whatever assisted therein.

We are of the opinion that where one who has, by his own labor and at his own expense, discovered a mine, but has not made a location thereof under the mining laws, afterwards discloses to another the location of such mine, in consideration of, and in reliance upon, an agreement or understanding between them to the effect that the mine, when located, shall be the joint property of both, and where, in pursuance of such understanding, the further agreement is then made that the latter will locate the mine in their joint names, or for the benefit of both, so that each shall appear to be a half owner thereof, the subsequent location of such mine by the latter in the name of himself alone, without the consent of the discoverer, will raise a resulting trust in favor of the discoverer, with respect to the half interest which was to belong to him, under the agreement. The time and labor expended in making the discovery, coupled with the information given as to the situation of the mine, would be a sufficient consideration to support the agreement to make the location in their joint names, and to satisfy the demands of equity that there shall be an adequate and substantial consideration in order to

raise a resulting trust. The manner of the pleading in the present case, it must be admitted, is crude and informal, but we think in substance it meets the propositions we have just stated. It is not expressly alleged that the plaintiff was induced to show the location of the mine by the promise of the defendant that, if he would do so, the defendant would make the location for plaintiff's benefit. This, however, is substantially stated. The averment that the plaintiff said that, if the claims were taken up, the plaintiff would be entitled to a half interest therein, that defendant agreed to this, said he understood it, and that it was satisfactory to him, must be understood to mean that it was agreed that, if either party made the location, the plaintiff was to have a half interest in the claims. On the principle that the greater includes the less, this would be, in effect, an agreement by defendant that, if he located the mines, the plaintiff should have a half interest therein. The allegation following this, to the effect that the plaintiff "relied on said statements and representations," and "in consequence of such reliance" conducted the defendant to the mines and showed him their situation, may reasonably be understood, and, in view of the immediate context and other general averments, should be construed as the equivalent of an allegation that the disclosure thus made to the defendant was made by the plaintiff on the faith of, and in consequence of, the agreement previously stated to the effect that, if either party located it, plaintiff was to be a half owner therein. The words "statements and representations" are not technically the same as the word "agreement," but, in view of the connection in which the words appear and the previous and subsequent allegations of the complaint, we think it is clear that they were intended to refer to the previously alleged agreement, and that they should be so understood. The complaint, therefore, sufficiently shows that the disclosure was made and procured by means of the previous agreement, to which the defendant was a party, to the effect that, if he located the mines, they should be so located that the plaintiff should have a half interest therein. It is then alleged that at this juncture the parties made a formal agreement that the defendant should locate the mines in the names of both, and in such a manner that the plaintiff should appear of record to be a half owner thereof, but that, instead of doing so, he located them in the name of himself and another, and afterwards repudiated all interest of the plaintiff therein. Upon these facts a resulting trust would be created in favor of the plaintiff against the defendant Douglass and any third person taking with notice of plaintiff's rights, and such parties would be declared in equity to be trustees for the plaintiff, and would be compelled to hold such half interest in trust for him and for his benefit.

Upon the construction we have thus given

to the language of the complaint, it is sufficiently certain with respect to the terms of the trust and the description of the property. The consideration is substantial and adequate. It is not claimed that the complaint is defective in other respects. Notwithstanding the informal character of the pleading, we think the complaint states a cause of action to enforce a resulting trust and for an accounting of the proceeds of the property embraced in the trust, and that the demurrer should have been overruled.

The judgment is reversed.

We concur: ANGELLOTTI, J.; McFARLAND, J.

148 Cal. 521

McDOUGAL et al. v. FULLER et al. (L. A. 1,447).

(Supreme Court of California. Jan. 24, 1906.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—DEED OF TRUST—MODIFICATION BY COURT—BINDING EFFECT ON CREDITORS.

A complaint, in a suit by trustees in a deed for the benefit of creditors to settle their final accounts, which alleged that the conditions of the deed were duly modified by decree made in the superior court in a certain action, showed that the creditors were parties to such action; for the conditions of the deed could not be changed unless they were parties, and the modifications must bind them.

2. SAME — CLAIMS — PAYMENT — PROPORTIONAL SHARE OF ASSETS.

A deed to trustees for the benefit of creditors provided that all claims against the grantor not bearing interest by agreement should bear 7 per cent. interest from a specified date, and all claims bearing interest by agreement should continue to bear the interest agreed on. The principal of each claim was paid in full. The amount remaining was insufficient to pay all the accrued interest. *Held*, that each creditor was entitled to his share of the amount remaining, ascertained by determining the amount of interest due each under the agreement.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments for Benefit of Creditors, § 927.]

3. SAME — COMPENSATION OF TRUSTEES — AUTHORITY OF COURT—TERMS IN TRUST DEED—EFFECT.

A deed to trustees for the benefit of creditors authorized the trustees to sell the property on it being found impracticable to use it at a profit, and directed that the proceeds should be devoted "to the expenses of executing this trust, if any portion of the expenses may then remain unpaid, including reasonable counsel fees and also the sum of \$500 to the trustees collectively in full for all services," etc. The services rendered by the trustees were different in extent and character from the services contemplated at the execution of the deed. *Held*, that the provision for the compensation of the trustees did not prevent the court from allowing a greater compensation for their services.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments for Benefit of Creditors, §§ 1153, 1157.]

4. SAME—JUDGMENT—SETTLING ACCOUNTS OF TRUSTEES—FORM.

The court in settling the final accounts of trustees in a deed of trust for the benefit of grantors has authority to make an allowance

to the trustees for further expenses in complying with the judgment.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments for Benefit of Creditors, §§ 1153, 1157.]

5. SAME—SETTING ASIDE FINAL SETTLEMENT—ERROR—SUFFICIENCY.

An error in the settlement of the accounts of trustees in a deed for the benefit of creditors, whereby a creditor is deprived of less than \$12, is not sufficient to set aside the judgment, where the trustees had received and disbursed over \$500,000 among many creditors.

Department 1. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by William McDougal, as successor to James Spliers, deceased, and others, against Thomas S. Fuller and others. From a judgment for plaintiffs, defendant Thomas Johnson appeals. Affirmed.

Kendrick & Knott, for appellant. A. Heynemann, W. J. Hunsaker, and Graves, O'Melveny & Shankland, for respondents.

ANGELLOTTI, J. This action was brought by plaintiffs to obtain a decree settling their final accounts as trustees for the benefit of the creditors of the Golden Cross Mining & Milling Company, a corporation, awarding them compensation for their services, and distributing the trust property to those entitled thereto. The defendants are the many creditors of said corporation. The lower court made the desired decree, distributing the residue of property, consisting of \$37,785.73 in money, to the parties deemed entitled thereto. This is an appeal from the judgment upon the judgment roll; defendant Johnson being the sole appellant. Johnson filed his written appearance in the court below, and therein stated that he submitted "to the court, without further answer, all questions relating to the allowance of the account of the plaintiffs, all questions relating to the allowance of attorney's fees, and all questions relating to the compensation of the trustees." He denied none of the allegations of the complaint, and set up no new matter, resting entirely upon the allegations of the complaint. As to him, therefore, the only question is as to whether the complaint warrants the decree, so far as it affects him.

From the complaint the following facts substantially appear, viz.: On January 4 and 9, 1896, the corporation made deeds of its mining property to the trustees, in trust for the benefit of all its creditors, both those named in a schedule annexed thereto and such others as might be found to be creditors and whose claims were duly approved. Under the terms of the deeds of trust the trustees were to superintend the working of the property receive all money accruing from the same, and pay all expenses, and from the net proceeds make equal pro rata distributions to the claimants. By the terms of the deeds the trust was to continue for 15

months, unless the claims were paid in full before, or the profitable working of the mine found to be impracticable. If, at the end of 15 months, any part of the indebtedness remained unpaid, or sooner, if it was found impracticable to work the mine at a profit, the trustees were empowered to sell the property at public auction, after notice, and devote the proceeds, first, to "the expenses of executing this trust, if any portion of the expense may then remain unpaid, including reasonable counsel fees, and also, the sum of five hundred dollars to the trustees collectively, in full for all services"; second, the remaining indebtedness; and, third, the surplus to the grantor. It was provided that all claims against the corporation not bearing interest by agreement should bear interest from April 1, 1896, at the rate of 7 per cent. per annum, "and all claims and demands secured hereby that bear interest by agreement shall continue to bear the same rate of interest as may have been agreed upon by the grantor." Upon the execution of these deeds the trustees entered into possession and operation of said mining property, and continued therein until they were compelled to deliver such possession to a receiver appointed by the superior court of San Diego county, in an action brought by the Free Gold Mining Company against them and others; the names of the persons other than the trustees, who were parties defendant, not appearing in the action. It is alleged in the complaint herein "that numerous clauses, terms, conditions and provisions of the several trust deeds hereinbefore set forth were modified, superseded, and in whole or in part abrogated in and by those certain orders, judgments, or decrees, duly given and made in and by the superior court of the county of San Diego, state of California, in an action pending therein, entitled 'No. 10,215, Free Gold Mining Company, Plaintiff, v. James Spliers et al., Defendants,' of date November 28, 1897, and also the 18th day of April, 1898, of which the following are copies, respectively, to wit." Then follow copies of the stipulations and orders referred to.

This allegation must, of course, be here taken as admitted, and it must be assumed in support thereof that the creditors were parties defendants in that action; such assumption being the only one consistent with the allegation, and there being absolutely nothing in the record inconsistent therewith. Terms, conditions, and provisions of the trust deeds affecting the rights of the creditors among themselves and against the trustees could not be changed in an action to which the creditors were not parties, and the allegation that such terms, etc., were changed in certain respects by orders, etc., duly given and made in a certain proceeding, necessarily implies a proceeding in which such changes could be made, viz., one to which they were parties, where there is nothing to indicate that they were not parties. Appellant's as-

sumption that the creditors were not parties to the San Diego action finds absolutely no support in the complaint, upon which alone the questions here must be determined. So far, therefore, as the stipulations and orders purport to change the conditions and provisions of the trust deeds as to the relative rights of the creditors as against the trustees and among themselves, such stipulations and orders must here be taken as binding on the creditors. The exact nature of the San Diego action is not shown, except so far as it appears that it was effectual to prevent the further working of the mine by the trustees, and the receipt of any proceeds therefrom for the benefit of the creditors of their grantor, except to such extent as allowance might be made therefor by the courts in that action.

It is apparent that the trustees claimed in such action that the rights of such creditors were paramount to those of the plaintiff in that action, and that, as a result of their efforts, there was ordered to be paid by the receiver from the proceeds of the mine obtained by him such amounts as would, in the judgment of the court, pay the creditors in full; the amount of such total indebtedness being determined, for the purposes of that action, by the court in that action. Under the authorization of the superior court large amounts of money were paid by the receiver to the trustees, and by them distributed to the creditors, until, at the commencement of this action, the great bulk of the creditors had received the full face amounts of their claims, exclusive of interest, and the remainder had received 80 per cent. of their claims, exclusive of interest. Over \$500,000 had been received and disbursed by the trustees. At that time the trustees had on hand certain money and a claim against the receiver adjudged by the superior court in the hereinbefore referred to action to amount to \$19,800, which was subsequently paid, the two aggregating \$37,785.73, and this constituted all of the trust property.

Defendant Johnson was one of the creditors of the corporation, holding its note for \$7,000, dated June 18, 1894, bearing interest at the rate of 8 per cent. per annum from February 15, 1894, on which there had been paid, prior to the execution of the deed of trust, the sum of \$2,785, leaving a balance of \$4,215, bearing interest. The company was further indebted to him in the sum of \$75 on an open account. At the time of the commencement of this action he had been paid the full amount of his claims, exclusive of any interest. The complaint showed that the trustees had been involved in much expensive litigation presenting questions as to the validity of the trust, and their right to the property for the benefit of creditors. There can be no question that the showing made was sufficient to warrant such allowance of compensation as was made to them for their services, unless the court was limit-

ed to an aggregate of \$500 by the terms of the trust deed. The trial court, by its decree, adjudged that the \$37,785.73 remaining be distributed as follows, viz: (1) \$4,968 to the trustees as and for their compensation. (2) \$4,638.09 to the creditors who had received only 80 per cent. of their claim; the same being the remaining 20 per cent., exclusive of any interest. Compliance with this provision would satisfy every claim so far as principal is concerned, leaving due to each claimant the interest to which he was entitled. (3) The amount remaining being insufficient to pay the interest in full to each creditor, a sum equal to 14 per cent. of the original face amount of his claim, exclusive of interest, by way of interest thereon. (4) The balance, \$604.25, was allowed to plaintiffs to cover the further expenses and disbursements to be incurred in complying with the judgment.

Appellant insists that he was entitled to a larger portion of the amount available to creditors than was awarded to him; and in one respect his claim is justified by the record. The allowance of 14 per cent. of the principal of his claim put him, as far as interest was concerned, on the same footing with all the other creditors; while, under the terms of the trust deeds, he was entitled to a higher rate of interest than the great bulk of the creditors. We have already set forth the provision of the deeds in this regard, and as to this provision no change or modification was attempted to be made by the superior court in the Free Gold Mining Case. The allegations of the complaint show that all of the indebtedness, except \$43,546.40, which was less than one-sixth of the total indebtedness, bore not exceeding 7 per cent. interest, and a small portion only 6 per cent.; and that the \$43,546.40 bore interest at the rate of 8 per cent., and the remainder bore interest at 7 and 6 per cent., was recognized and stated in the stipulations and orders filed and made in such action. Whatever amount of assets was available for the payment of creditors, each creditor was entitled to the same proportion of the exact amount due him. This proportion could be ascertained only by determining the amount of interest due him under the terms of the agreement. The sum total of the amount due all the creditors would show the total remaining indebtedness, and this divided by the amount available for the creditors would give the amount of dividend. Each creditor would thus receive his proportionate share. This appears too plain to require further discussion. If, as to all the claims, interest commenced at the same date, the method followed in the lower court would have been correct if all the claims bore the same rate of interest, but, as they did not, it was in disregard of the terms of the agreement, and in view of the comparatively small number of creditors entitled to 8 per cent. interest.

operated to deprive such creditors of some portion of the assets to which they were entitled.

There is nothing in the contention that under the allegations of the complaint appellant was entitled to only 7 per cent. interest. A mere addition of the amounts of the claims specified as carrying 8 per cent. interest will demonstrate that the amount of the note was included in the \$43,546.40 alleged to bear interest at the rate of 8 per cent. per annum, and in the specific allegation as to the note it is declared to bear interest at the rate of 8 per cent. The allegation as to 7 per cent. manifestly has reference only to the balance due on the open account, \$75. This is the only respect in which appellant was not awarded the proper proportion of the available residue. Under the stipulations and orders in the San Diego action, interest on various claims was to be paid to the creditors only from November 1, 1897. On the record before us this must be held conclusive, so that, whatever may have been the original agreement as to interest, all creditors were thereby placed in the same position as to the time from which interest should be paid.

As to the other points made by appellant, we find no error in the action of the lower court. The services rendered by the trustees were entirely different, both in extent and character, from the services contemplated by the parties at the time of the execution of the trust deeds, and there is no such explicit provision in such deeds as would make the stipulation as to \$500 compensation conclusive under the changed conditions. Under the circumstances here appearing we have no doubt as to the power of a court of equity to grant such compensation as would be reasonable. We cannot say that the amount allowed was at all excessive.

In passing, it may be said that the complaint alleged that 5 per cent. upon the full amount accounted for by the trustees, which would give them more than five times the

amount allowed, would be a reasonable allowance, and expressly asked that the court fix the compensation, and the appellant nowhere objected to this being done, or contested the claim of plaintiffs in this respect. Nor was it improper for the court to make such allowance as was necessary for such further expenses and disbursements as might be incurred in closing the trust, by complying with the terms of the judgment. Such an allowance was a necessary incident of the settlement of the account and the closing of the trust, and was fully authorized by the allegations of the complaint. We cannot say, upon the record before us, that the allowance was excessive.

Appellant sets forth a long list of persons, firms, and corporations, to whom, as creditors, portions of the residue were ordered paid by the decree, who, he urges, were not specified in the statement of claimants contained in the complaint. Many of these apparently claimed under and as a part of the claim of one W. W. Stewart, receiver, for \$10,576.63, which claim, the complaint shows, was a part of the indebtedness secured. Others will be found specified in the list of claimants for the exact amount stated in the decree. We have examined the list, and find no warrant for holding that the complaint did not justify the inclusion of all the specified parties. There is no other point requiring notice.

The amount of which appellant was improperly deprived by reason of the failure to fix his dividend upon the basis of 8 per cent. interest, instead of 7 per cent. interest, could not exceed the sum of \$12. This amount is altogether too small to justify the reopening of the matter of the distribution of this fund among the very many creditors affected, and we are satisfied that under the circumstances the de minimis rule should be held to apply.

The judgment is affirmed.

We concur: SHAW, J.; McFARLAND, J.

(148 Cal. 437)

**COUNTY BANK OF SAN LUIS OBISPO
v. JACK. (L. A. 1,521.)**

(Supreme Court of California. Jan. 15, 1906.)

1. APPEAL—TIME OF TAKING.

Where a judgment was entered in the trial court on June 20, 1903, and the notice of appeal therefrom was not served and filed until December 23, 1903, the appeal was not taken within six months, and was ineffectual.

2. SAME — SUFFICIENCY OF COMPLAINT OR FINDINGS—REVIEW.

The sufficiency of the complaint or findings to support the judgment cannot be considered on plaintiff's appeal from an order denying its motion for a new trial, where the judgment was for the defendant after trial on the merits, and the defendant insists that the judgment should be affirmed because the complaint states no cause of action.

3. SAME—AMENDMENT.

An erroneous judgment in favor of defendant will not be sustained, on plaintiff's appeal from an order denying its motion for a new trial, because the complaint did not state a cause of action, where the alleged defect was merely technical, and could be remedied, if necessary, by amendment.

4. JUDGMENT — COLLATERAL ATTACK — SERVICE.

Where a judgment recited that it appeared to the court's satisfaction that defendants had been duly summoned, etc., and had made default, it would be presumed, on collateral attack, that proof of valid service was regularly made, apart from an alleged defective affidavit of service.

5. SAME.

Where there was no affirmative statement, in an affidavit of service on two defendants, that but one copy of the complaint and summons was delivered to the two, it would be presumed, on a collateral attack on a judgment reciting that proof of a valid service had been made, that a copy was properly delivered to each of the defendants.

6. TAXATION — TAX DEEDS — RECITALS — EVIDENCE.

Pol. Code, § 3897, provides that whenever the state has become the owner of any property sold for taxes, and the deed to the state has been filed with the controller, he may thereupon authorize the tax collector to sell the property, etc., and section 3898 declares that on receiving the amount of the sale the collector may execute a deed to the purchaser reciting the "facts necessary to authorize such sale and conveyance," which deed shall convey all the interest of the state in the property, and shall be prima facie evidence of all the facts recited therein. *Held*, that the requirement that the deed shall recite the facts necessary to authorize the sale does not authorize a recital of the chain of title or of the facts and proceedings by which the state obtained title to the property, and hence a deed from the state, reciting a conveyance of the land in question to the state, was insufficient to show the vesting of the title of the original owner in the state and a conveyance of such title to the state's grantee.

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the County Bank of San Luis Obispo against J. F. Jack. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, it appeals. *Reversed*.

Smith & Allen, for appellant. Stearns & Sweet, for respondent.

SHAW, J. The record purports to present appeals from the judgment and from the order denying the plaintiff's motion for a new trial. The judgment was entered in the court below on June 20, 1903, and the notice of appeal from the judgment was served and filed on December 23, 1903, which was more than six months after the entry of the judgment, and consequently after the time within which such appeal could be taken had expired. This court, therefore, has no jurisdiction of that appeal, and the questions arising upon the judgment roll cannot be considered. The objection of the respondent, that the complaint does not state facts sufficient to constitute a cause of action, is no answer to an appeal by the plaintiff from an order denying a motion for a new trial, and cannot be considered. *Hall v. Susskind*, 120 Cal. 559, 53 Pac. 46; *Tompkins v. Montgomery*, 123 Cal. 219, 55 Pac. 997; *Swift v. Occidental Co.*, 141 Cal. 165, 74 Pac. 700; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661. These cases all go to the point that the sufficiency of the complaint or findings to support the judgment cannot be considered upon an appeal by the defendant from an order denying his motion for a new trial. The principle, however, is equally applicable upon an appeal of the plaintiff from an order denying plaintiff's motion for a new trial, where the judgment below was for the defendant after a trial upon the merits, and the defendant claims that the judgment should be affirmed because the complaint states no cause of action. At all events, this is true in cases like the present, where the alleged defect in the complaint is merely technical, and can be remedied by an amendment, if necessary. *Pacific Paving Co. v. Vixelch*, 141 Cal. 4, 10, 74 Pac. 352.

The complaint states a cause of action to quiet title. Both parties claim title to the land in controversy under one Henry J. Symonds, the plaintiff by virtue of a foreclosure sale, the defendant by a sale for taxes to the state, and a subsequent sale from the state to the defendant. The defendant claims that the evidence of plaintiff was insufficient to show a valid transfer under the foreclosure sale; the objection thereto being that the judgment of foreclosure under which the plaintiff claims is void for lack of jurisdiction over the persons of the defendants. The mortgage was executed by Henry J. Symonds and his wife, Eliza Symonds. The foreclosure judgment was rendered on default. The first objection is that the proof of service of summons in the judgment roll in the action was made by affidavit, and that the affidavit is defective because no venue is stated therein. The other objection is that the proof does not show a legal service.

We are of the opinion that neither of the objections can be sustained upon the record, upon a collateral attack such as that here made upon the validity of the judgment. The affidavit is not the only evidence in

the record in regard to the service of summons. The judgment recites that, the court having heard all the evidence and proofs, it appeared therefrom to the satisfaction of the court "that Henry Symons and Eliza Symons, his wife, the above named defendants, have been duly and regularly summoned to answer unto the plaintiff's complaint herein, and that the default of each defendant for not appearing and answering unto plaintiff's complaint has been duly and regularly entered herein." The case comes within the rule that in all particulars wherein the record is silent or noncommittal the presumption is in favor of the validity and regularity of the action of the court; that unless the record shows affirmatively that something necessary to the jurisdiction of the court was not done, or that something which was required was done in a manner so irregular as to make it void, the presumption is that the thing concerning which the record does not speak, was properly done. Thus in *Drake v. Duvenick*, 45 Cal. 465, it is said: "The record fails to show by direct assertion that the copy of the summons was delivered to Dorland, but as it fails to show the contrary, and as the court must have found from the return or other evidence before it that it was so delivered—for upon that its jurisdiction depended, and it necessarily decided that it had jurisdiction, as the first point in the case—we think it one of the cases where presumption will now come to the aid of the judgment." With regard to the venue, the affidavit does not affirmatively show that the oath of the person making the affidavit of service was administered by the notary public in the county for which he was appointed as such notary, but neither does it show that it was not administered within that county. It is silent as to the place where the oath was taken. The court affirmatively finds from the evidence that the defendants were duly and regularly summoned. This it may have found either from evidence that the oath was administered in the proper county, or from other evidence of service which is not in the record. The alleged defect in the proof, as set forth in the affidavit, is that the affiant therein states that he personally served the summons on the defendants "by delivering to and leaving with said Henry Symons and Eliza Symons, said defendants, personally, a copy of said summons attached to a copy of the complaint in said action," and that this statement does not show that he delivered to each of the defendants a copy of the complaint and summons, but that, for aught that appears therefrom, he may have delivered but one copy to the two of them for their joint behoof, and that this latter form of service would not be a legal service. It must be admitted that the affidavit of service is ambiguous on this point. But here again there is no affirmative statement that but one copy was delivered to

the two defendants, and proof that each received a separate copy would not be contradictory of the affidavit, but would be in harmony therewith. The recital in the judgment and the presumption of law come to the aid of the specific proof appearing in the record, and it is to be presumed from the recital and from other evidence satisfactory to the court that it appeared that each of the defendants at the time of the service received a copy of the summons and complaint. *Sacramento Bank v. Montgomery*, 146 Cal. 751, 81 Pac. 138; *People v. Davis*, 143 Cal. 678, 77 Pac. 651; *Freeman on Judgments*, § 130. It may be added that in *Reavis v. Cowell*, 56 Cal. 588, it was held that a statement of the venue therein is not necessary to the validity of an affidavit. The citation of authority holding that the sufficiency of such proof of service may be inquired into upon a direct appeal from the judgment does not detract from the force of the principles above stated. They have no application to cases where the attack is collateral.

The next question is whether or not the deed to the defendant from the state of California is valid and sufficient to show the vesting of Symond's title in the defendant. There was no other evidence tending to show that the title of Symonds had been transferred to the defendant, no deed to the state having been introduced, and the sufficiency of this deed as evidence of such transfer must depend on the sufficiency of the recitals in the deed to prove a previous transfer of the title from Symonds to the state. The deed introduced did not purport to transfer title from Symonds to the state. Its purport and its only efficacy as a conveyance was to transfer the title of the state, such as it had, to the defendant. It contained a great many recitals of matters of fact, and among other things stated that in the year 1894 the land was the property of Symonds, and was regularly assessed to him for the taxes of that year, which he failed to pay when due; that the land was then advertised and sold for the payment of such taxes, then delinquent, on July 3, 1895, and was on that day in pursuance of said proceedings sold to the state of California for the non-payment of said taxes; and that afterwards, on August 1, 1901, in pursuance of said sale, there having been no redemption therefrom, the tax collector of the county duly executed a deed conveying to the state all the said property, which deed was duly recorded and thereupon filed in the office of the state controller. Further recitals were made to the effect that the controller thereafter authorized the tax collector of Kern county to sell said land at public auction, in the manner provided by law; that the tax collector had accordingly advertised it for sale, and, the defendant being the highest bidder, had sold it to him for the sum of \$12. The

contention of the respondent is that these recitals, contained in the deed from the tax collector to the defendant, are sufficient evidence of the previous sale of the interest of Symonds to the state at the sale for delinquent taxes, and of the deed of the tax collector to the state in pursuance thereof.

This claim cannot be sustained. The only authority for such a proposition is found in sections 3897 and 3898 of the Political Code. Section 3897 provides that whenever the state has become the owner of any property sold for taxes, and the deed to the state has been filed with the controller, as provided in section 3786, the controller may thereupon in writing authorize the tax collector of the county to sell the property or any part thereof, as he may deem advisable, at public auction, for cash after certain prescribed notice of the sale, and that the tax collector may thereupon sell the same in the manner prescribed. Section 3898 provides what shall be done with the money received at such sale, and thereupon proceeds as follows: "On receiving the amount bid, as prescribed by the preceding section, the tax collector must execute a deed to the purchaser, reciting the facts necessary to authorize such sale and conveyance, which deed shall convey all the interest of the state in and to such property, and shall be prima facie evidence of all the facts recited therein." This does not go so far as the respondent contends. It cannot be allowed to have the effect of operating as proof of the execution of a previous deed whereby the title of the taxpayer had been transferred from him to the state. It would be most extraordinary if it had been intended to provide that proof of such divestiture of title to property could be made by the mere ex parte recital of an executive officer set forth in a subsequent conveyance to which the owner was not a party. No such purpose was contemplated by the Legislature. The statement that the deed should be prima facie evidence of all facts recited therein cannot enlarge the office of such recitals so as to make them evidence of facts not required to be recited therein. The requirement that the deed shall recite the facts necessary to authorize the sale and conveyance refers only to the facts necessary to authorize the tax collector to sell the title of the state, the title which the state had previously acquired. It does not authorize or require the recital of the chain of title, or of the facts and proceedings whereby the state obtained title to the property. Evidence of those facts is provided for by section 3787, referring to the deed of the tax collector to the state when the tax sale is not redeemed. It declares such deed to be "conclusive evidence of the regularity of all other proceedings from the assessment by the assessor, inclusive, up to the execution of the deed." The recitals required by the provisions of section 3898, above quoted, refer

to the authorization of the sale by the controller, and the proceedings for the sale made in pursuance of such authority, and, perhaps, of the fact of the filing of the deed in the office of the controller, those being acts occurring subsequent to the vesting of title in the state, and the latter being necessary to give the controller authority to act in the matter. So far as it recites other matters, it is ineffectual as evidence, and the proof of the defendant was therefore not sufficient to show that he had acquired the title of the original owner, Symonds.

Other questions are presented and argued which are not necessary to the decision of this appeal, but which may arise upon a new trial in the lower court. As we cannot perceive with certainty precisely what questions will arise, nor the particular phase of them that may be presented, we cannot discuss them intelligently, and we therefore refrain from expressing any opinion thereon. The findings that the defendant is the owner of the land and that the plaintiff is not the owner thereof are not sustained by the evidence and the motion for a new trial should have been granted.

The order denying a new trial is reversed.

We concur: ANGELLOTTI, J.; McFARLAND, J.

148 Cal. 507

PEOPLE v. GRAY. (Cr. 1,289.)

(Supreme Court of California. Jan. 18, 1906.)

1. WITNESSES — IMPEACHMENT — INCONSISTENT STATEMENTS.

In homicide, where a witness testified to a vague description given by deceased of his assailant, evidence of the arrest of another person, prior to defendant's arrest, on the description given to the authorities by the witness, was not admissible to impeach the witness, in the absence of a showing that the person previously arrested did not answer the vague description testified to by the witness as well as did defendant.

2. CRIMINAL LAW — EVIDENCE — ARREST OF OTHER PERSONS.

The previous arrest of another person than defendant on suspicion of having committed the crime is inadmissible on the issue of defendant's guilt.

3. SAME—OPINIONS—PERSONAL IDENTITY.

In homicide, the opinion of a witness as to whether another person arrested prior to defendant's arrest answered the description given by deceased of his assailant was incompetent.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1043.]

4. WITNESSES — IMPEACHMENT — INCONSISTENT STATEMENTS—FOUNDATION.

Under the express provisions of Code Civ. Proc. § 2052, a witness cannot be impeached by evidence of statements made by him until the statements are related to him, with the circumstances of time, place, and persons present, and he is asked whether he made the statements, and, if so, he must be allowed to explain them.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1233-1242.]

5. HOMICIDE—EVIDENCE—DESCRIPTIONS OF ASSAILANT.

In homicide, a description of the assailant given to the authorities by a witness as the description given the witness by deceased was inadmissible for any purpose other than in impeachment of the witness.

6. WITNESSES—CROSS-EXAMINATION.

In homicide, an attempt to prove that a person arrested before defendant for the crime wore clothes answering the description given to witness by deceased, as testified to by the witness, was not proper cross-examination of the witness.

7. SAME—IMPEACHMENT—ARREST FOR DRUNKENNESS.

Under Code Civ. Proc. § 2051, providing that a witness may be impeached by contradictory evidence or by evidence of bad reputation for honesty, but not by evidence of particular wrongful acts, except that it may be shown that he has been convicted of a felony, evidence that a witness has been arrested for being drunk is not admissible in impeachment of the witness.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1117, 1126.]

In Bank. Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

W. M. Gray was convicted of murder, and appeals. Affirmed.

Charles B. Harris and J. L. Copeland, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

ANGELLOTTI, J. The defendant was convicted of murder in the first degree in the superior court of Sacramento county, upon an information filed by the district attorney of that county, charging him with the killing of Wong Koung, a Chinaman. His motion for a new trial was denied, and he was sentenced to suffer the penalty of death. From the judgment and from an order denying his motion for a new trial the defendant prosecutes this appeal.

The killing of deceased was done in the perpetration of the crime of robbery. There was no claim that the evidence was insufficient to justify the verdict. The only points made in behalf of the defendant on this appeal are as to alleged errors in the rulings of the trial court in reference to the admission and rejection of evidence. There was no eyewitness of the commission of the crime which resulted in the death of the deceased. The deceased, under a sense of impending death, gave to his friend, Chin Coy, and another Chinaman, a partial description of his assailant, which, as testified to by Chin Coy, was as follows, viz.: A "nigger" man, big like Chin Coy, with a light hat and light sweater, a vest, and no coat. This was the extent of the description given by deceased, as testified to by Chin Coy, and Chin Coy had no other knowledge as to the description or identity of the assailant. The defendant is a negro, and there is nothing in the record showing how he, in other respects, answered the description testified to.

1. It was attempted by defendant to show that, upon the description given by Chin Coy to the authorities, another negro was arrested prior to defendant's arrest, on suspicion of having committed this murder. The court refused to admit this evidence. In this there was no error. There was no pretense that the negro so arrested did not answer the vague and uncertain description testified to by Chin Coy as well as did the defendant, so that, even if a proper foundation for the impeachment of Chin Coy had been laid, which was not the case, the proposed testimony could not have tended to show, so far as appears, anything inconsistent with the testimony of Chin Coy in regard to the description given by the deceased. We can conceive of no other ground upon which such evidence would have been admissible. Certainly, it cannot be held that the mere arrest of one person on suspicion of having committed a crime is material upon the question as to whether or not another person committed that crime.

2. Defendant sought to show by cross-examination of Chin Coy that in his opinion another negro, arrested prior to defendant's arrest, answered the description given by deceased, and also, by such negro, that Chin Coy stated that he (said negro) answered the description given by the deceased. It is apparent that the opinion of Chin Coy as to whether the man arrested measured up to the description testified by him to have been given by the deceased was immaterial and incompetent. An opinion as to the identity of a person, based solely upon the statement of another, is not admissible to prove identity. Such an opinion, to be admissible, must be based upon personal knowledge of the person identified, and be the result of the witness' recollection of the person and the facts connected with his seeing or hearing him, and not be entirely the result of information derived from others. *Lawson on Expert and Opinion Evidence*, pp. 323, 324. Where the opinion of the witness is based solely on a description given by another, that description being given, all persons are as able to judge as to whether one answers the description as is the witness himself, and opinion evidence upon the proposition is not admissible. (See *Wigmore on Ev.* § 557; and *Whittier v. Town*, 46 N. H. 23, 88 Am. Dec. 185, for discussion of rule.) Any prior statement by Chin Coy to another, to the effect that another than defendant answered the description given by deceased, could therefore be admissible only for the purpose of impeaching him in the matter of the evidence given by him as to the description furnished him by deceased. If he had previously stated that another, who did not in fact answer the description testified to, did answer the description given by deceased, it would be a statement inconsistent with his testi-

mony as to the description given by deceased. As already said, however, there was no claim that the other negro arrested did not answer the description testified to as fully as did the defendant, and the evidence was not offered for the purposes of impeachment, but simply to show the opinion of Chin Coy as to identity. No foundation for any such impeachment was laid, or sought to be laid, upon the cross-examination of Chin Coy, which was an essential prerequisite to the proof of inconsistent statements by him. Code Civ. Proc. § 2052.

3. A police officer was asked by defendant to detail the description of the assailant given to him by Chin Coy, as the description given by the deceased; and an objection to the question was sustained. Such evidence could have been admissible only by way of impeachment of Chin Coy, and, no foundation for any such impeachment having been laid, the objection made on that ground was properly sustained. It is proper to say that defendant's counsel expressly disavowed any purpose of impeachment.

4. We cannot see that the attempt to prove, on the cross-examination of Chin Coy, that the other person arrested wore clothes answering the description given by the deceased, as testified by him, was legitimate cross-examination. The objection on that ground was properly sustained.

5. The court properly sustained an objection to a question asked a witness, as to whether he knew that the witness Mrs. Wilkes, or Chick Dorsey, as she was called, had been arrested for being drunk. The question involved in the case was as to her character for truth, honesty, and integrity, and the proposed evidence did not go to any of these traits, nor could she be impeached by evidence of particular wrongful acts not amounting to a felony. Code Civ. Proc. § 2051. Under the provisions of our Code, a person cannot be impeached by evidence of particular wrongful acts, except that it can be shown that he has been convicted of a felony. *People v. Silva*, 121 Cal. 668, 54 Pac. 146; *People v. Warren*, 134 Cal. 202, 66 Pac. 212; *People v. White*, 142 Cal. 292, 75 Pac. 828.

6. The witness Plunkett, called for the defense for the purpose of impeaching the witnesses Mrs. Wilkes and Grubbs, was asked on cross-examination concerning his feelings towards the members of the police force and the administration of police affairs of the city of Sacramento. As to this, it is sufficient to say that there was nothing in the answers given that was in any way prejudicial to the defendant. This disposes of all the points made for reversal.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.

TERRITORY ex rel. OVERHOLSER et al. v. BAXTER, Auditor.

(Supreme Court of Oklahoma. Oct. 6, 1905.)

1. COUNTIES — ERECTION OF JAIL — PURCHASE OF SITE — ISSUE OF BONDS.

The express power to erect a jail and issue bonds in payment therefor includes the implied power to purchase a site on which to erect such jail and to issue bonds in payment therefor.

2. SAME — COURTHOUSE — FIXTURES.

The power to erect a courthouse and issue bonds in payment therefor includes the necessary and indispensable power to purchase fixtures and permanent furnishings for the completion of such courthouse, to place the same in fit condition to be used for the transaction of public business, and to issue bonds in payment therefor.

(Syllabus by the Court.)

Application by the territory, on the relation of Ed Overholser and others, for a writ of mandamus to L. W. Baxter, Auditor of the Territory of Oklahoma. Writ granted.

This is an original proceeding in mandamus, to require the auditor of this territory to register certain bonds issued by the board of county commissioners of Oklahoma county. The case is submitted to this court upon the following agreed statement of facts: "It is mutually agreed by and between the parties above named that, whereas a controversy has arisen as to the legality of the issue of certain bonds by the county of Oklahoma, and whereas a doubt exists as to whether such bonds should be registered by the defendant, it is mutually agreed by and between the plaintiff and defendant as an agreed case to be submitted to this court with the following facts in relation thereto: That on the 12th day of June, A. D. 1905, at a regular meeting of the board of county commissioners of Oklahoma county, Oklahoma Territory, the above-named plaintiffs, constituting said board, there was presented to said board a petition requesting the said board to submit the following propositions to the voters of said county at a special election to be held for that purpose, said petition being signed by more than one-sixth of the taxpayers and qualified electors of said Oklahoma county, Oklahoma territory; that the question requested to be submitted by said petition was as follows: That an election be called for voting upon the proposition of issuing \$30,000 of bonds of the county of Oklahoma, Oklahoma territory, for the purchasing of a site in block No. 3 of Main Street addition to the city of Oklahoma City, and the erection of a county jail thereon, and also upon the proposition of issuing \$10,000 of bonds of the county of Oklahoma, Oklahoma Territory, for the completing of the present courthouse now under construction by purchasing permanent furnishings and fixtures for the same. That by an order made on said day said propositions were ordered to be submitted to the electors of said county, at a special election to be held on the 1st day of August, 1905. That on the

1st day of August, 1905, said propositions were separately voted upon and the returns of said election were returned to the board of county commissioners, as required by law, and a canvass duly made thereof on the 4th day of August, 1905, at a meeting of the board for said purpose, and said propositions were both carried and so declared by the board of county commissioners, and said bonds ordered to be issued as directed by said special election. That the ballots voted at said election contained the following propositions: First question. Shall the board of county commissioners of Oklahoma county, Oklahoma territory, be authorized to issue bonds of said county in the sum of \$30,000, bearing interest not to exceed 4½ per cent. per annum, proceeds from the sale of which are to be expended in the purchasing of a site in block No. 3 in Main Street addition to Oklahoma City and the erection of a county jail thereon? On proposition No. 2 the ballot was as follows: Second question. Shall the board of county commissioners of Oklahoma county, territory of Oklahoma, be authorized to issue bonds of said county in the sum of \$10,000, bearing interest not to exceed 4½ per cent. per annum, the proceeds of the sale of which are to be expended in the furnishing of the present courthouse by purchasing of permanent furnishings and fixtures therefor. That afterwards the board of county commissioners of Oklahoma county, Oklahoma territory, adopted a form of bond as required by section 5, of chapter 12, p. 113, of the Laws of 1897, territory of Oklahoma; said bonds being issued under the provisions of said chapter 12, p. 111, Laws 1897. That all of the conditions and terms of said act were duly complied with before said election and before calling the same, and that said bonds were in no wise in excess of the amount of bonds allowed to be issued by said county under any of the laws of the territory of Oklahoma, or of the United States."

R. G. Hay, Co. Atty., for plaintiffs. P. C. Simons, Atty. Gen., for defendant.

HAINER, J. (after stating the facts). Upon the agreed statement of facts, two questions are submitted to this court for determination. They are (1) whether bonds can be issued, under the provisions of chapter 12, p. 111, of the Statutes of 1897, for purchasing a site for the erection of a jail; and (2) whether bonds can be issued under the provisions of said act, and the proceeds expended for the purpose of purchasing permanent furnishings and fixtures for the completion of the courthouse and placing the same in condition to be used for the transaction of the business of said county. Section 1 of article 1 of chapter 12, p. 111, of the Session Laws of Oklahoma of 1897, provides as follows: "Whenever the board of county commissioners of any county in the territory of Oklahoma considers it to be to

the best interest of the county to purchase or erect a courthouse or jail, they shall have power to contract for the purchase or erection of same, and to issue bonds in payment therefor."

The question here presented is: Does the power to erect a courthouse or jail include the implied power to purchase a site upon which to erect a jail, and to issue bonds in payment therefor? It seems to us that the answer to this question is obvious. The power to erect a courthouse or jail implies the incidental power to purchase a site for such purpose. This implied power is essential and indispensable for the purpose of carrying into effect the express power conferred by the statute. To hold otherwise would seem to us to defeat the object and purpose of the statute. In *De Witt v. San Francisco*, 2 Cal. 289, it was held that the authority by act of the Legislature to erect a courthouse and jail, would necessarily embrace the power to purchase the land on which to erect them. In passing upon this question, the Supreme Court of California uses the following language: "Indeed it cannot seriously be doubted that, if the power to purchase any property had not been given in express words, yet that the authority to erect a courthouse or jail would necessarily embrace the power to purchase the land on which to erect it; the land whereon to build it being no less essential than the stone and material to build it with." In *Shiedley et al. v. Lynch et al.*, 8 S. W. 434, the Supreme Court of Missouri held that the act of the Legislature granting authority to the county court to erect courthouses confers as a necessary incident the power to purchase land for the erection of such courthouses if necessary. Hence, we think the power conferred upon the board of county commissioners to erect a jail, and to issue bonds in payment therefor, carries with it the implied and incidental power to purchase a site therefor; and this brings us to the second question: Does the power to erect a courthouse and jail imply the power to purchase permanent furnishings and fixtures for the completion of the courthouse or jail, to place them in condition to be used for the purpose for which they were erected? It seems to us that the same reasoning applies to this question as to the other question. The power to erect a courthouse includes the power to purchase permanent furnishings and fixtures for the purpose of placing the courthouse in fit condition to be used for the purpose for which it was intended. We therefore hold that the express power to erect a jail and issue bonds in payment therefor includes the implied power to purchase a site on which to erect such jail and to issue bonds in payment therefor, and that the power to erect a courthouse and issue bonds in payment therefor includes the necessary and indispensable power to purchase fixtures and permanent furnishings for the completion of

such courthouse, to place the same in fit condition to be used for the transaction of public business, and to issue bonds in payment therefor.

Both questions must be answered in the affirmative, and a peremptory writ of mandamus will therefore issue. All the Justices concurring.

GREELEY et al. v. GREELEY.

(Supreme Court of Oklahoma. Sept. 8, 1905.)

1. APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Where the evidence reasonably supports the judgment, it will not be weighed by the court for the purpose of determining if the preponderance thereof was not with the other party.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3928-3934.]

2. SAME—WAIVER OF ERRORS.

All errors committed in a case in the probate court are waived by refiling the case by agreement in the district court, after the papers have been certified to such court.

(Syllabus by the Court.)

Error from District Court, Noble County; before Justice Bayard T. Halner.

Action by Lucinda Greeley against Tib Greeley and others. Judgment for plaintiff, and defendants bring error. Affirmed.

S. H. Harris, for plaintiffs in error. H. B. Martin, for defendant in error.

BURWELL, J. All of the parties to this action were formerly residents of Iowa. Tib Greeley came to Oklahoma and purchased the land in controversy, viz., the S. W. $\frac{1}{4}$ of section 26, in township 22 N. of range 1. W. of the Indian meridian, in Noble county, Okl., as he claims, under an agreement with the appellee, Lucinda Greeley, to the effect that she should furnish the money with which to purchase a farm in this territory; that she was to make her home with him and his wife, and in the event that she became dissatisfied on the farm, and wished to live somewhere else, then he was to pay her 7 per cent. per annum on the amount of money she had invested in the land; that in consideration of furnishing her a home or paying her 7 per cent. on her investment the land was to be the property of Tib Greeley. And he insists that he went into possession of the land under such agreement, all of which is denied by the appellee, who contends that she furnished the money with which to pay for the land, and took the title in her own name because it was hers, and that she simply permitted the appellants to live on the land as tenants at will, until a certain date, when she notified

them that, if they remained on the land longer, they would have to pay rent. They continued to occupy the land after such notice, and after demand duly made for such rent and refused by appellants she brought suit therefor in the probate court, which was finally certified to the district court. Other actions were commenced in the different courts, but finally it was agreed between the different parties that they would waive a jury and submit all of their differences in one trial to the district court, reserving the right to amend the pleadings to conform to the evidence. On this trial was litigated the ownership of the land, as to whether or not the contract contended for by appellants was entered into, the right of possession of the land, and also the question of rents and damages. All of these issues were determined in favor of Lucinda Greeley, and the court rendered judgment decreeing her to be the owner of the land, and entitled to the possession thereof, and that she recover from appellants \$150 for rents due, together with the further sum of \$200 as damages for the unlawful detention and occupancy of the land, and for costs.

The appellants have cited many authorities to the effect that a contract such as they claim to have made with the appellee (they having gone into possession under it) is binding, and that they are entitled to a specific performance of the same. But after a careful examination of the record we deem it unnecessary to discuss these cases, or the correctness or the incorrectness of the rule contended for. The court, from the evidence, found that no such contract was entered into, and further found generally for the appellee, rendering judgment as stated above. The only question which this record presents is as to whether or not the evidence justifies the judgment, and this point must be determined against the appellants. It is true that certain questions of practice are argued, such as allowing the plaintiff (appellee) to amend her pleadings after a demurrer had been sustained to her evidence on a former trial in the probate court. But these matters were all waived by the agreement entered into when the parties consolidated all their cases and agreed to litigate before the district court in one trial all of their differences, and by refiling the case in the district court at the time of the agreement referred to.

We find no error in the record. The judgment is hereby affirmed, at the cost of appellants. All of the Justices concurring, except HAINER, J., who presided at the trial below, not sitting.

SPARKS v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 7, 1905.)

1. CRIMINAL LAW—APPEAL—EVIDENCE.

In a criminal case, when the jury have found a defendant guilty, this court will not reverse the judgment for want of evidence, unless such evidence fails to reasonably support the verdict.

2. SAME—OBJECTIONS TO EVIDENCE—HARMLESS ERROR.

An objection to the admission of evidence, although erroneous, which does not affect the substantial rights of an appellant, will be disregarded by this court.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3137.]

3. SAME—SCOPE OF OBJECTION.

Under the authority of *Enid & Anadarko Railroad Company v. Wiley et al.*, 78 Pac. 96, 14 Okl. 310, an objection on the ground of incompetency and immateriality, without specifically stating the ground upon which the objection is founded, is too indefinite to present any question of law, and will be disregarded.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1633; vol. 15, Cent. Dig. Criminal Law, §§ 2639, 2654.]

4. SAME—OBJECTIONS TO INSTRUCTIONS—NECESSITY OF EXCEPTION.

Though an instruction be erroneous, the case in which it was given will not be reversed unless an exception was saved to the giving thereof.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2668.]

5. SAME—ESTOPPEL TO OBJECT.

Where a defendant's counsel requested an instruction to be given, the defendant cannot complain, notwithstanding it incorrectly stated the law to his (possible) prejudice.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3009.]

(Syllabus by the Court.)

Appeal from District Court, Woodward County; before Justice James K. Beauchamp.

Arthur G. Sparks was convicted of larceny, and appeals. Affirmed.

Rehearing denied November 14, 1905.

Charles Swindall and Boyle & Guthrie, for appellant. P. C. Simons, Atty. Gen., and Don C. Smith, Asst. Atty. Gen., for the Territory.

BURWELL, J. The defendant, A. G. Sparks, was convicted and sentenced to a term of five years in the territorial penitentiary for the stealing of 32 cattle. He appealed to this court.

We have considered the record in its most favorable light to the defendant, but find no error upon which a new trial should be granted. The evidence was sufficient to uphold a conviction, and, while the defendant offered evidence tending to show that he purchased the cattle from a man by the name of F. R. Read, the jury found against him; and when the entire evidence is examined there are a number of very suspicious circumstances. Read, according to the defendant's own testimony, was driving the cattle along the public highway to Woodward for the purpose of shipping them, and he purchased them from Read without asking him where he lived, from whom or where he got

the cattle, whether or not they were incumbered, and, in fact, without making any inquiry about either the cattle or Read. He never saw or heard of Read before the transaction, and has never heard from him or as to his whereabouts since; and, notwithstanding the trouble in which the defendant was involved by reason of the cattle having been found in his possession, he made practically no effort to locate Read. He never reported the matter to the county attorney or sheriff. He insists that he paid Read \$250 in cash, but the only corroborating evidence of this was the testimony of his brother-in-law that he borrowed \$100 from him for that purpose. But although neither the defendant or the brother-in-law, Mr. Thomas Doran, knew Read, and the cattle were left in Doran's pasture for two days, they had no conversation whatever about Read, or where the cattle came from, further than the statements which Sparks claims that he made to the effect that he had purchased them from a man by the name of Read. Sparks also insists that he gave Read a draft for \$710 on Ben Welch & Co., of Kansas City, Mo. The cattle were shipped to Ben Welch Live Stock Commission Company on August 27, 1902, which was two days after the draft purports to have been executed. It is clear from the record that Ben Welch & Co. and the Ben Welch Live Stock Commission Company are one and the same firm. This draft was not placed in a local bank for collection or sent to some Kansas City bank for that purpose, but was sent direct to Ben Welch Commission Company, with a letter signed "F. E. Read," requesting that the amount be sent to the Woods County Bank, at Alva, Okl., to be placed to Read's credit. Although the letter transmitting the draft is dated August 25, 1902, it was not received by Welch & Co. until the 29th or 30th of the same month. Meanwhile, the owner of the cattle having located them and wired parties at Kansas City in relation thereto, payment of the draft was stopped, and it has never been paid. Sparks claimed that his business was that of buying cattle, and he admitted on the witness stand that he had served for 2½ years on the city detective force in Kansas City. He was at the time a man of experience in business and familiar with the subtleties of those who commit crimes, and ordinarily such a man would have used some precaution to avoid loss, if he was acting in good faith in the transaction.

The territory seeks to make a point on the fact that the draft was not indorsed by Read, but there can be no inference of guilt on the part of Sparks by reason of such failure, as a letter accompanied the draft which took the place of an indorsement on the back of it, if such an indorsement were necessary, and the absence of such indorsement does not indicate that the draft was sent to Welch & Co. by Sparks, but the

sending of the draft direct to the payor is a circumstance which might be considered against him; that is, the jury might take that fact into consideration in determining as to whether Sparks himself sent the draft to Welch & Co., and used the name of Read as a subterfuge and a blind.

The county attorney sought to prove by a witness that the defendant had admitted on the former trial that he and Tom Doran and Ben Walfort were hunting in Walfort's pasture a short time prior to the date on which the cattle were stolen. Counsel for the defendant objected on the ground of incompetency and immateriality. The objection was overruled, and an exception saved. It is now insisted that the stenographer's notes were the best evidence. This is undoubtedly correct; but it was held in the case of the Enid & Anadarko Railway Co. v. Wiley et al., 14 Okl. 310, 78 Pac. 96, that "an objection that evidence offered is incompetent, without specifically stating the ground upon which the objection is founded, is too indefinite to present any question, and will be disregarded." In that case the trial court had admitted the record of a patent without a showing first that the patent had been lost or was beyond the control of the party. But independent of this rule, the defendant was not prejudiced by such evidence, because he admitted the same facts on this trial which the witness testified that he had sworn to on the former trial.

The defendant complains of the instructions of the court; and we frankly admit that they do not all conform to our view of the law. But conceding, for the sake of argument, that the instructions were incorrect, no exceptions were saved to those given, and the one most likely to prejudice defendant's rights was requested by his counsel, and therefore, as to it, he cannot complain. The defendant has been ably represented in this court. Every possible error has been urged here, and the fact that mistakes which may have been made on the trial cannot be taken advantage of in this court is no fault of the attorneys who represented him in his appeal, as they did not participate in the trial in the court below.

The judgment of the lower court is hereby affirmed, at the cost of the appellant. All the Justices concurring, except BEAUCHAMP, J., who presided in the court below, not sitting.

McCARTHY v. BENTLEY.

(Supreme Court of Oklahoma. Sept. 6, 1905.)

1. APPEAL — BILL OF EXCEPTIONS — CASE-MADE.

Motions presented in the trial court, the rulings thereon, and exceptions are not properly part of the record, and can only be presented and preserved for review on appeal to the Su-

preme Court by incorporating the same into a bill of exceptions or case-made.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2359-2366.]

2. SAME—OBJECTIONS NOT RAISED BELOW.

The record in this case discloses no error which can be reviewed by this court.

(Syllabus by the Court.)

Error from Probate Court, Caddo County; M. N. Gish, Judge.

Action by D. Bentley against J. B. McCarthy. Judgment for plaintiff. Defendant brings error. Affirmed.

F. E. Riddle, for plaintiff in error. A. J. Morris, for defendant in error.

BEAUCHAMP, J. On the 3d day of October, 1903, the defendant in error, D. Bentley, filed his petition in the probate court of Caddo county, praying judgment upon an attachment bond executed by the Williamson-Halsell-Frasier Company and the plaintiff in error, J. B. McCarthy, for the sum of \$235 for damages for wrongfully causing an attachment to be levied upon certain personal property belonging to defendant in error. Answer was filed by the Williamson-Halsell-Frasier Company and McCarthy. The case came regularly on for trial on the 25th day of January, 1904. Bentley appeared in person and by his attorney; McCarthy and his codefendant the Williamson-Halsell-Frasier Company not appearing. Trial was had resulting in a judgment against Bentley and the Williamson-Halsell-Frasier Company, and on the 28th day of January, 1904, F. E. Riddle, as attorney for the defendants, made application for a new trial on behalf of the Williamson-Halsell-Frasier Company, which was by the court granted, and the cause as between Bentley and the Williamson-Halsell-Frasier Company was set for trial on the 9th day of February, 1904, and on that day Bentley appeared by his attorney and the Williamson-Halsell-Frasier Company by its attorney, and the Williamson-Halsell-Frasier Company and McCarthy moved the court to correct the journal entry made on the 28th day of January, 1904, upon the motion for a new trial, for the reason that said motion for a new trial was made on behalf of both defendants (Williamson-Halsell-Frasier Company and McCarthy), that defendants were both represented by the same attorney of record, and that said attorney presented said motion on behalf of both defendants, which motion was by the court heard and overruled. Thereupon the Williamson-Halsell-Frasier Company answered ready for trial, and the plaintiff dismissed as to it, leaving the judgment standing against the plaintiff in error, McCarthy. So far as the record in this case discloses, no exceptions were saved by McCarthy, by bill of exceptions or otherwise. The case is brought here by McCarthy by petition in error, and what purports to be a transcript

of the record and of the files and proceedings in the probate court.

The petition in error contains five assignments of error: "(1) That said court erred in entering up a judgment on his docket showing that a new trial had been granted as to the Williamson-Halsell-Frasier Company, principal on said bond, and leaving the judgment still in force against this plaintiff in error, as surety on said bond. (2) The court erred in refusing to correct the journal entry, in order that it might show that a new trial was granted as to both defendants. (3) The court erred in not setting the judgment aside as to this plaintiff in error, the surety on said bond, after the said Williamson-Halsell-Frasier Company, principal on said bond, had been released from any liability. (4) The court erred in its refusal to grant a new trial as to this plaintiff in error. (5) The court erred in overruling the motion of plaintiff in error for a new trial, and in attempting to enforce a judgment against him as surety on said bond, after the principal, the Williamson-Halsell-Frasier Company, had been released."

The first, second, fourth, and fifth assignments in error relate only to alleged errors of the court in its rulings upon the motions, none of which are a part of the record proper, and this court has repeatedly held that such matters are not a part of the record without a case-made or bill of exceptions. *McMechan v. Christy*, 3 Okl. 301, 41 Pac. 382; *Lookabaugh v. La Vance*, 6 Okl. 358, 40 Pac. 65; *City of Kingfisher v. Pratt*, 4 Okl. 284, 43 Pac. 1068; *Menten v. Shuttee et al.*, 11 Okl. 381, 67 Pac. 478. None of the matters contained in these assignments of error being a part of the judgment roll, and exceptions to the rulings complained of not having been saved by bill of exceptions or case-made, as provided by the statutes of this territory, we cannot consider the alleged errors complained of.

As to the third assignment of error, the record does not disclose that any application has ever been made to the probate court seeking to set aside the judgment as to McCarthy since the action was dismissed as to Williamson-Halsell-Frasier Company, nor that the court has ever passed upon that question. In fact, it is not shown by the record that any application to vacate and set aside the judgment against McCarthy was ever made at any time. The application to set aside the judgment rendered in the first instance against the Williamson-Halsell-Frasier Company and McCarthy, which judgment was against them jointly and severally, was made on the part of the Williamson-Halsell-Frasier Company alone. The only

application of that nature on the part of McCarthy was an application that was made to the court after a new trial was granted to the Williamson-Halsell-Frasier Company to correct the journal entry so as to show a new trial was granted to both. It is not questioned but that the judgment was proper at the time it was entered in the first instance; the only claim being that the court erred in not setting aside the judgment as to the plaintiff in error after Williamson-Halsell-Frasier Company had been released from any liability, and this the court has never been asked to do.

The record discloses no error which can be reviewed by this court. It might be well to remark that, while the record does not disclose the facts, in the brief of counsel for defendant in error it is stated that injunction proceedings were commenced in the district court of Caddo county by the plaintiff in error to enjoin the collection of this judgment against him for the reason, among others; that the dismissal of the action as to the Williamson-Halsell-Frasier Company was a dismissal of the action as to him, and in which action it was alleged and contended by the defendant in error that the recital in the journal entry "that the defendant in error releases any cause of action against the Williamson-Halsell-Frasier Company on the bond sued on, and that the judgment should be construed as a bar on any action against the Williamson-Halsell-Frasier Company on said bond," was inserted by counsel for plaintiff in error, and that counsel for defendant in error was induced to and did sign and O. K. said journal entry upon the fraudulent representations and promises of the attorney for plaintiff in error and the Williamson-Halsell-Frasier Company that, if he would approve the said journal entry, the judgment would be at once paid and satisfied; that a trial was had before the district court and a referee, and after hearing the evidence the referee found, and the court approved the finding, that the contention of the defendant was true; and that the action in the probate court was dismissed as to the Williamson-Halsell-Frasier Company without prejudice to a future action. The court approved the report and finding of the referee, and denied the injunction, which judgment of the district court has never been appealed from. So that this court is asked to do the very thing the district court after a full hearing upon the facts refused.

There being no error in the record that can be properly considered by this court, the petition in error is dismissed, at the costs of the plaintiff in error. All the Justices concurring.

DUNN v. OVERTON et al.

(Supreme Court of Oklahoma. Sept. 6, 1905.)

REPLEVIN — ATTACHMENT — FRAUDULENT TRANSFER.

In replevin by A. against an officer who justifies under a writ of attachment against the property of B., on the grounds of a fraudulent transfer of the property by B. to A. to defeat the creditors of B., it is a material element of such defense that the relation of debtor and creditor exists between the attachment plaintiffs and B., and the question as to whether such transfer was fraudulent is immaterial, until the officer has shown that he represents creditors.

(Syllabus by the Court.)

Error from District Court, Greer County; before Justice James K. Beauchamp.

Action by Mary J. Dunn against John B. Overton and others. Judgment for defendants, and plaintiff brings error. Reversed.

Shartel, Keaton & Wells, for plaintiff in error. Garrett & Garrett, for defendants in error.

PER CURIAM. This was an action in replevin brought by the plaintiff in error to recover certain live stock levied upon by the defendant in error, sheriff of Greer county, under a writ of attachment. The writ of attachment was issued out of the probate court of Greer county in an action there brought by Gilliland & Co. against J. F. Dunn, husband of the plaintiff in this case. Dunn was sued by Gilliland & Co. in the probate court for debt. The plaintiff brought this action to recover possession of the property levied upon, alleging that it belonged to her. The defendants, answering, charged that he held the property by virtue of the writ of attachment issued as above stated, and alleged title to the property in plaintiff's husband, and further charged that plaintiff's title thereto, if any she had, was fraudulent as to Dunn's creditors, and that Gilliland was one of such creditors. The cause was tried in the court below, and the evidence offered was addressed exclusively to the question of ownership of the property, no evidence being introduced tending to show any indebtedness of J. F. Dunn to Gilliland & Co. J. F. Dunn is not a party to this action, and Mrs. Dunn was not a party to the action in the probate court. The verdict and judgment was in favor of the defendants. Motion for a new trial was overruled, and the cause comes to this court upon error.

The right of the defendants in error to recover in the court below was dependent upon the existence of an indebtedness from J. F. Dunn to Gilliland & Co., without which there was no right of action against Dunn, and no rightful levy of an attachment upon his property. The failure in this case to make proof of such indebtedness brings the case within the conclusions reached by this court in *Marrinan & Bros. v. Hannah F.*

Knight, 7 Okl. 419, 54 Pac. 656, which holds that under such circumstances a recovery cannot be had by the defendants in error.

The judgment of the district court of Greer county is reversed, and the cause remanded, with instructions to the trial court to sustain the motion for a new trial.

LEE et al. v. ELLIS.

(Supreme Court of Oklahoma. Sept. 6, 1905.)

PUBLIC LANDS—HOMESTEAD ENTRY—VALIDITY.

One who was within the Chilocco reservation before the hour of 12 o'clock noon, central standard time, of September 16, 1893, and made the race from such reservation into that part of the Cherokee Outlet which was opened to settlement on that day, is not, by reason thereof, disqualified from settling upon and filing a homestead entry upon a portion of said land.

(Syllabus by the Court.)

Error from District Court, Kay County; before Justice B. T. Hainer.

Action between Sam Lee and George P. Endicott and Herbert E. Ellis. Judgment for Ellis, and Lee and Endicott bring error. Affirmed.

S. H. Harris, for plaintiffs in error. W. S. Cline and Claude Duval, for defendant in error.

BEAUCHAMP, J. This case involves the question as to whether one who made the race into the Cherokee Outlet on September 16, 1893, from the Chilocco Indian School reservation, is a sooner, and therefore disqualified to make homestead entry on any of the lands thrown open for settlement by the President's proclamation opening the Cherokee Outlet to settlement. Herbert E. Ellis, the defendant in error, made the run into the Cherokee Outlet the day of the opening, and made homestead entry on the land in controversy, which is the S. W. $\frac{1}{4}$ of section 15, township 28, N. of range 2 E. of the Indian meridian, in Kay county. The identical questions involved in this case have been decided by this court in the case of *McCalla v. Acker*, filed September 3, 1904, reported in 78 Pac. 223. Upon the authority of that case, and the authorities there cited, the judgment of the district court of Kay county is affirmed, with costs to plaintiff in error. All the Justices concurring, except **HAINER, J.**, who tried the case below, not sitting.

TERWILLIGER v. GEORGE O. RICHARDSON MACH. CO.

(Supreme Court of Oklahoma. Sept. 6, 1905.)

BILLS AND NOTES—CONSIDERATION—FAILURE.

The George O. Richardson Machine Company sold one Pease certain threshing machinery on time payment, receiving as collateral security the note of one Terwilliger, which was executed and delivered to said machine company upon the verbal promise of Pease to

thresh grain for him in an amount equal to the value of the note. Pease failed to thresh Terwilliger's grain, and made default in his payment to the company. *Held*, that Terwilliger cannot, because of Pease's default to him, escape his liability to the company.

(Syllabus by the Court.)

Error from District Court, Grant County; before Justice James K. Beauchamp.

Action by the George O. Richardson Machine Company against Mabel Terwilliger, administratrix of the estate of F. A. Terwilliger. Judgment for plaintiff, and defendant brings error. Affirmed.

J. A. Burnette, for plaintiff in error. Chas. L. Purves and Chas. G. Yankey, for defendant in error.

GILLETTE, J. This is an action by the defendant in error to recover from the plaintiff in error upon a promissory note; the action being brought in the district court of Grant county. The case was tried to the court upon the following agreed statement of facts:

"It is hereby stipulated and agreed by and between the plaintiff and defendant that the following shall be considered by the court as the facts in the said case, and judgment shall be rendered by the court with like effect as if the evidence in the said case had been submitted to it for its consideration and judgment; jury being waived: First. That the plaintiff herein, George O. Richardson Machine Company is a corporation duly organized and existing under the laws of the state of Missouri, and has complied with all the laws of the territory of Oklahoma governing and concerning foreign corporations. Second. That during the year 1902 J. R. Swartzel was the agent of the plaintiff at the city of Caldwell, Kan., for the purpose of selling threshing machinery and other agricultural implements at the city of Caldwell and adjacent territory of Sumner county, Kan., and Grant county, Okl. Third. That in the spring or early summer of 1902 the said J. R. Swartzel, agent of the plaintiff, sold a complete threshing outfit to one James Pease, and to secure the purchase price of said machinery, and as collateral to the notes of said Pease to the plaintiff, the said James Pease secured notes from various farmers in the vicinity of Caldwell, which were to be paid by such persons to the said Pease when he should do their threshing in the year 1902; among them being the note sued on herein. Fourth. At no time was the said F. A. Terwilliger, deceased, indebted to the said J. R. Swartzel or the George O. Richardson Machine Company, in any amount whatsoever, prior to the execution of the note sued on herein. Fifth. That the sole and only consideration of the note sued on herein was the promise of James Pease that he would do the threshing for the said F. A. Terwilliger for the season of 1902; that the promise of the said Pease to do

this threshing for the said F. A. Terwilliger, was verbal only. Sixth. That the farmers' notes, among such notes being the one sued herein, were procured by the said James Pease and J. R. Swartzel, not only with the knowledge of the plaintiff company, but such a procedure was a part of its general requirements and directions. Seventh. On or about the 4th day of August, 1902, after having received and started his threshing outfit, the said James Pease abandoned it and left the country, and wholly failed to do the threshing of F. A. Terwilliger for the year 1902. Eighth. Immediately after the 4th day of August, 1902, the plaintiff, through agent, W. B. Rice, and local agent, J. R. Swartzel, took possession of the said threshing machine, and foreclosed its chattel mortgage on the same, and sold the said machine to Conklin Bros., who continued to operate the said machine during the balance of the season of 1902. Ninth. That the notes of James Pease to the plaintiff, to which this note is and was collateral, have never been paid by the said James Pease or any one else for him. Tenth. That the said F. A. Terwilliger repeatedly requested and demanded of the plaintiffs, its agents and servants, and of the Conklin Bros., who were operating the said machine, to do his threshing in the season of 1902, but the plaintiffs, its agents, servants, and said Conklin Bros., wholly failed, neglected, and refused to do the said threshing, and the said F. A. Terwilliger employed another machine and outfit to do said threshing, and paid for the same. Eleventh. That the note sued upon herein was one of the series which the plaintiff required of Pease as collateral security to the notes due from the said Pease to the said plaintiff. While said note was taken in the name of the said J. R. Swartzel, it was in fact intended to be payable to James Pease, and to be as collateral security to the notes of the said James Pease to the plaintiff. The plaintiff, when it accepted the note sued on, knew that the consideration thereof was that Pease should do Terwilliger's threshing in the year 1902. Twelfth. That the contract of Pease to do the threshing for those who had made collateral notes was to apply to this note the same as to the other collateral notes given by the various farmers, and the consideration was that the said Pease was to do the threshing of the said F. A. Terwilliger in the season of 1902. Thirteenth. That in March, 1903, the said F. A. Terwilliger died intestate, and the defendant, the said Mabel Terwilliger, is the duly appointed, qualified, and acting administratrix of the estate of the said F. A. Terwilliger, deceased, and that due legal demand has been made by the plaintiff upon the administratrix of the said estate for the allowance and payment of said note; that the same was refused prior to the filing of this suit. Fourteenth. That the

said original note is attached hereto and marked 'Exhibit A,' and made a part hereof. That the said note or any part of it has never been paid, and, if the court shall decide that the defendant herein is liable on the said note, that there is due the sum of \$97 to this plaintiff. Fifteenth. That after the execution of the said note, and before the maturity thereof, and on or about the 20th day of June, 1902, the said J. R. Swartzel placed his written signature upon the back of the said note, and delivered the same to the plaintiff herein, who has been the legal holder of the same ever since."

Exhibit A, attached to said stipulation, is as follows:

"\$75.00. Caldwell, Kansas, 5/5, 1902. For value received in ——— I promise to pay J. R. Swartzel, dealer in implements, etc., or order, at Caldwell, Kansas, Seventy-Five Dollars, with interest at the rate of eight per cent. per annum from maturity. The title, ownership, and right of possession of the said ——— for which this note is given shall not pass from payee until this note, including interest, shall have been paid, and the holder may at any time declare this note due, take possession of said ———, and, having given ten days' notice of the time and place of sale, sell the same at public auction, and indorse the proceeds, less expenses and costs, on this note. D. A. Terwilliger. Witness ——— 1,323. Post office, Caldwell. County ———. State, Kansas. Lives ——— miles north, lives ——— miles east, lives ——— miles south, lives ——— miles west. Taken by ———, Agent."

Judgment in the court below for the plaintiff, and defendant brings the case to this court, alleging error.

It is urged by counsel for plaintiffs in error that the consideration for which the note sued on having wholly failed, and the company having received the same with knowledge of what the consideration was, it was not an innocent purchaser for value,

and was not, therefore, entitled to recover in this action. This contention cannot be sustained. The note sued on was given by Terwilliger without condition expressed in the note. It was a plain note of hand for value received, due September 1st after its date, May 5th. The company demanded security for a time sale of certain threshing machinery sold to Pease, the purchaser, and Pease gave the security demanded, which was in part the note in question. Terwilliger executed it with full knowledge that it was delivered to the company as collateral security for the sale of the machinery about to be made to Pease. To that extent Terwilliger was a party to and induced the sale. The company may have known what consideration was moving from Pease to Terwilliger, and that the note was only a promise for a promise. The company, however, was not a party to any agreement between Terwilliger and Pease, except to that extent that, in consideration of the execution and delivery of Terwilliger's note as collateral, the machinery would be sold to Pease. This consideration was fully carried out by the company, and, when carried out, Mr. Terwilliger was thereafter liable upon his contract. The company not being actually or impliedly a guarantor that Pease would perform his verbal agreement with Terwilliger, it cannot be held liable for his (Pease's) failure to perform such agreement. Under the agreed statement of facts in this case, Terwilliger was, in effect, the guarantor of Pease's contract with the company to the extent of the note in question, in consideration of the sale of the machinery, and cannot, because of Pease's default in his promise to him, withdraw from his liability as such guarantor.

The judgment of the court below is affirmed at the costs of the plaintiff in error. All the Justices concurring, except BEAUCHAMP, J., who presided in the court below, not sitting.

WILLIAMSON v. WILLIAMSON.

(Supreme Court of Oklahoma. Sept. 6, 1905.)

1. APPEAL AND ERROR—CASE-MADE—INDEXING.

The rules of the Supreme Court do not require that a case-made shall be indexed, but only that counsel for the plaintiff in error shall number the pages of the petition in error and record before filing the same.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2500, 2604.]

2. SAME—NECESSITY OF CASE-MADE.

The statutes of this territory provide for two methods for bringing a case to the Supreme Court. There must be filed with the petition in error a transcript of the proceedings in the court below or a case-made.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2622.]

3. SAME—REVIEW—RULING ON DEMURRER.

The record in this case examined, and found that exceptions to the ruling of the trial court in sustaining the demurrer to the petition were sufficiently saved to present the errors complained of to this court.

4. JUDGMENT—SETTING ASIDE—NEW TRIAL.

Section 4760, Wilson's Rev. & Ann. St. 1903, authorizes the district courts to vacate their judgments and to grant a new trial, where fraud is practiced by the successful party in obtaining the judgment sought to be vacated, and where a party is sued in the district court, waives service of summons, and has had full opportunity to make any proper defense in the action and is not prevented therefrom by any fraud practiced by the plaintiff, but neglects to appear and defend in such action, such negligence is no ground for setting aside a judgment or for granting a new trial.

(Syllabus by the Court.)

Error from District Court, Canadian County; before Justice C. F. Irwin.

Action by Nellie Williamson against R. J. Williamson. Judgment for defendant, and plaintiff brings error. Affirmed.

G. S. Pearl and Baldwin & Marsh, for plaintiff in error. Joseph G. Lowe, for defendant in error.

BEAUCHAMP, J. This action was commenced by the plaintiff in error against the defendant in error in the district court of Canadian county, by petition under the provision of section 4760, Wilson's Rev. & Ann. St. 1903, to vacate a decree of divorce previously entered in that court, divorcing the defendant from the plaintiff, and for a new trial on the grounds of fraud practiced by defendant in obtaining the decree. The defendant demurred to the petition, which was by the court sustained, and judgment given for the defendant for costs. Exceptions were saved by plaintiff, and she brings the case here by petition in error and case-made for review.

It is contended by the defendant that the petition in error should be dismissed for the reason that the case-made is not indexed as required by the rules of this court. The pages of the petition in error and the record are numbered, and that is all that is required or necessary in that respect.

Again, it is contended that the record is not properly authenticated, and this proceeding should be dismissed for that reason, and it is argued "that the clerk, not the judge, is the custodian of the records. The clerk alone can certify as to what the record contains. The judge cannot do it. The clerk does not certify that the record attached to the petition in error is correct, and a full and complete transcript." The record filed with the petition in error does not purport to be a transcript of the record of the proceedings had in the case, but a case-made, and our attention is not directed to any defect in the record as a case-made; and upon examination we find that it was served, settled, certified, and signed by the judge as true and correct, and attested and filed by the clerk, all in due time and attached to and filed with the petition in error in this court, as provided by sections 4443 and 4444, St. 1893. Our statutes provide for two methods for bringing a case to this court. There must be filed with the petition in error a transcript of the proceedings in the court below, or a case-made. *Wade v. Mitchell*, 14 Okl. 168, 79 Pac. 95.

And again it is contended by the defendant in error "that no exception was saved to the ruling of the court sustaining the demurrer to the petition, and that therefore there is nothing in the record for this court to pass upon." In this we find that counsel is mistaken. The journal entry as disclosed by the record recites "that to the order and ruling of the court and sustaining said demurrer the said plaintiff at the time excepted."

Having disposed of all of the preliminary questions raised by counsel, we will now proceed to dispose of the case upon the merits. Does the petition state facts sufficient to constitute a cause of action, and to justify the relief demanded by plaintiff? The petition alleges that the judgment was obtained by fraud practiced upon her by defendant through his attorney, George E. Bingham, in this, to wit: that Bingham, "after the allowance by the court of alimony pendente lite was made, went to Amarillo, Tex., where plaintiff was then engaged at work in a hotel to support herself, and told plaintiff, and represented to her, that the allegations of the petition then on file for a divorce from her were such that she could not procure any of the property, money, or effects that belonged to her and defendant, and that she could not afford to appear and resist said action for a divorce, but that, out of the 'goodness of his heart,' defendant was willing to 'give' her the sum of \$200, and that defendant refused said sum. That Bingham, as the attorney for defendant and acting for him in the premises, by divers statements, suggestions, and hints worked upon the fears and loneliness of plaintiff, and, by assuring her that she could only get \$150 alimony all told, induced her to accept

\$300, and sign a waiver of appearance, and induced her to sign letters addressed to the clerk." The record does not disclose when the waiver of service of summons was signed by plaintiff, but the judgment was rendered November 22, 1902. As will be seen, the only allegation of fraud is of misrepresentation by defendant's attorney as to the amount of alimony that she could recover, and by which she was induced to make settlement of the property rights, and to sign a waiver of service of summons; there is no allegation that the defendant or his attorney practiced any fraud in obtaining the decree of divorce. The plaintiff had notice of the action against her, and if she had any defense she had full opportunity to present it. The waiver of the service of summons in no way prevented her from appearing in the case, and making any defense that she had. Negligence of a party is no ground for setting aside a judgment or for granting a new trial. The statutes under which this action was commenced authorize the court to vacate the judgment and to grant a new trial, where fraud is practiced by the successful party in obtaining the judgment sought to be vacated; and, as the petition contains no allegation of fraud in obtaining the judgment, the order of the trial court sustaining the demurrer to the petition was right, and the judgment for costs necessarily followed.

The judgment of the trial court is therefore affirmed, with costs to plaintiff in error.

IRWIN, J., who tried the case below, not sitting. All of the other Justices concurring.

REES v. GRAY et al.

(Supreme Court of Oklahoma. Sept. 5, 1905.)

APPEAL—REVIEW—EVIDENCE NOT IN RECORD.

Where the record proper affirmatively shows that all the evidence taken on the trial is not incorporated therein, and the only attempt to cure omissions in the record is by statements in the petition in error, this court, following precedent, will decline to pass upon assignments of error arising wholly on the evidence.

(Syllabus by the Court.)

Error from District Court, Custer County; before Justice C. F. Irwin.

Action by J. G. Rees against W. A. Gray and Laura L. Gray. Judgment for defendants, and plaintiff brings error. Affirmed.

H. P. Bailey and Rutherford Brett, for plaintiff in error. W. D. Cardwell, for defendants in error.

PANCOAST, J. Plaintiff in error brought an action to recover judgment against defendants in error for breach of warranty of title to real estate. At the time of commencement of the action he sought aid by attachment upon affidavit setting forth various grounds therefor. Shortly thereafter

he filed an amended petition, to which defendants below demurred. The demurrer was overruled, and the defendants in error filed their answer, and moved, also, to dissolve the attachment. Plaintiff replied, and upon these pleadings trial was had. The court found "that the allegations of plaintiff's petition are not supported by the evidence," dissolved the attachment, and rendered judgment for defendants below for costs. Upon the dissolution of the attachment and the finding of the court against plaintiff upon the evidence, error is predicated.

The record before us is imperfect. The death of the stenographer who took the evidence, and the inability of plaintiff in error to procure a transcript of the evidence taken on the trial, are facts suggested in the petition in error, and an attempt is made to embrace in the case-made a statement or abstract of the testimony given below. Aside from a recital in the petition in error that all the evidence in the case is preserved in the abstract thereof attached to the record, there is nowhere in the record itself a statement that all the evidence is incorporated therein. In fact the record itself affirmatively shows that so much of the testimony given on the trial as was applicable to the question of fact raised by the verified denial of the correctness of the grounds for attachment is not here. A statement in the petition in error that all the evidence is preserved in the record is not sufficient to cure the omission of a recitation to that effect in the case-made proper; and, in the absence of evidence vital to a consideration of the assignment of error, it is impossible for this court to decide disputed questions arising thereon, and, following precedent, we must decline to do so.

The judgment of the trial court is therefore affirmed.

IRWIN, J., who tried the case below, not sitting. All the other Justices concurring.

AULTMAN TAYLOR MACHINERY CO. v. BURCHETT, Sheriff, et al.

(Supreme Court of Oklahoma. Sept. 5, 1905.)

1. OFFICERS—OFFICIAL BOND.

Ordinarily the duration of the sureties' liability on the official bond of a public officer is coextensive with the officer's official tenure of office, and ceases when the term expires by operation of law.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Officers, § 235.]

2. EVIDENCE—JUDICIAL NOTICE.

The courts of this territory will take judicial notice of the terms of office of public officers, where fixed by the statutes of the territory.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 66, 67.]

3. OFFICERS—ACTIONS ON OFFICIAL BONDS.

To entitle the plaintiff to recover in an action upon the official bond of a public officer, it is necessary for the plaintiff to allege and to show in his petition defaults which are covered by and included within the conditions of the bond sued on.

(Syllabus by the Court.)

Error from District Court, Kingfisher County; before Justice C. F. Irwin.

Action by the Aultman Taylor Machinery Company against B. W. Burchett, as Sheriff, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Stevens & Miller, for plaintiff in error.

BEAUCHAMP, J. This action was commenced by the plaintiff in error in the district court of Kingfisher county against the defendants in error to recover upon the official bond of B. W. Burchett, as sheriff. The defendants demurred to the petition of the plaintiff, for the reason that the petition does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendants. The trial court sustained the demurrers. The plaintiff electing to stand upon its petition and refusing to further plead, the court rendered judgment for the defendants for costs, exceptions were saved by plaintiff in error, and plaintiff in error brings the case here by petition in error and case made for review.

The material allegations of the plaintiff's petition, so far as necessary to an understanding of the question raised, are: "That prior to the 20th day of June, 1900, the defendant Burchett, as sheriff, did wrongfully and unlawfully take into his possession and sell and dispose of certain property of the plaintiff. That on the 21st day of June, 1900, the plaintiff recovered a judgment in the district court for the sum of \$242.00, with interest and costs, against the defendant Burchett, as sheriff. That execution had issued and was returned unsatisfied for want of property upon which to levy. That on the 8th day of August, 1896, Burchett, as principal, and Washburn, Winkler, and Grimes, as sureties, made and executed an official bond for Burchett as sheriff, which was approved on the 12th day of August, 1896.

Copies of the judgment and bond are attached to the petition as exhibits. That the plaintiff has demanded payment of the judgment from the defendants and each of them, which they have refused."

There is no allegation in the petition from which the court can possibly determine when the acts complained of, for which judgment was rendered against Burchett, were committed, or in any way connecting the judgment with defaults committed or connected with the term of office covered by the bond, and for which the bond would be liable; the only allegation being that the acts were committed prior to June 20, 1900. The acts may have been committed before the commencement of the term of office for which the bond was given to cover, or subsequent, or for matters for which the bond could in no case be held liable, so far as the petition discloses. Ordinarily the duration of the sureties' liability is coextensive with the officer's official tenure of office, and ceases when the term expires by operation of law. A. & E. Ency. of Law, vol. 25, p. 725. The courts will take judicial notice of the terms of office of public officers fixed by the statutes of the territory. A. & E. Ency. of Law, vol. 17, p. 918. As before stated, the petition alleges and shows that the bond was given August 8, 1896, and by the exhibit is shown to be an "additional official bond." The term of office of sheriffs under the statutes of this territory is two years, so that the bond was given about four years before the date of the judgment against Burchett, and the fact that the judgment is against him as sheriff is no evidence that it was for defaults covered by the bond sued on. To entitle the plaintiff to recover upon the official bond of a public officer, it is incumbent upon him to allege and show in his petition defaults which are covered by and included in the conditions of the bond sued on.

This being an action upon the official bond, the order and judgment of the court sustaining the demurrer as to all of the defendants, including Burchett, and for costs, was right, and is therefore affirmed, with costs to plaintiff in error. All of the Justices concurring, except IRWIN, J., who tried the case in the district court, not sitting.

BACON v. LOCKE, Constable.

(Supreme Court of Washington. March 9, 1906.)

1. HAWKERS AND PEDDLERS—LICENSES—UNIFORMITY—CONSTITUTIONAL LAW.

Laws 1905, pp. 372, 373, provide that every person, firm, or corporation who peddles out, or, "after shipment to the state," canvasses and sells by sample any carriage or wagon, and certain other articles, shall pay in advance a license tax of \$200 for each calendar year, or portion thereof, to be paid in each county in which the occupation is pursued. *Held*, that such provision was void for nonuniformity required by State Const. art. 1, § 12.

2. CONSTITUTIONAL LAW—PRIVILEGES OF CITIZENS—LICENSES.

Laws 1905, pp. 372, 373, providing that every person who, after shipment to the state, canvasses and sells by sample certain articles, shall pay a license tax of \$200 for each calendar year, or portion thereof, in each county in which the occupation is pursued, are unconstitutional, as impairing the privileges and immunities of citizens of the several states, guaranteed by Const. U. S. art. 4, § 2.

3. HAWKERS AND PEDDLERS—LICENSES—STATUTES—CONSTRUCTION.

Laws 1905, pp. 372, 373, provide that every person, firm, or corporation who peddles out, or, after shipment to the state, canvasses and sells by sample any articles described, shall pay a certain license tax, etc. *Held*, that the phrase "after shipment to the state" could not be construed as referring to "persons," and not to the property designated, nor as exempting from the operation of the act nonresidents sending agents into the state merely to canvass to take orders for their principals, for the purpose of sustaining the validity of the act.

Appeal from Superior Court, Whatcom County; Jeremlah Neterer, Judge.

Application by George T. Bacon for writ of habeas corpus to obtain his release from the custody of respondent, W. F. Locke, constable. From an order denying the application, petitioner appeals. Reversed.

Rose & Craven, for appellant. Virgil Peringer, for respondent.

ROOT, J. Appellant was arrested upon a complaint charging him with the crime of peddling and canvassing without a license, in violation of an act of the Legislature approved March 14, 1905, and found at pages 372, 373 of the published Laws of 1905. He filed a petition for his release upon a writ of habeas corpus, which petition and application was by the honorable superior court denied. From this order and judgment he appeals to this court.

It is his contention that the statute in question is in conflict with certain provisions of the Constitutions of the United States and of this state. That portion of the statute involved herein reads as follows: "That every person, firm or corporation who peddles out, or, after shipment to the state, canvasses and sells, by sample to users or consumers, clocks, agricultural implements, or machinery, stoves, ranges, windmills, lighting rods, wagons, buggies, carriages, sur-

reys, and other similar vehicles, washing machines, sewing machines, churns, or groceries shall pay in advance a license tax of two hundred (\$200.00) dollars for each calendar year, or portion thereof, to be paid in each county in which said occupation is pursued." Appellant was agent of the Spaulding Manufacturing Company, whose factory is located at Grinnell in the state of Iowa. On the 8d of July, 1905, he sold to Julius Shields in Whatcom county, as per sample then exhibited, a carriage or wagon, taking his order for the same, and afterwards on the 6th of July delivering the wagon thus sold; said wagon being taken from the warehouse of the Spaulding company in said county, where it had a car load lot of carriages or wagons stored. It is urged by appellant that this statute discriminates against goods manufactured in other states, and consequently against the owners of said goods and their agents. Section 8, art. 1, of the United States Constitution contains the following: "The Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with Indian tribes." Section 2 of article 4 contains the following: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Section 1 of the fourteenth amendment reads as follows: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Section 12 of article 1 of the state Constitution reads as follows: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations."

We think appellant's contention must be upheld. The clause "after shipment to the state" has the effect of discriminating between goods manufactured in this state and those shipped here from a sister commonwealth. To avoid this was one of the prime purposes of the constitutional provisions hereinbefore quoted; and the decisions of the United States Supreme Court, as we understand them, have announced principles which, applied to this statute, would render it clearly obnoxious to the federal Constitution. *Webber v. Virginia*, 103 U. S. 344, 26 L. Ed. 505; *Brennan v. Titusville*, 153 U. S. 280, 14 Sup. Ct. 829, 38 L. Ed. 719; *Woodruff v. Parham*, 75 U. S. 140, 19 L. Ed. 382; *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Brown v. Maryland*, 12 Wheat. 446, 6 L. Ed. 678; *Ex parte Deeds* (Ark.), 87 S. W.

1030; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Howe Machine Co. v. Gage*, 100 U. S. 676, 25 L. Ed. 754; *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430; *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. 454, 29 L. Ed. 691; *Ward v. Maryland*, 79 U. S. 418, 20 L. Ed. 449; *Robbins v. Taxing Dist. Shelby Co.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694.

In the case of *Webber v. Virginia*, 103 U. S. 350, 26 L. Ed. 567, the Supreme Court, speaking through Mr. Justice Field, said: "By these sections, read together, we have this result: The agent of the sale of articles manufactured in other states must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them; while the agent for the sale of articles manufactured in the state, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufacturers and against the manufacturers of other states. Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is therefore a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured without the state, it is to that extent a regulation of commerce in the articles between the states. It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the state can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several states. * * * Commerce among the states in any commodity can only be free when the commodity is exempted from all discriminating regulations and burdens imposed by local authority by reason of its foreign growth or manufacture." In *Robbins v. Shelby Taxing Dist.*, 120 U. S. 497, 7 Sup. Ct. 596, 30 L. Ed. 694, the Supreme Court, speaking by Mr. Justice Bradley, employs this language: "When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are. *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Machine Co. v. Gage*, 100 U. S. 676, 25 L. Ed. 754. But to tax the sale of

such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself." In the case of *Brennan v. Titusville*, 153 U. S. 302, 14 Sup. Ct. 832, 38 L. Ed. 719, the court, speaking by Mr. Justice Brewer, announced the following: "It is undoubtedly true that there are many police regulations which do not affect interstate commerce, but which have been and will be sustained as clearly within the power of the state; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free. That this license tax is a direct burden on interstate commerce is not open to question. In the early and leading case of *Brown v. Maryland*, 12 Wheat. 419, 444, 6 L. Ed. 678, in which a state law, requiring an importer to take out a license and pay \$50 before he should be permitted to sell a package of imported goods, was adjudged in conflict with the commerce clause in the national Constitution, Chief Justice Marshall said: 'But, should it be proved that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more. It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself.' " In the case of *Machine Company v. Gage*, 100 U. S. 678, 25 L. Ed. 755, the court, through Mr. Justice Swayne, spoke as follows: "A law which requires a license to be taken out by peddlers who sell articles not produced in the state, and requires no such license with respect to those who sell in the same way articles which are produced in the state, is in conflict with the power of Congress to regulate commerce with foreign nations and among the several states." It would seem that the citation just made is so applicable to the case at bar as to render it absolutely conclusive of the question involved. In *Welton v. Missouri*, 91 U. S. 278, 23 L. Ed. 349, the Supreme Court used this language: "Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the state to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vest-

ed in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license." In an elaborate note to *People v. Wemple*, 27 Am. St. Rep. 542, 561, Mr. Freeman lays down the rule as follows: "A state may exact a license fee from persons carrying on business within its territory, without rendering its action in so doing subject to the objection that it is attempting to regulate interstate or foreign commerce; provided it does not discriminate in favor of its people, products, or manufactures, nor charge persons importing articles of commerce within the state for the privilege of there disposing of them."

Respondent contends with much ability and ingenuity that the language of this statute may be so construed as to avoid constitutional objections. He contends that the phrase "after shipment to the state" refers to persons and not to property; and also that it is susceptible of the construction that would express an intention that nonresidents, who send their agents into this state simply to canvass and take orders for their principals, are excepted from the requirements of the statute, and that no others are excepted. We are unable to recognize force in these contentions. The language is not obscure or ambiguous, and we cannot give to it a significance strained and unnatural. *Sutherland*, Stat. Constr. §§ 235, 237, 238; *McClusky v. Cromwell*, 11 N. Y. 593. The effect of the usual and ordinary meaning of the language employed in the statute being to require of a canvasser a license when selling goods shipped from a sister state to this, but not imposing a like obligation upon one canvassing for goods manufactured in this state, we are constrained to hold the statute inhibited by the federal Constitution.

The judgment of the honorable superior court is reversed, and the cause remanded, with instructions to grant the writ and release the appellant.

MOUNT, C. J., and CROW, RUDKIN, FULLERTON, HADLEY, and DUNBAR, JJ., concur.

PURDIN et ux. v. WASHINGTON NAT. BLDG., LOAN & INV. ASS'N.

(Supreme Court of Washington. Jan. 9, 1906.)

DRAINS—IRRIGATION DISTRICTS—ESTABLISHMENT—PROCEEDINGS—COLLATERAL ATTACK.

The validity of proceedings for the establishment of an irrigation district cannot be attacked collaterally in a suit to recover possession of land sold for nonpayment of irrigation taxes.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Drains, § 54.]

Appeal from Superior Court, Kittitas County; Frank H. Rudkin, Judge.

Action by R. Lee Purdin and wife against the Washington National Building, Loan &

Investment Association. From a decree in favor of plaintiffs, defendant appeals. Affirmed.

Kauffman & Frost, for appellant.

ROOT, J. Respondents commenced this action to recover possession of certain real property, to which they claim title under a sale for delinquent district taxes levied by the Middle Kittitas irrigation district, organized under the act of March 20, 1890 (Laws 1889-90, p. 671). The defendant claims title to said property, with right of possession, as successor in interest to the persons owning said property at the time of the creation of said irrigating district, there being upon said property at that time a mortgage which was subsequently paid and satisfied by the owners making a deed of conveyance of said property to the mortgagee, this defendant, who accepted the same in satisfaction of said mortgage without any foreclosure proceedings being had. Appellant interposed two affirmative defenses: (1) That its interest in said land attached prior to, and is paramount to, the title obtained by the sale for delinquent district taxes; (2) that the irrigation district was not legally organized because the petition for its organization did not carry the number of signatures which the law requires. No question is made of the regularity of the tax proceedings which culminated in the deed to respondents' grantor. In the lower court judgment went in favor of the plaintiffs, from which judgment defendant appeals.

Appellant contends that the taxes levied by the irrigating district could in no manner have preference over the mortgage lien which was upon the property at the time of the creation of the district, and that there is nothing in the statute authorizing the creation of such districts which give taxes levied thereby a preference over prior liens. It is not necessary to determine this last contention at this time. The mortgage upon the premises was never foreclosed; consequently the interest acquired by respondents and their grantors was never decreed to be subordinate to said mortgage lien, or in any manner foreclosed by the owner of said mortgage. Appellant claims that the district was not created until August 3, 1891, on which day the commissioners of the county made and entered the order creating an irrigating district. The mortgage was given on July 27, 1891. The date of transfer from the mortgagor to the mortgagee does not appear. We can find nothing in the record showing appellant's title to be equal, or paramount, to that of respondents.

As to the contention that the district was not legally organized, we do not think that appellant can raise that question in this proceeding. Such an attack cannot be made collaterally. In the case of *Miller v. Perris Irrigation District* (C. C.) 85 Fed. 693, the United States circuit court for the southern

district of California, in a case involving questions very similar to this before us, among other things said: "The rule sustained by the overwhelming current of authorities, and based on consideration of public policy is that, where a reputed corporation is acting under forms of law, unchallenged by the state, the validity of its organization cannot be drawn in question by private parties. Corporate franchises are grants of sovereignty only, and if the state acquiesces in their usurpation, individuals will not be heard to complain. Neither the nature nor extent of an illegality in its organization can affect the existence of a reputed corporation if the requisites just stated are present; that is, if such corporation be acting under color of law, and the state makes no complaint. Where these requisites concur, there is a de facto corporation. Such corporation may legally perform every act which the same entity could perform were it a corporation de jure. *People v. La Rue*, 67 Cal. 526, 8 Pac. 84." The principle laid down in the case just cited seems to be the one generally accepted and followed by the courts in cases of this kind. *Dean v. Davis*, 51 Cal. 406; *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. 514; *Norton v. Shelby County*, 118 U. S. 426, 6 Sup. Ct. 1121, 30 L. Ed. 178; *Rothchild v. Rollinger*, 32 Wash. 307, 73 Pac. 367.

We think that the judgment of the superior court was correct, and it is therefore affirmed.

MOUNT, C. J., and CROW, DUNBAR, FULLERTON, and HADLEY, JJ., concur.

BALDWIN v. DALY et al.

(Supreme Court of Washington. Jan. 10, 1906.)

1. COMPROMISE AND SETTLEMENT—PART PAYMENT BY SURETY—DISCHARGE FROM BALANCE—CONSIDERATION.

An immediate payment by a surety of a part of the notes, all of which are not due, is a sufficient consideration for an agreement by the payee to release the surety from his obligation to pay the balance.

2. BILLS AND NOTES—DISCHARGE OF SURETY—PAROL AGREEMENT—VALIDITY.

Under Negotiable Instruments Act (Laws 1899, p. 361) § 122, authorizing the holder of a negotiable instrument to "renounce his rights against any party to the instrument," and providing that a "renunciation must be in writing," the release of a surety on a note cannot be shown by parol; the word "renunciation" being used in the sense of "release."

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by A. L. Baldwin against George A. Daly and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Reaves, Thorp & Wheeler, for appellants. Sauter & Sheldon, for respondent.

FULLERTON, J. This action was brought in April, 1904, by the respondent against the

appellants to recover upon a promissory note for \$724.95, dated February 19, 1903, and due 12 months after date. In his complaint the respondent set forth the note in words, showing its execution as principals by both of the appellants, alleged that a payment of \$84.95 had been paid thereon prior to its maturity, and that the balance was overdue, and demanded judgment for such balance. The appellants answered separately. The appellant Daly answered to the effect that prior to the maturity of the note the respondent and appellants entered into an agreement by which the respondent, for a valuable consideration, extended the time of the payment of the note until June 1, 1904, and that the action was prematurely brought. The appellant Peter set up the same defense, and the further defense that the respondent had released him from his obligation to pay the note. He alleged that this note, with three certain other notes, had been given as part of the purchase price of a sawmill sold by the respondent to the appellant Daly and one Furr; that he had no interest in the purchase of the mill, but signed the same as an accommodation maker for Daly and Furr, all of which the respondent well knew; that, when the first of the notes given as the purchase price of the sawmill matured, it was paid by Daly and Furr, but, when the second and third of the notes matured, neither Daly nor Furr was able to pay the same, and the respondent called upon him for payment; that he absolutely refused to pay the notes until the respondent should foreclose a chattel mortgage given by Daly and Furr to secure their payment and obtain all he could from the sale of such property, and that the matter was then taken up by all of the parties and an agreement entered into by the terms of which the respondent agreed, in consideration of the sum of \$1,400, which would pay the second and third notes, then due, in full, and the interest and \$84.95 on the principal of the fourth note (the one here in suit), to give to the appellant Daly until June 1, 1904, to pay the balance owing on fourth note, and to release the answering appellant entirely from any further liability thereon, and to look solely to the chattel mortgage and appellant Daly for payment of the same. It is then alleged that in consideration thereof, and for the sole purpose of being released from the further payment of the note sued on, he did pay the respondent the sum of \$1,400, which sum was applied by the respondent in the manner agreed upon between the parties. A reply was filed denying the affirmative allegations of the answers. At the trial, which was had before the court without a jury, the appellant Peter offered oral evidence tending to show that he was only surety upon the note sued upon, and that he was released from his liability thereon as alleged in his answer. This evidence the court rejected, holding that oral evidence was not competent to

prove either that the appellant was only surety on the note, or that he had been released from liability thereon. The trial then proceeded on the issue of extension of time, at the conclusion of which the court held the allegations not proven, and entered judgment for the respondent for the sum shown to be due on the note. This appeal is from the judgment so entered.

The ruling of the trial court, to the effect that it is incompetent for one of two or more makers of a joint and several promissory note to show by parol that he is in fact only a surety, and that he was known to be such by the payee named in the note when the note was taken, is contrary to the ruling of this court in *Culbertson v. Wilcox*, 11 Wash. 522, 39 Pac. 954, and *Bank of British Columbia v. Jeffs*, 15 Wash. 230, 46 Pac. 247. It is apparent, however, that this question is not a material one here, unless it is to be held that the appellant Peter was entitled to show that the respondent had released him from liability on the note. On this question the appellant suggests two considerations, either of which he contends is fatal to the appellants' claim: First, that no consideration for the alleged release was pleaded; and, second, that a release cannot be shown by parol.

As to the first point, it was alleged that for an immediate payment of a part of the debt, all of which was not then due, the respondent agreed to release the appellant, who was only a surety, from his obligation to pay the remainder. And while it is true that courts have disagreed on the question whether the payment of a part of a debt is a sufficient consideration to support an agreement for the release of the whole, this court has taken part with the courts holding such contracts to be founded on a sufficient consideration, and we think the pleading sufficient in that respect. See *Brown v. Kern*, 21 Wash. 211, 57 Pac. 798.

We are constrained to hold, however, that the second contention must be sustained. Section 122 of the negotiable instruments act (Laws 1899, p. 361) reads as follows: "The holder may expressly renounce his rights against any party to the instrument, before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon." This plainly provides that the renunciation of a debt must be in writing where the debt is evidenced by a negotiable instrument, and, if "renunciation" is used therein in the sense of "release," there can be no question that the appellant must show a written renunciation in order to prove the allegations of his answer. Counsel for the

appellant argues that the word is used in a sense different from that of release, and that, while a renunciation must be by a writing, a release may be proved by parol. But we cannot think the statute permits of this distinction. The words "the holder may expressly renounce his rights against any party to the instrument" must refer to the release and discharge of a party to the instrument from his obligation to pay it, else they can have no legitimate meaning.

The remaining question is the sufficiency of the evidence to establish an extension of time of payment of the note, but without entering into an analysis of the evidence it is sufficient to say that we find no cause to reverse the case on this ground.

The judgment is affirmed.

MOUNT, C. J., and HADLEY, RUDKIN, ROOT, CROW, and DUNBAR, JJ., concur.

TRUDEAU v. AMERICAN MILL CO.

(Supreme Court of Washington. Jan. 19, 1906.)

1. MASTER AND SERVANT—ASSUMPTION OF RISK—DEFECTIVE APPLIANCES—PROMISE TO REPAIR.

Though a master, on complaint of the servant, has promised to repair a defective appliance, the servant must exercise reasonable care commensurate with the danger in the use of the appliance.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 641-647, 684-686.]

2. SAME—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DEFECT.

A servant was attempting to dump a wagon, so arranged by shafting and a chain that the box could be dumped, when the shafting whirled rapidly around, carrying with it a wrench that he had used, and the wrench flew off and struck him. Held that, though he had been unable to remove the wrench while dumping the wagon, owing to the defective condition of the shafting, having known of the defect, he was guilty of contributory negligence in keeping the wrench on the shafting until the load began to dump, and in standing where the wrench could strike him.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 706, 707.]

Appeal from Superior Court, Chehalis County.

Action by Edward Trudeau against the American Mill Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Govnor Teats, for appellant. J. B. Bridges, for respondent.

RUDKIN, J. The complaint in this action alleges substantially the following facts: The plaintiff was in the employ of the defendant as a teamster, engaged in hauling and delivering wood from the defendant's mill in the city of Aberdeen. The wagons used by the plaintiff in this work were furnished with a platform about even with the top of the wheels, on the top of which was a

large, cumbersome box in which the wood was placed. This box was moved back and forth on the platform by means of an endless chain and shafting for the purpose of unloading. The shafting extended to the side of the platform box, about the center thereof, and the box was moved back and forth by the teamster by means of a large wrench placed on the shafting. At the time the plaintiff entered the employ of the defendant, on the 18th day of December, 1904, the shafting on one of the wagons was bent so that it was difficult to remove the wrench from the shafting when the load began to dump. This wagon was only used a portion of the time. On or about the 10th day of January, 1905, the plaintiff complained to the superintendent of the mill of the defective condition of this shafting, but nothing appears to have been done in regard thereto. On or about January 18th the plaintiff complained to the blacksmith in the defendant's employ, but was by him informed that he had no authority to make repairs unless directed so to do by the millwright. The plaintiff thereupon sought the millwright, and they went together to the blacksmith. They found the latter busy, but the millwright and blacksmith promised to make the necessary repairs at the first opportunity. Soon thereafter the mill closed down, and when the plaintiff returned to work, on or about the 22d day of February, he discovered that the shafting had not been repaired. He again sought out the blacksmith, and the latter again promised to make the repairs within a few days. The plaintiff continued at work, and, on the 25th day of February, 1905, was delivering a load of wood, and "when undertaking to dump the said load of wood, and when the said box had reached about the point of the equilibrium, and at the point of dumping, he undertook to remove the said wrench, as was necessary for him to do, from the said shafting, but, due and owing to the said defective condition of the same, he was unable to do so, the box fell to the ground, the shafting suddenly and with great force was whirled around, carrying with it the said wrench, which struck the plaintiff upon the left temple and side of the head," etc. To this complaint a demurrer was sustained for want of sufficient facts. The plaintiff elected to stand on his complaint, and refused to plead further. A judgment of dismissal was thereupon entered, from which this appeal is taken.

The defect in the shafting in question was open and apparent, the appellant had full knowledge thereof and of the dangers incident to its use, and, had he received the injuries complained of at any time before the promise to repair was given, the defense of assumption of risk or contributory negligence would necessarily have barred a recovery. If we concede that the appellant did not assume the risk arising from the

use of the defective appliance after complaint was made, by reason of the promise to repair, yet he was in duty bound to exercise reasonable care and caution in view of the defective condition of the appliance which he was handling. His care must be commensurate with the danger. In other words, he must exercise due and reasonable care under the particular circumstances. *Crooker v. Pacific Lounge & Mattress Co.*, 34 Wash. 191, 75 Pac. 632; *Indianapolis & St. L. R. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824, 5 Am. St. Rep. 578. It is true, as contended by the appellant, that the facts are admitted by the demurrer; but the court is not bound to accept every inference the pleader may draw from these facts. For instance, it is apparent from the complaint that it was not necessary for the appellant to keep the wrench on the shafting until the load began to dump. The wrench might readily have been removed before the load reached the dumping point. The rest could have been accomplished in entire safety by a lift on the front, or by pulling down on the load from behind. Again, it is not apparent to the court why the appellant should assume a position where the wrench would strike him in the event that he continued the use of the wrench until the load commenced to dump. In view of all the circumstances, we are of opinion that the appellant was guilty of contributory negligence, which was the direct and proximate cause of his injury.

The demurrer was properly sustained, and the judgment is affirmed.

MOUNT, C. J., and ROOT, DUNBAR, CROW, FULLERTON, and HADLEY, JJ., concur.

STATE ex. rel. LOWARY v. SUPERIOR COURT OF LINCOLN COUNTY et al.

(Supreme Court of Washington. Jan. 19, 1906.)

1. APPEAL—DISMISSAL OF GROUNDS—CESSATION OF CONTROVERSY.

The Supreme Court will not dismiss a case because of a cessation of the controversy between the parties, unless such cessation is shown to exist by clear and statutory proof.

2. REVIEW—TIME OF APPLICATION.

An application for a writ to review an order appointing a guardian for an alleged incompetent, and a subsequent order refusing to vacate the appointment, will be entertained, although not made until over a year from the date of the former order, and almost a year from the date of the latter, where it appears from the application that relator is in ill health, was deprived of her property by the order complained of, and consequently without means to give bond or employ counsel to prosecute an appeal, and it is charged and found that relator is in fact mentally incompetent to manage her property.

3. INSANE PERSONS—APPOINTMENT OF GUARDIANS—NOTICE.

Under the statute requiring notice of application for the appointment of a guardian for an incompetent person to be served on the

incompetent person and on the person having control of such incompetent person, and providing that the incompetent person must be present at the hearing if able to attend, the service of the required notice is jurisdictional, and the record must show that such notice was served on the person having control of the incompetent person, or that there was no person upon whom such service could be made, and that the incompetent himself was present at the hearing or was unable to attend.

Writ of review by the state, on the relation of Addie V. Lowary, against the superior court of Lincoln county and another. Judgment reversed.

Mendenhall, Rhodes & Pence, for relator.
H. A. P. Myers, for respondents.

RUDKIN, J. On the 23d day of July, 1904, A. D. Strout filed a petition in the superior court of Lincoln county praying for the appointment of himself, or some fit and proper person, as guardian of the person and estate of his daughter, Addie V. Lowary, on the ground that she was mentally incompetent to manage her property and that she had property needing care and attention. The petition averred that said Addie V. Lowary was a resident of said Lincoln county and had no relatives residing therein except the petitioner and his wife, but did not set forth who, if any person, had the care, custody, and control of said Addie V. Lowary. August 3, 1904, was fixed as the date for the hearing of said application, and on the 23d day of July preceding, notice of such hearing was personally served on said Addie V. Lowary by the sheriff of Lincoln county. The matter was continued until the 16th day of August, 1904, and on the latter date a hearing was had and an order made, appointing the petitioner guardian as prayed. At such hearing said Addie V. Lowary did not appear in person, but one Mulligan and the prosecuting attorney of Lincoln county appeared in her behalf. On the 30th day of September, 1904, said Addie V. Lowary filed a petition for the vacation of the order appointing the guardian on numerous grounds, among others, that she was not a resident of Lincoln county at the time said application was made and had not resided in said county for more than one year prior thereto. On the 18th day of October, 1904, the petition to vacate was denied. On the 2d day of October, 1905, application was made to this court for a writ of review, to review the order appointing the guardian and the order refusing to vacate the appointment. The writ was allowed and the matter is now before us for final determination. On the 2d day of December, 1905, the respondent filed in this court a statement, signed by the relator, reciting that the matter in dispute has been satisfactorily adjusted and praying that this proceeding be dismissed. In opposition to this motion there have been filed affidavits of the relator and her husband to the effect that, if any such statement was signed by relator, it was signed through mis-

take and obtained through fraud. This court will not dismiss a case because of a cessation of the controversy, unless such cessation is shown by clear and satisfactory proof. No such showing is made in this case, and the motion to dismiss is accordingly denied. It was further contended by the respondent that the writ was not applied for within the time limited by law. The statute does not fix the time within which such applications must be made, but the courts by analogy apply the limitation fixed by law for the prosecution of an appeal. Ordinarily this court will not entertain jurisdiction of an application of this kind after the time limited by law for prosecuting an appeal has expired; but it appears from the application before us that the relator was in ill health, and was deprived of her property by the order complained of, and was thus without means to give bond or employ counsel to prosecute an appeal. In addition to this, the respondent charged and the court found that she was incompetent to manage her affairs, and the respondent who preferred the charge will not now be heard to gainsay it. This court will therefore assume, for the purpose of protecting her rights, that the relator was in fact incompetent, and in view of these facts we are of the opinion that the application was timely made.

On the merits of the case little need be said. It clearly appears that both the order appointing the guardian and the order refusing to vacate the appointment are erroneous. The statute provides that notice of applications of this kind must be served on the minor or incompetent person and on the person having the care, custody, and control of such minor or incompetent person, and that the person for whom a guardian is sought must be present at the hearing if able to attend. The former of these requirements at least is jurisdictional. A proceeding for the appointment of a guardian is statutory, and the requirement that notice shall be given is mandatory. Ordinarily the notice to be served on the minor or incompetent person is of far less importance than the notice required to be served on the person having the care, custody, and control. The minor may be of such tender years, or the incompetent person so far bereft of reason that the notice served upon them is little more than a formality; whereas, the law presumes that those having the care, custody, and control of such persons have at least sufficient interest in their welfare to see that their legal rights are protected. The record should therefore show that the required notice was served, or that there was no person upon whom service could be made, and that the person for whom the guardian is sought was present at the hearing or was unable to attend. The record before us not only fails to show these facts, but it was made manifest to the court, on the petition to vacate the order of appointment, that the relator was in the care,

custody, and control of certain persons at the time of the application, and that no notice of the application was served upon them; that the relator was able to attend at the hearing and did not, and, in addition to all this, that the relator was not a resident of Lincoln county at the time of the application, and had not been for more than one year prior thereto. The court was therefore without jurisdiction, and its judgment is a nullity.

The judgment is reversed, and the cause remanded, with directions to vacate the order appointing the guardian and require the respondent to account for all moneys or property received by virtue of his appointment.

MOUNT, C. J., and FULLERTON, HADLEY, CROW, ROOT, and DUNBAR, JJ., concur.

K. P. MIN. CO. v. JACOBSON.

(Supreme Court of Utah. Jan. 25, 1906.)

1. VENDOR AND PURCHASER—SURRENDER OF OPTION.

There is a surrender of an option to purchase a mine, where the purchaser signifies his intention to surrender it and forfeit his rights and the vendor thereupon takes possession and continues therein.

2. SAME—EVIDENCE.

Evidence, in an action for breach of a contract containing an option for purchase of a mine, held insufficient to sustain a finding that there was not a surrender by the purchaser and an acceptance thereof by the vendor.

3. SAME — DAMAGES — LIMITATION BY CONTRACT.

An option for purchase of a mine, providing for certain payments and certain work at certain times by the purchaser, and that if the purchaser shall fail to pay any of the installments of the purchase price, or shall fail to comply with any of the covenants or conditions, the contract shall terminate and all installments, or other sums which may have been paid by the purchaser, shall be forfeited and become liquidated damages, limits the damages, where the contract is forfeited, to work done and payments made.

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by the K. P. Mining Company against Tony Jacobson. Judgment for plaintiff. Defendant appeals. Reversed.

This is an action to recover for an alleged breach of a certain contract made between plaintiff and defendant August 28, 1903. The contract contained an option giving the defendant the right to purchase from the plaintiff certain mining claims known as the Native Copper No. 1, No. 2, and No. 3 lode mining claims, situated in Little Cottonwood mining district, Salt Lake county, Utah. The contract, so far as material here, recites that the agreed purchase price for all the claims mentioned is \$40,000, payable as follows: \$5,000 on or before February 28, 1904; \$10,000 on or before August 28, 1904; \$25,000 on or before August 28, 1905. That the second party shall, on or before February 28, 1904,

or immediately thereafter, make application and proceed to procure a patent from the government of the United States in the name of the first party, and that said application shall be prosecuted with diligence to final entry, and all sums of money required for the procuring of said patent shall be advanced by the second party. "Time is the essence of this contract and in the event the second party shall fail to pay any one of said installments within the time provided therefor or in the event said second party shall fail to comply with the covenants and conditions herein imposed upon him or any one of the same then this contract shall terminate and be of no force and effect and all installments or other sums which may have been paid by the second party under this contract or by reason thereof shall be forfeited by the said second party and become the property of the first party as liquidated damages and as additional compensation for the use of the property under said contract, and the said first party shall be relieved from all liability existing hereunder. The second party shall take possession of said mining claims at once and commence work upon the same within fifteen days after the date of this lease and shall cause to be performed upon said property not less than 120 shifts (one man working one day constituting one shift) of mining labor each and every month of the term of this lease. And it is further understood and agreed that in the event the second party shall fail to comply with each and all of the covenants, conditions, and agreements assumed and imposed upon him under this contract, then the party of the first part may at his option, terminate this lease by giving a written notice of his option, so to do to the second party and in such event this lease shall become null and void and of no effect and thereupon the contract of sale and purchase hereinabove set forth shall immediately terminate and be of no force or effect and all payments or installments made by the second party under the contract of sale and purchase and under this lease shall be forfeited by the second party and become the property of the first party as liquidated damages and as additional compensation for the use of said property under this contract and the said first party in such event shall be relieved of all liability otherwise existing hereunder."

Defendant went into possession of the mining claims, and, during the month of September, 1903, caused to be performed thereon 35 shifts of labor. On October 5, 1903, he informed William Kiesling who was manager and also a director of plaintiff company, that he (the defendant) guessed he would have to surrender the property. Kiesling was called as a witness for the plaintiff, and testified on this point in part as follows: "Well, he says [referring to defendant]: 'I don't know if we can do anything with it,' he says: 'I guess I will have

to give it back to you.' * * * I said to him: 'If you had thought of that a month ago, why didn't you tell us? You ought to have told us that a month ago.' And he said: 'Well, I guess I will have to give it back to you.' And I said: 'We will see what we can do.' " On this point defendant testified and he is corroborated by two other witnesses, that he stated he could not do anything with the property and would have to give it up, and Kiesling answered: "All right I am glad of it." On October 15, 1903, 10 days after the foregoing conversation, plaintiff, without notice to or consulting defendant, went upon the property referred to and had it surveyed by a United States deputy mineral surveyor for the purpose of obtaining a patent therefor, and in due time made application for patent. On February 4, 1904, plaintiff commenced this action to recover from defendant \$1,500, because of defendant's failure to perform, during each and every month since the 28th day of August, 1903, 120 shifts of labor on the mining claims referred to. The case was tried by the court without a jury, and after hearing the evidence the court, among other things found "that said defendant did not, on or before the 1st day of October, 1903, or at any time, or at all, surrender to the plaintiff all or any rights under said contract option and lease, and did not then and there, or at any time, or at all, surrender and deliver to the plaintiff the possession of said premises, or any part thereof, * * * and said plaintiff did not then and there, or at any other time, or at all, prior to the 28th day of February, 1904, enter into possession of said premises, or any part or portion thereof, and that said plaintiff was not, at any time between the 28th day of August, 1903, and the 28th day of February, 1904, in possession of said premises, or any part thereof."

Judgment was entered in favor of plaintiff for \$1,410. Defendant appeals.

Cannon, Irwin & Snow, for appellant.
Frick & Edwards, for respondent.

McCARTY, J., after stating the facts, delivered the opinion of the court.

Appellant contends that the finding made by the court wherein it is held that he did not surrender his option on October 5, 1903, and that the plaintiff did not take possession of the property on the 15th day of the same month, is contrary to, and not supported by, the evidence. While there is some conflict in the evidence respecting the language used by appellant when he claims to have notified Kiesling, who was the manager of respondent company and one of the directors, that he wanted to forfeit the option he had under the contract to purchase and surrender the property, yet, when considered in connection with the admitted fact that the company, on the 15th day of October, went into possession of the property for the purpose of making a survey for patent, and,

for aught that appears in the record, has ever since continued in possession thereof, and performed work and incurred expenses which the contract expressly provided should be performed and borne by appellant, shows that, whatever the exact language used by appellant may have been when he signified his intention to surrender his option and forfeit his rights under the contract, the company, by its acts in taking and continuing in possession of the property, accepted and treated the statements and conduct of appellant as a surrender by him of the property and a forfeiture of his rights under the contract. "An actual and continued change of possession by the mutual consent of the parties will operate as a surrender by operation of law, though there was no express agreement of the parties that it should so operate." 18 Am. & Eng. Enc. L. 362. The finding of the court on this point is not only unsupported by, but is contrary to, the evidence.

There is another reason why respondent cannot recover in this action. The contract itself provides for liquidated damages; that is, the parties have stipulated therein what the damages shall be in case of a breach by appellant of any of its covenants. And the general rule is that when parties to a contract of this kind, where the damages resulting from a breach thereof are uncertain in amount, have stipulated what such damages shall be, no other or greater damages than those agreed upon can be recovered. In 8 Am. & Eng. Enc. L. (2d Ed.) 636, the doctrine is stated as follows: "If the parties to a contract themselves limit the damages by stipulation in the contract itself, the measure of damages will be thereby controlled and determined. Thus, in an action on a written contract for a stipulated amount, the contract itself furnishes the measure of damages." In 13 Cyc. 90, it is said: The contract is to govern, and the true question is: What was the contract? Whether it was folly or wisdom for the contracting parties thus to bind themselves is of no consequence, if the intention is clear. If there be no fraud, circumvention, or illegality in the case, the court is bound to enforce the agreement." In Page on Contracts, § 1171, the author, in stating this general doctrine, says: "If the actual damages exceed those contracted for, the injured party is bound by the stipulation of the contract, and cannot recover the actual amount of damages." 1 Sutherland on Damages (3d Ed.) § 279; *Hennessey v. Metzger*, 152 Ill. 505, 38 N. E. 1058, 43 Am. St. Rep. 267; *Jackson v. Hunt* (Vt.) 56 Atl. 1010. This doctrine is so well settled that we deem a further discussion and citation of authorities unnecessary.

The contract under consideration in part provides that in case appellant shall fail to pay any one of the installments of the purchase price therein mentioned, "or shall fail to comply with the covenants and condi-

tions therein imposed upon him or any one of the same then this contract shall terminate * * * and all installments or other sums which may have been paid by the second party [appellant] shall be forfeited by the said second party and become liquidated damages," etc. It will thus be observed that the contract by its terms clearly provides what the damages shall be in case of a breach of any of its provisions by appellant: First, he shall forfeit whatever installments of the purchase price he may have paid, and, second, "other sums which may have been paid by him." Now, the term "other sums" undoubtedly includes the money paid by appellant for work done on the mining claims referred to, and which is one of the forfeitures therein mentioned. If respondent could recover for the price of unperformed labor sued for in this case, he would be entitled to recover the amount of the first installment, \$5,000, of the purchase price of the property, and it appears to be conceded that an action would not lie for the breach of this covenant.

The judgment is reversed, and as it is plain that respondent, by the terms of the contract itself, is precluded from recovering damages in any sum, the trial court is directed to dismiss the case; the costs of this appeal to be taxed against respondent.

BARTCH, C. J., and STRAUP, J., concur.

(30 Utah, 122)

HELSTROM v. RODES.

(Supreme Court of Utah. Jan. 13, 1900.)

1. TRUSTS—MINING CLAIMS—LOCATION.

Plaintiff's husband and another located a mining claim, a portion of which they sold to J., who conveyed to defendant. The assessment work not having been performed, plaintiff relocated the claim, and obtained a patent from the United States therefor. Held that, in the absence of any evidence that plaintiff relocated the claim for the benefit of any one but herself, a finding that she held a portion of the claim in trust for defendant was erroneous.

2. PUBLIC LANDS — OCCUPANCY — IMPROVEMENT.

Mere occupancy of public land, with the construction of improvements thereon, vests no right in the occupier as against the United States or a patentee from it.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, §§ 51-53.]

3. SAME — OCCUPYING CLAIMANTS — COMPENSATION FOR IMPROVEMENTS.

One who makes improvements on public land knowing that it is open to exploration and sale for its minerals, and who takes no steps to secure title or right to possession under the laws or the local rules and customs of miners, has no valid claim of possession or of compensation for improvements as an adverse holder in good faith, as against a patentee from the United States.

Appeal from District Court, Third District; M. L. Ritchie, Judge.

Action by Mary Helstrom against Isaac Rodes. From a decree in favor of defendant, plaintiff appeals. Reversed.

J. Ingebretzen and J. D. Pardee, for appellant. McGurrian & Gusten, for respondent.

STRAUP, J. This is an action in ejectment. The findings show: That in 1896 Helstrom, then the husband of plaintiff, and Jensen, being the locators, and as such the owners, of a mining claim called the "Lily Lode," sold a portion of it to Johnson, who thereafter erected a dwelling house thereon, and was in possession thereof until 1903, when he sold and conveyed it to the defendant. The annual assessment work for 1893 not having been done on the claim, in January, 1899, the plaintiff, at the request and for the benefit of her husband and his successors in interest, relocated the claim as the Julia lode. That the plaintiff resided on said claim since 1896, and was a co-tenant with the defendant and his predecessors. In July, 1902, plaintiff obtained a patent from the United States to the Julia lode, which embraces the premises claimed and occupied by the defendant. The court decreed that she held such portion of the claim in trust for the defendant, and directed that she execute a deed of conveyance conveying it to him. She appeals, attacking the findings and claiming that they have no support from the evidence.

The contention is well founded. There is a total want of evidence to support the findings that plaintiff located the Julia claim at the request of her husband or of any one, or that she made the location for his benefit or for the benefit of his successors in interest, or for the benefit of any one other than herself, or that she is, or ever was, a co-tenant with the defendant or his predecessors in interest. To the contrary, the evidence shows that the plaintiff located the Julia claim alone for herself, and not for the benefit of any one else. Nor does the court find, when plaintiff applied for patent, that there was any agreement between her and the defendant, or his grantor, to convey any part of said claim to them or either of them. Hence the cases cited by the defendant, to the effect that where one co-tenant of a mining claim, who, on the annual assessment thereon not being done, relocates it, or where a patent to a mining claim was issued to one who, by previous agreement with the original locators or their assigns, was to convey a portion of it or an interest therein to them, or where a party wrongfully obtains the legal title to land which rightfully belongs to another, and holds it in trust for such other, have here no application. The case falls within the rule that an occupant of the public land, without title, and without any attempt being made to secure title, cannot resist the enforcement of the patent of the United States on the ground of such occupancy. Mere occupancy of the public land and improvements thereon are no vested right therein as against the United States, and consequently not against any pur-

chaser from it. A person who makes improvements upon public land, knowing that it is open to exploration and sale for its minerals, and makes no effort to secure the title to it as such land under the laws of Congress, or the right of possession under the local rules and customs of miners, has no valid claim of possession or of compensation for his improvements as an adverse holder in good faith, when such sale is made to another, and the title is passed to him by a patent of the United States. *Sparks v. Pierce*, 115 U. S. 408, 6 Sup. Ct. 102, 29 L. Ed. 428; *Deffebach v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423; *Collins v. Bartlett*, 44 Cal. 371; *McKiernan v. Hesse*, 51 Cal. 594; *Treadway v. Sharon*, 7 Nev. 37; 1 *Snyder on Mines*, § 582.

It is not alleged in the answer, nor found by the court, that in locating the claim or obtaining the patent plaintiff, or the owners of the Lily lode, were guilty of any fraud or wrong, or that any act or thing was done by them to defeat any right of the defendant or his grantor; nor does the evidence show any such facts. Nor was the defendant without knowledge of the defect of his grantor's title. His grantor, a witness in his behalf, testified, and it is not denied by the defendant: "When I got ready to sell it, I asked Mrs. Helstrom if she wouldn't sign a quitclaim deed for it. She never did sign a deed for it. When I sold to Rodes, I talked with him about the title to the ground, and told him that I didn't have a patent for the ground. I told him that the title to the ground was in Mrs. Helstrom. We talked about it in the presence of Mr. Quinn, and Mr. Quinn told him that he should get Mrs. Helstrom to sign a quitclaim deed, but she never signed it. Then I afterwards went with Mr. Rodes to Mr. Lee, Justice Lee, and I heard Lee tell Rodes that he didn't need to have Mrs. Helstrom sign a quitclaim deed." Notwithstanding the notice given him by his grantor, and notwithstanding he knew plaintiff had located the property and had obtained a patent for it, the defendant had no transaction or conversation with her, made no effort to obtain her grant or release, but contented himself with the conveyance made by his grantor, who had neither record nor actual title. True, his grantor had title from the locators of the Lily lode, but, in order that it may be of worth, it was necessary to show that the Julia lode was located by the plaintiff for the benefit of the locators of the Lily lode, or for the benefit of their assigns, or that, through fraud, the Lily lode was abandoned and the Julia lode located to defeat the conveyance made to the defendant's grantor, or some facts showing that the plaintiff held the disputed ground in trust for the defendant, and in equity and good conscience ought to convey it to him. This the evidence fails to show.

The judgment of the court below is set aside, and a new trial is granted. The costs on appeal are to be taxed against the respondent.

BARTCH, C. J., and McCARTY, J., concur.

CORPORATION OF MEMBERS OF
CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS v.
WATSON.

(Supreme Court of Utah. Jan. 13, 1906.)

1. DEEDS—MENTAL CAPACITY.

The test of capacity to make a deed is whether the grantor at the time fully understood, realized, and appreciated the probable results and consequences of the transaction.*

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 149, 151.]

2. CONTINUANCE — ABSENCE OF WITNESS — DILIGENCE.

Rev. St. 1898, § 3133, requiring for a continuance, because of absence of evidence, a showing that "due diligence has been used to procure it," is not satisfied where a subpoena for the absent witness was not placed in the hands of an officer for service till the morning the case was called for trial, though it had been set for several weeks, and the witness had testified on a former trial.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Continuance, § 80.]

3. APPEAL—LAW OF THE CASE.

The rule of the law of the case does not require a deed held void on appeal to be so held on a second appeal; a different state of facts being presented.†

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4361.]

Appeal from District Court, Third District; W. C. Hall, Judge.

Action by the Corporation of the members of the Church of Jesus Christ of Latter-Day Saints, residing in the Fifteenth Ecclesiastical Ward of Salt Lake Stake of Zion, against Helen Watson. Judgment for plaintiff. Defendant appeals. Affirmed.

D. S. Truman, for appellant. F. S. Richards and J. T. Richards, for respondent.

McCARTY, J. This is an action by plaintiff in ejectment to recover possession of the N. ½ of lot 4, in block 81, plat A, Salt Lake City survey, and known as No. 21 South Fourth West street, in Salt Lake City, Utah. The defendant answered denying plaintiff's title, upon the ground that the deed under which it claimed title was executed by the grantor while mentally incapacitated, and that it was procured by undue influence. Upon the trial a decree was entered for the plaintiff. On appeal to this court the case

*Chadd v. Moser, 71 Pac. 870, 25 Utah, 369; Stringfellow v. Hanson, 71 Pac. 1052, 25 Utah, 480.

†Venard v. Green, 11 Pac. 337, 4 Utah, 458; Brim v. Jones, 45 Pac. 46, 352, 13 Utah, 440; National Bank v. Lewis, 45 Pac. 890, 13 Utah, 507; Silva v. Pickard, 47 Pac. 144, 14 Utah, 245; Societe Des Mines d'Argent et Fonderies de Bingham v. Mackintosh, 24 Pac. 669, 7 Utah, 25.

was reversed. 25 Utah, 45, 69 Pac. 531. A retrial resulted in favor of plaintiff, which was reversed upon appeal to this court. 27 Utah, 538, 76 Pac. 706. The case was tried again, and is now on an appeal taken by defendant from a decree entered in favor of plaintiff.

The facts in the case are as follows: On August 4, 1886, George Chatfield died intestate, leaving surviving him as his only heir at law his wife, Martha S. Chatfield, to whom he was married about seven months prior to the time of his death. At the time of said marriage Chatfield was the owner and in possession of the property in controversy, and, with his wife, continued to reside upon it until his death, August 6, 1886. The defendant herein, who was the daughter of Mrs. Chatfield by her former husband, a Mr. Sandal, resided with her mother on the premises in question until the latter's death in 1889, and has since continued to reside thereon. It is alleged in defendant's answer, and admitted in plaintiff's reply thereto: "That for a long time prior to his death Chatfield was a believer in the tenets and faith of the Church of Jesus Christ of Latter-Day Saints and a member of that denomination, * * * and that Martha S. Chatfield was an aged person, being about 60 years of age." For about five months before his death Chatfield had been in poor health, and for the greater part of the last three weeks prior to his death was confined to his bed. He had time and again, before his illness, expressed his intention of deeding the premises in question to the "Church," plaintiff herein, and the record shows that he had so expressed himself, prior to his marriage hereinbefore referred to, and, on the day before his death, made and executed a deed conveying the property to said church.

Defendant introduced some evidence which tended to show that for several weeks prior to the time the deed was executed Chatfield was very sick, and on the day of the transaction was much of the time in a stupor and unable to recognize those with whom he was surrounded and who were waiting upon him. The great preponderance of the evidence, however, shows that, notwithstanding he was weak and at times in great pain, he was perfectly rational and knew what he was doing when he signed the deed, and fully appreciated the effect and consequences of his act. George M. Cannon, before whom Chatfield signed and acknowledged the deed, testified in part as follows: "I read the deed to him in the presence of the other people who were there and explained exactly what the deed meant. * * * I told him if he signed that deed it would convey the property to the grantee, and he stated he wished to sign it. * * * G. W. Price, an old gentleman who lived there neighbor to him, and also Mrs. Chatfield, the wife of the grantor—he requested those people to witness it. That was done. * * * I asked him if he ac-

knowledgeed it of his own free will and choice, and he stated that he did—that that was his purpose. * * * I found him [referring to his mental condition] just as I had always found him, about the same as he had been during all my acquaintance with him. Q. Was that of sound mind? A. Yes, sir; that was of sound mind. * * * Q. What was his condition or talk with reference to being at all incoherent or unintelligible? A. His language was perfectly clear and lucid as I ever knew it to be." Other witnesses for plaintiff gave testimony which tended to corroborate the foregoing evidence of George M. Cannon. It is alleged in defendant's answer, and admitted by plaintiff in its reply, that subsequent to Chatfield's death, May 13, 1889, plaintiff signed and executed a lease to Mrs. Chatfield of the premises in question at the normal rental for the natural term of her life, and that plaintiff collected an annual rental of \$1 per year from said Martha S. Chatfield for the years 1892 and 1893.

Among other things the court found: "That for about two weeks prior to his death, the said George Chatfield was weak in body, but his mind was not impaired, and at the time mentioned in defendant's answer (August 3, 1886) he was wholly competent to transact business, and at none of said times was wholly or at all incompetent by reason of disease, or mental weakness, or bodily infirmity, or otherwise to transact any business." On the question and issue of undue influence having been used to induce Chatfield to execute the deed mentioned, the court found: "That at the times alleged in the defendant's answer, the said George Chatfield was about 67 years of age, that it does not appear from the evidence that said George Chatfield has been, for any time prior to his death, suffering from such a complication of diseases and mental weakness that he was easily induced, lead, or influenced by his religious beliefs or the acts of his spiritual adviser, Joseph Pollard, or any other person; but, at the time of the execution of said deed, the said George Chatfield was of sound mind, not acting under any undue influence, and the said deed was his voluntary act."

In her assignments of error appellant alleges that these findings are not supported by, but are contrary to, the evidence. There is no evidence in the record, whatever, which shows or tends to show, or from which it can be inferred, that an ulterior influence of any kind was used to induce Chatfield to make the deed in question; but, on the contrary, there is evidence which shows affirmatively that he executed the instrument of his own free will and choice. And the evidence further shows that he had decided to deed this property to respondent long prior to the time of his marriage to defendant's mother. Not only is the record barren of facts tending to show undue influence, but there is also an entire failure of

proof that Chatfield at the time he made the deed was incompetent to transact business. True, the evidence shows that he was enfeebled by old age and bodily infirmities, in fact was very sick, but it does not necessarily follow from this that he was mentally incapacitated from executing the deed. The test is, as declared by the great weight of authority, and as held by this court in the case of Chadd v. Moser, 25 Utah, 360, 71 Pac. 870, and Stringfellow v. Hanson, 25 Utah, 480, 71 Pac. 1052, did Chatfield, at the time, fully understand, realize, and appreciate the probable results and consequences of the transaction? For a more extended discussion of this question see authorities cited in those cases. We think the testimony hereinbefore set out, and other evidence referred to, affirmatively shows that Chatfield was of sound mind and knew and understood perfectly well what he was doing when he made the conveyance under consideration. This is in accordance with the opinion of this court on a former appeal of this case, wherein the facts found were substantially as here stated. 25 Utah, 45, 69 Pac. 531.

When the trial was nearly concluded in the lower court, defendant moved for a continuance supported by affidavit, in which it was alleged that one N. V. Jones was a material and necessary witness on behalf of defendant. The affidavit recites, so far as material here, that: "On October 1, 1904, defendant, by and through her attorney, D. S. Truman, caused a subpoena to be issued out of said court for the purpose of serving the same upon said N. V. Jones, but * * * by reason of press of business and some oversight which was occasioned by the above-mentioned engagements and business (which it is unnecessary here to enumerate) said attorney forgot to give said subpoena to the sheriff for service, but did give the same to him for service early Monday morning, October 8d (the day on which the case came on for trial). That said sheriff tried to serve the same upon said N. V. Jones, but found he had temporarily left the city and county for a short time." In addition to the facts set forth in the affidavit the attorney for appellant made the following explanation to the trial court why the subpoena was not served on the absent witness, which explanation he has incorporated into and made a part of the record on this appeal: "The only or the principal reason that he (Jones) wasn't served Saturday was that I was in court all morning and put the subpoena in my pocket and forgot it for the time being to leave it at the office when I went up, and in the afternoon I was busy all the time until I went home to dinner after working hours." The court held that the affidavit and explanation made were not sufficient to entitle defendant to a continuance and

denied the motion, to which ruling defendant excepted and now assigns the same as error.

The granting or refusing of a continuance is a matter largely within the discretion of the trial court, and, unless it is made to appear that the discretion has been abused, this court will not disturb the order granting or denying a continuance. *Life Ins. Co. v. Gisborne*, 5 Utah, 319, 15 Pac. 253; 1 *Spelling*, New Tr. App. Pra. 124. In this case the showing made does not meet the requirements of section 3133, Rev. St. Utah 1898, which provides that, in order to entitle a party to a continuance because of the absence of evidence, it must first be shown by affidavit that "due diligence has been used to procure it." The affidavit shows on its face that a subpoena for the absent witness was not placed in the hands of an officer for service until the morning the case was called for trial, notwithstanding the record shows the case was set for trial several weeks before it was called. It was known to appellant and her counsel long before the case was called for trial what facts N. V. Jones would testify to, as the record shows he was a witness and testified in a former trial of this case to substantially the same facts set out in the affidavit, which it is unnecessary to reproduce here. Therefore appellant and her counsel showed a lack of diligence which was wholly inexcusable. The motion was properly denied. 1 *Spelling*, New Tr. App. Pr. 137; 4 *Enc. Pl. & Pr.* 835; 9 *Cyc.* 109.

Appellant insists that, the deed having in effect been declared void by a former decision rendered by this court in the same case (25 Utah, 45, 69 Pac. 531), such decision became and is the law of the case, and that the trial court erred in not declaring the deed a nullity on the retrial of the case. We recognized the rule to be as repeatedly declared by this court, and which is in harmony with the great weight of authority, viz.: When a question or point of law in a case is determined by an appellate court, its decision will be followed and adhered to in all subsequent appeals in the same case. *Venard v. Green*, 4 Utah, 458, 11 Pac. 337; *Brim v. Jones*, 13 Utah, 440, 45 Pac. 46, 352; *National Bank v. Lewis*, 13 Utah, 507, 45 Pac. 890; *Silva v. Pickard*, 14 Utah, 245, 47 Pac. 144. But this rule only obtains when the record on the second appeal presents the same, or substantially the same, matters of fact or questions of law upon which the first decision is founded. For the doctrine is equally well established that, where other and different questions arise on a subsequent appeal, or a different state of facts is presented, the former decision is not controlling. 3 *Cyc.* 399; 2 *Enc. Pl. & Pr.* 379; *Spelling* New Tr. App. Pr. 691; *Societe des Mines d'Argent et Fonderies de Bingham v. Mackintosh*, 7 Utah, 35, 24 Pac. 669; note and brief, 34 *L. R. A.* 321,

where numerous cases upholding this same doctrine are cited.

Now, by an examination of the first decision rendered by this court in the case under consideration and the facts as presented by the record on that appeal, it will be seen that there was evidence before the court which tended to show that a part of the consideration for the conveyance was that Mrs. Chatfield should have a life estate in the property, but, when the deed was drawn, because of some oversight or mistake, no such provision was inserted or reservation made therein. And it was because of this that the deed was declared to be void. The court, speaking through Justice Miner, said: "The contract, being executed for the benefit of one party, should also have been executed for the benefit of the other party in conformity with the agreement." The case was therefore remanded for a new trial. And on a second appeal (27 Utah, 538, 76 Pac. 706), it was held that, a new trial having been granted without any restrictions or limitations, it was the duty of the trial court to retry the case on all the issues presented by the pleadings, which was done. At the last trial no evidence was introduced which in the remotest degree tended to show that there was any agreement or understanding of any kind between Chatfield and the representative of respondent, Bishop Pollard, that Mrs. Chatfield was to have a life estate in the property. Therefore the record on this appeal does not present the same facts as were before the court on the first appeal. In other words, the case was decided by the lower court at the last trial upon a different state of facts from those produced at the first trial. Under these circumstances the rule sought to be invoked does not apply to this case.

The judgment of the lower court is affirmed.

BARTCH, C. J., and STRAUP, J., concur.

A BOOTH & CO. v. WEIGAND.

(Supreme Court of Utah. Jan. 3, 1906.)

1. CORPORATIONS—FOREIGN CORPORATIONS—DOING BUSINESS WITHIN STATE.

The doing of a single act or the making of a single contract by a foreign corporation in the line of its business within the state, without having complied with the statutes regulating foreign corporations, does not constitute "doing business" within the state, within Const. art. 12, § 9, prohibiting corporations from doing business in the state without having a place of business, with an agent on whom process may be served, and without first filing a certified copy of articles of incorporation with the Secretary of State.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2520-2525.]

2. SAME—ASSIGNMENTS—EXECUTED CONTRACTS—RIGHT TO SUE.

Const. art. 12, § 9, prohibits corporations from doing business within the state without

having a place of business, with an agent on whom process may be served, and without first filing a certified copy of articles of incorporation with the Secretary of State. Rev. St. 1898, § 351, requires foreign corporations to file a certified copy of their articles with the Secretary of State, etc., and section 352 provides that foreign corporations failing to comply shall not be entitled to the benefits of the corporation laws of the state. Held, that the term "benefits" did not include the right to sue, and that a foreign corporation, not having complied with such sections, was not thereby precluded from maintaining a suit against a citizen on a contract made in Utah and executed on the part of the corporation, which was not illegal in itself, and on claims of others assigned to it not in the ordinary course of its business.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2527, 2542-2544, 2563-2568.]

Bartch, C. J., dissenting.

On rehearing. Former decision annulled. Judgment affirmed.

For former opinion, see 79 Pac. 570.

STRAUP, J. 1. The respondent, plaintiff below, is a corporation organized under the laws of the state of Illinois. It brought an action against appellant, defendant below, on three counts or causes of action—the first for goods sold and delivered by it to the appellant; the second and third on assigned claims for goods sold and delivered to appellant by the Cudahy Packing Company, a corporation, and by E. G. Hines, doing business as Hines Mercantile & Commission Company. The defendant answered, alleging that the plaintiff had not legal capacity to sue on any of the causes of action, on the ground that it was a foreign corporation and had not complied with the laws of this state permitting foreign corporations to do business within its borders, and that it was conducting at Salt Lake City a general mercantile business of buying and selling at retail fish, game, and poultry, and there maintained an office and principal place of business. As a further defense to the first cause of action it was alleged that the goods were sold and delivered whilst it was engaged in such business. As a further defense to the second and third causes it was alleged that at the time of the assignments by the Cudahy Packing Company and by Hines of their claims to plaintiff it was, unlawfully and in violation of the statutory and constitutional provisions of the state permitting foreign corporations to do business, engaged in said fish, game, and poultry business; but it was not alleged that the claims or the assignments thereof were in any manner connected with said business, or in anywise grew out of the same, or were at all related thereto; nor was it alleged that the business conducted by the said assignors was in any particular unlawful or wrongful, or that either of the assignors had violated any provision of law. The lawful status of the assignors and of their business is unquestioned. Plaintiff's demurrer to this answer being sustained, and the defendant

declining to further answer, judgment was entered for plaintiff.

The defendant appealed therefrom, and at the October term, 1904, this court decided that none of the said contracts could be enforced in the courts of this state by the plaintiff because of its noncompliance with the following constitutional and statutory provisions: Article 12, § 9: "No corporation shall do business in this state, without having one or more places of business, with an authorized agent, or agents, upon whom process may be served; nor without first filing a certified copy of its articles of incorporation with the Secretary of State." Section 351, Rev. St. 1898: "All corporations, not organized under the laws of this state, before doing business within the state, shall file with the Secretary of State," etc., "a certified copy of their articles of agreement, a certificate of incorporation, and by-laws, etc., and shall also, before doing business within the state, by resolution, etc., accept the provisions of the Constitution of this state, and designate some person residing in the county in which its principal place of business in the state is situated upon whom process, etc., may be served." Section 352, Rev. St. 1898: "Any such corporation failing to comply with the provisions of the foregoing section shall not be entitled to the benefits of the laws of this state relating to corporations; and any person acting as agent of a foreign corporation which shall neglect or refuse to comply with the foregoing provisions, shall be deemed guilty of a misdemeanor and shall be personally liable on any and all contracts made in this state by him for and in behalf of such company during the time that it shall remain so in default," etc. The following constitutional provisions were also referred to: Article 12, § 1: "All corporations doing business in this state, may, as to such business, be regulated, limited or restrained by law." Section 4: "All corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons." The case is reported in 28 Utah, 372, 79 Pac. 570.

A petition for rehearing having been granted, the matter is again before us for review. We are persuaded that the former decision is erroneous, and is against the weight of authority, especially as to the second and third causes.

2. It is well first to notice the principal cases cited in support of the former decision:

Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 857, is cited and quoted from. In that case, Paul, a resident of Virginia, and an agent of a New York Insurance company, was convicted in the state court for engaging in the insurance business without a deposit bond as required by the statute. He appealed to the Supreme Court of the United States, attacking the validity of the statute, and denying the power of the state to pass such a law.

The case of *Pembina Min. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650, cited, was one where a mining company, a corporation under the laws of Colorado, and there having its principal office, was assessed a tax for "office license" in the state of Pennsylvania. The validity of the act authorizing the state to make such assessment was assailed and claimed to be unconstitutional. It is readily perceived that these cases presented altogether different questions from the one here under consideration. Inasmuch as the right of the state to impose conditions upon which foreign corporations may do business within its borders is conceded in this case, and the validity of neither the constitutional nor statutory provisions is questioned, these cases are of no importance in the determination of the real question before us, which is, as to the second and third causes: Does our Constitution or statute in effect declare that a contract is void, or non-enforceable by a foreign noncomplying corporation, when made by it within the state, and when relating to single or isolated transactions, and, as to the first cause, is such a contract void or nonenforceable by it, when relating to and growing out of general business transacted by it within the state?

Barse Live Stock Co. v. Range Valley Cattle Co., 16 Utah, 59, 50 Pac. 630, cited, is a case where plaintiff, a foreign corporation, brought an action against appellants to compel them to transfer to it on the books certain stock claimed to have been assigned, and to recover dividends that had been paid thereon. Its right to maintain the action was questioned because of its non-compliance with the enabling statute, but the claim was held untenable. Confined to the actual point decided and before the court, the decision is an authority here for the respondent on the second and third causes, and is not an authority against it on the first, because the question involved was not before the court.

In the case of *Railroad v. Telluride Power Co.*, 23 Utah, 22, 63 Pac. 995, cited, the claim was made that the power company, a Colorado corporation, was not organized in compliance with the laws of that state, and had not conferred upon it the power to acquire and hold the subject-matter of the litigation; and the question decided was that "a corporation of Colorado coming into this state cannot bring with it powers with which it is not endowed in Colorado. It can only have an existence under the express laws of the state where it is created, and can exercise no power which is not granted by its charter or some legislative act."

The case of *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 894, 38 L. Ed. 759, cited, involved the validity of an ordinance and the right to recover for liquor sold in violation of its terms. But, as was well said in that case, "the liquor traffic is freighted with peril to the general welfare, and the necessity

of careful regulation is universally conceded." There the business itself was injurious to health, and affected morals and society, and, because of those evils, it was legislated against and restricted. Here the business was not only innocent, but was in aid of the necessities of life. This distinction, well recognized in most cases, has in some not been fully observed, and may account for some of the diversity of opinion upon this question.

The case of *Electric, etc., Co. v. Perry* (C. C.) 75 Fed. 898, cited, is somewhat similar, for there the corporation brought an action against the chief of police and constables to restrain them from interfering with its business of pool selling in violation of law.

The case of *Crefeld Mills v. Goddard* (C. C.) 69 Fed. 141, cited, was upon a statute which expressly provided that any foreign corporation doing business in the state (New York) without complying with the statute "shall maintain no action in this state upon any contract made by it in this state." The difference between that statute and ours is readily perceived. Whenever the statute has expressly declared that the contract is unenforceable, that, of course, is the end of the controversy. Such a statute is self-construing, and the court has no other duty than to give it effect.

The case of *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137, cited, is an authority for the respondent so far as it goes. There, the noncomplying foreign corporation made a contract in the state of Colorado and there brought an action upon the contract. Upon the questions being raised that the corporation had not the right to maintain the action, and that its contract was void because of its non-compliance with the enabling statute, it was held that the contract was valid, and that the corporation had the right to maintain its action thereon.

The cases of *Cincinnati, etc., Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626, and *Thorne v. Travelers' Ins. Co.*, 80 Pa. 15, 21 Am. Rep. 89, are also cited. They may be said to support the decision, especially as applied to the first cause of action; and yet there are dissimilarities when the difference between executory and executed contracts and statutory restrictions of a particular kind of business or specified things are considered. In the first case the statute provided that it should not be lawful for any agent of a foreign insurance company "to directly or indirectly take risks, or to do or transact any business of insurance in this state" without first procuring a certificate, etc. Without complying with the statute the agent insured a citizen of Illinois, who gave his promissory note in payment of premiums. In an action on the note by the company it was held that the contract was void, because of the noncompliance with the statute. The statute was directed against a particular kind of business, and the doing of specific acts and

things was made unlawful. The giving of the note was with respect to these specific things denounced by the statute. It will also be observed that there the contract was executory on the part of the company seeking to enforce it. Here the contract was fully executed on the part of the plaintiff, and the consideration thereof accepted and retained by the defendant. Much to the same effect is the cited Pennsylvania case.

The cases cited from Alabama support the decision; but these cases have been criticised. In speaking of them, and other like cases, Mr. Thompson, in his Commentaries on the Law of Corporations (volume 6, § 7955), says: "It cannot escape attention that these decisions ignore the distinction, often taken by enlightened courts in respect to the validity of contracts, between contracts which are merely *malum prohibitum* and contracts which are *malum in se*. Such decisions put the contracts under consideration, although perfectly innocent and meritorious in themselves, on the footing of contracts which are essentially criminal, corrupt, or fraught with moral turpitude, or otherwise opposed to the public policy of the state. In leveling such contracts to this ground, and in allowing their own citizens to repudiate them on such a plea while keeping the consideration, the courts degrade the commercial morals of the people, encourage general dishonesty, expel capital from the state, and bring its judiciary into deserved disrepute."

8. It of course is conceded that there is a conflict of authorities upon this question, and that there are authorities which support the decision, especially as to the first cause of action. There are, however, certain recognized principles underlying most of the decisions. They are: That by the law of comity among nations a corporation created by one sovereignty is permitted to make contracts in another and to sue in its courts, and the same law of comity prevails among the several states of the Union. That the state may prescribe the terms and conditions upon which a foreign corporation may be permitted to carry on its business within its borders. When, by express terms, it has been declared by the state, or where such an intention is clearly manifest from the language used, that contracts, made within the state by a foreign corporation in the course of business within the meaning of constitutional and statutory provisions without complying therewith, are void or unenforceable, and no action can be maintained thereon by the noncomplying corporation, at least so long as such noncompliance exists. That in each case it is the intention of the Legislature, rather than the letter of the statute, which controls. The question before us is therefore to be determined by ascertaining the meaning of the statute and the Constitution, and by determining whether it was the intention of the lawmakers in effect to declare void contracts made in the

state by foreign noncomplying corporations. As to the contracts of the second and third causes of action, the solution is not difficult; for the taking of the assignments or the bringing of an action on the assigned claims was not "doing business" within the meaning of the constitutional or statutory provisions. The business conducted by respondent, as alleged in the answer, was that of buying, selling, and retailing fish, game, and poultry. It is not alleged that the claims or the assignments had any connection therewith. So far as made to appear, they were wholly independent thereof. Of course, if respondent had been engaged in the business of buying claims, or in the collection business, and the assignments were had in pursuance thereof, it would be different. The words "doing business," as used in these provisions, refer to a general transaction of business, and not to an isolated transaction, or to single, or wholly collateral acts. The statute obviously relates to some regular or customary business. *Barse Live Stock Co. v. Range Valley Stock Co.*, 16 Utah, 59, 50 Pac. 630; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; *Colo. Iron Wks. v. Sierra Grande Min. Co.*, 15 Colo. 499, 25 Pac. 325, 22 Am. St. Rep. 433; *Florsheim Bros. Dry Gds. Co. v. Lester*, 60 Ark. 120, 29 S. W. 34, 27 L. R. A. 505, 46 Am. St. Rep. 162; *Gilchrist v. Helena, etc., Co. (C. C.)* 47 Fed. 593; *Elliott, Priv. Corp. (3d Ed.)* p. 271, and cases. Note to *Cone Export & Commission Co. v. Poole*, 24 L. R. A. 289. The taking of the assignments and the bringing suit thereon by the respondent, being wholly independent of its business, renders the transaction the same as though a foreign corporation had acquired claims by assignment without the state and brought suit thereon, or as of any noncomplying foreign corporation's making a contract within the state involving isolated transactions or single acts, and maintaining an action thereon. As to such matter, the foregoing authorities demonstrate that it is not "doing business" within the meaning of like statutes.

Whether the contract relating to the first cause of action is void or unenforceable by respondent presents a question which is more difficult; but the decided weight of authority and the trend of later cases are to the effect "that the failure of the foreign corporation to comply with the domestic statutes prescribing the conditions upon which it shall be permitted to do business within the state does not render its contracts made therein void and nonenforceable, or prevent it from maintaining an action against the domestic citizen thereon, unless the statute so states in express language." 6 *Thomp. Com. L. of Corp.* § 7957, and cases. Unless such an intention is clearly expressed in the statute the courts will not hold such contracts void or nonenforceable. They will not do so by implication from loose and indefinite language. The

primary object and evident purpose of the statute are to subject foreign corporations to the jurisdiction of our courts, to the inspection and supervision of the officers of our state, and to acquaint them and the citizens dealing with the corporation of its nature and powers. They are not to invalidate acts or contracts of such noncomplying corporations, nor to afford the citizen of the state an opportunity to avoid his contracts made with it, nor is the nullification of his contract or of acts done in pursuance thereof the remedy for the violation of the statute. The state is authorized to enforce the statute, and may do so by proper proceedings on its behalf. Sections 3610 and 3611, Rev. St. 1898. That, together with the penalty imposed for its violation, no doubt was deemed sufficient by the Legislature to accomplish the purpose of the statute, and it is not for the judiciary at the instance or for the benefit of private parties to inflict the additional and harsh penalty of forfeiture by striking down contracts and acts not evil in themselves, especially when, as here, the contract had been fully executed on the part of the corporation, and the consideration thereof accepted and retained by the citizen. The following authorities fully sustain us: 2 *Morawetz, Priv. Corp. (2d Ed.)* § 665; 6 *Thomp. Com. L. of Corp.* 7937; *Taylor, Priv. Corp. (3d Ed.)* § 401; *Elliott, Priv. Corp. (3d Ed.)* §§ 208, 209; *Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317; *Bedford v. Eastern, etc., Loan Ass'n*, 181 U. S. 227, 21 Sup. Ct. 597, 45 L. Ed. 834; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893, 58 C. C. A. 79; *Caesar v. Capell (C. C.)* 83 Fed. 403; *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544; *Kindel v. Lithographing Co.*, 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; *Wright v. Lee*, 4 S. D. 237, 55 N. W. 931; *Toledo Tie & Lumber Co. v. Thomas*, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, 31 Pac. 327; *Fire Engine Co. v. Town of Mt. Vernon*, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80; *Tabor et al. v. Goss & Phillips Mfg. Co.*, 11 Colo. 419, 18 Pac. 537; *Tolerton & Stetson Co. v. Barck*, 84 Minn. 497, 88 N. W. 19; *Larned v. Andrews*, 106 Mass. 435, 8 Am. Rep. 346; *Hartford Ins. Co. v. Mathews*, 102 Mass. 221; *Vermont Loan & Trust Co. v. Hoffman*, 5 Idaho, 376, 49 Pac. 314, 37 L. R. A. 509, 95 Am. St. Rep. 186; *Mandlebaum v. Gregovich*, 17 Nev. 87, 28 Pac. 121, 45 Am. Rep. 433.

In view of the foregoing authorities it is not reasonable to presume that the Legislature intended to make void and unenforceable contracts like these under consideration. It is claimed, however, that the respondent was precluded from at all contracting in this state, whether on a single transaction or in course of its general business, and was forbidden from suing on such a con-

tract because of the provision, "Any such corporation failing to comply with the provisions of the foregoing section shall not be entitled to the benefits of the laws of this state relating to corporations." We have already shown, as to the second and third causes of action, the matter alleged did not constitute "doing business," within the meaning of the statute, hence they are not affected by the clause referred to. To say that the clause rendered the contract of the first cause of action void, and forbade respondent's suing thereon, we are obliged to do so by implication from loose and uncertain language. Because of its non-compliance with the statute, to say that the respondent shall not have the "benefit" to make a contract, or to sue in the courts of this state, is a meaningless expression. These things are not "benefits." The making of a contract involves power and capacity; suing thereon, a right. Unless a very unsatisfactory and loose definition is given the word "benefits," these things cannot be embraced within it. Whether the respondent had the power and capacity to contract is dependent upon its charter or the legislative act creating it. To construe this clause to mean that a noncomplying foreign corporation cannot sue in our courts is to deny such right to all such corporations, whether the contract was made here or elsewhere; in this case, whether the goods were sold without the state or sold within it. Surely such consequences were not contemplated by the Legislature, and, if so, it would have been against the express provisions of the Constitution giving the right to all corporations, without condition or limitation, to sue in our courts. It is somewhat difficult to understand just what the Legislature intended by the said clause, but it is quite clear no such consequences as these were intended.

Reference to the history of legislation upon this subject will, to some extent, account for the use of the term "benefits" in the statute. The territorial law (section 2293, Comp. Laws 1888) was: "Any such corporation failing to comply with the provisions of this section, shall not be entitled to the benefits of the laws of this territory, limiting the time for the commencement of civil actions." In this connection the use of the word "benefits" was appropriate and expressed sense. After statehood (Sess. Laws 1896, p. 308, c. 87), this particular clause was amended by changing the expression "of the laws of this territory limiting the time for the commencement in civil actions" to that "of the laws of the state relating to corporations." When used in this connection the word "benefits" renders the meaning incongruous and obscure. With such amendment the law was inserted in the Revised Statutes of 1898. Looking at the statute relating to corporations we find a

chapter on general incorporation, prescribing the nature of articles of agreement, powers of the corporation, including those to contract and to sue and be sued, powers and duties of officers relating to stock, stockholders, and meetings, amendments, etc., corporations not for pecuniary profit, the sections relating to foreign corporations above quoted; a chapter on assessments; one on banking corporations and banks; one on building and loan associations; one on loan, trust, and guaranty associations; and one on railroad corporations. All these relate to the manner of incorporating, to prescribing powers and duties, and imposing conditions and restrictions and the like; but nowhere is there found anything with reference to benefits, unless it can be said the whole and every part of the title is embraced and meant to be within the term. To give it such a meaning leads to the conclusion that a foreign corporation cannot sue a citizen of this state in our courts on a contract made or obligation incurred wholly without the state without first complying with the enabling statute. To say it may maintain such an action, but may not maintain an action on a contract made by it within the state, is to make a distinction not made by the statute, if the word "benefits" is to be given the meaning contended for. If suing is a "benefit," and the right to sue at all is denied to all noncomplying foreign corporations, why say they may sue on a contract made or obligation incurred wholly without the state, but may not do so if it is made or incurred within the state? To say it does not mean to restrict the right to sue, but does mean that such a corporation cannot make a valid contract within the state, why single that out from all the many other provisions of the title, or why exclude the one relating to "sue and be sued?" The difficulty is, we are dealing with a common term, "benefits," which does not properly describe or embrace the things being considered, the power of contracting and the right of suing, and thus we are whirled into obscurity.

If the Legislature intended to deny non-complying foreign corporations the power or capacity to contract in this state, or to deny them the right to maintain an action in our courts upon contracts growing out of business conducted by them in this state, it well could have said so in terms of no uncertain meaning, and should not have left it to conjecture and speculation. Until the Legislature has expressed such an intention in clear and express terms, or until such an intention is otherwise clearly manifested, we may well presume no such consequences were intended; and we are neither authorized nor disposed to ingraft them upon a statute of such doubtful language and elastic meaning as is the clause referred to. The authorities all recognize that the pur-

pose of these constitutional and statutory provisions is not designed or intended as a prohibition upon foreign corporations to contract in the state, to the extent of declaring such contracts void and nonenforceable. Until the Legislature shall do so, we are unwilling to give the citizen the right to discharge an innocent contract made by him with a noncomplying corporation and to avoid his obligation thereon or to prohibit its enforcement, especially when, as here, the contract on the part of the corporation is fully executed and the citizen has received and retained the consideration thereof, merely upon the ground that the corporation failed to perform "a duty that it owed to the state at large, but the nonperformance of which in no manner prejudiced him." *Washburn Mill Co. v. Bartlett*, supra.

It has been said, and is often expressed in the cases, that a contract made in violation of law, or made to do an act expressly forbidden by a statute, is void, and cannot be enforced. This is true, whether the act is forbidden because of an attached penalty, or because otherwise forbidden by clear terms of the statute. These principles of law are conceded, "but in determining the purpose of the enactment courts consider the nature of the forbidden act, for the very obvious reason that when such act is immoral or criminal in its nature, or dangerous to life, health, or property, the presumption must prevail that legislative wisdom intended to stamp it out; while, if the act be innocent in itself and in its consequences, no such presumption necessarily arises." *Washburn Mill Co. v. Bartlett*, supra. Notwithstanding these general principles, it is also true "that if it is manifest from the language of the statute, or from its subject-matter and the plain intent of it, that the act was not to be made void, but only to punish the person doing it with the penalty prescribed, it is equally clear that the courts would readily construe the statute in accordance with its language and its plain intent. We are, therefore, brought to the true test, which is that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold and construe the statute accordingly." *Pangborn v. Westlake*, 36 Iowa, 546.

Considering the purpose and object of the enactment of the statute as heretofore observed, it is quite clear that the Legislature did not intend to render void and unenforceable the contracts under consideration. Where, as here, the contract itself being innocent and concerning a subject-matter itself harmless and lawful, and being fully

executed upon the part of the corporation, and the consideration thereof retained by the citizen, he will not now be heard to defend against its enforcement, and be permitted to nullify his just obligation with respect to it, solely upon the plea of the non-compliance of the corporation with the enabling statute. No court has gone to any greater extent than have the courts of Alabama in holding contracts of noncomplying corporations void, yet that court refused to entertain the defense when the contract was fully executed upon the part of the corporation. It was said: "If the contract were executory, and it were shown the company had failed to comply with the requirements of the section of the Code above referred to, there could be no question but that, under our adjudications, there could be no recovery on the notes. But plaintiff, however, testified to a state of facts which, if true, takes these notes out from the influence of those decisions, and places them under the influence of others which hold that, where the contract has been executed, there can be no relief granted, because the transaction originated with a foreign company, which had not complied with our laws." *Russell v. Jones*, 101 Ala. 261, 13 South. 145. When due regard was given to the distinction between executory and executed contracts, and to the difference between contracts when relating to things or acts themselves unlawful, or immoral, or opposed to public policy, or to a particular kind of business, or to specific things or acts restricted or forbidden by statute, and when relating to things or acts innocent and lawful within themselves, much of the apparent conflict among the decisions disappears.

Our conclusion, therefore, is that the court below properly sustained the demurrer; that the order of this court, made in the former opinion, reversing the judgment below, is vacated; and that the judgment of the court below should be, and hereby is, affirmed, with costs.

McCARTY, J., concurs.

BARTCH, C. J. (dissenting). I cannot concur with the majority in overruling the former decision of this court on the rehearing. After further careful consideration of this subject I am convinced that the principles adopted and announced in the former opinion are not only strictly in harmony with the mandatory and prohibitory character of our constitutional and statutory provisions, but also in strict conformity with the policy of our laws, which is that foreign corporations shall not be permitted "to transact business within the state on conditions more favorable than those prescribed by law for similar corporations organized under the laws of this state." Const. art. 12, § 6. Under this opinion of the majority, it is manifest that foreign corporations, or individ-

uals through foreign corporations, have advantages in the state which domestic corporations, or citizens desiring to transact business through domestic corporations, do not possess. For instance, suppose an aggregation of individuals, citizens of this state, desiring to conduct and transact a certain line of business within our borders, and for that purpose, would enter into and adopt articles of agreement and by-laws, and form an organization, but would not file in the proper offices any copy of such articles of agreement and by-laws, or obtain any certificate of incorporation from the proper officer, and would not pay to such officer any of the fees exacted by the state as a condition precedent to authorization for the transaction of corporate business; could it be contended for a moment that such an association of individuals would have constituted itself a legal entity entitled to the benefits of our laws relating to corporations? Would not such an entity, in an attempt to enforce its contracts in the courts, be regarded as at most but a partnership, without any rights and privileges as a corporate body? Surely the courts could not recognize such an association as a corporation, so long as it persisted in violating the laws, nor until it had complied with the corporate laws. And yet, under the decision on this rehearing, if the same number of individuals come to this state, styled a foreign corporation, they in effect at once become a corporate entity, endowed with all the rights and privileges of a corporation, and entitled to the benefits of our corporate laws, and can open up a regular place of business and carry on business without filing any evidence of existence as a legal entity in any office in this state, or designating any person on whom process can be served, and without paying any fees imposed by the state as a condition precedent to the conducting and carrying on of business—such fees as are required to be paid by corporations to aid in defraying the expenses of the government, whose protection both classes of corporations alike invoke while engaged in business here. It is clear, therefore, that a foreign corporation can obtain benefits and advantages over domestic corporations by a violation of our laws, and thus can establish and transact business on more favorable terms than can corporations which are organized under and comply with the laws of this state. This places persons who violate the law upon more favorable footing than those who obey its mandates. Such is the sequence from the strange and strained construction of the majority placed upon the perspicuous language employed by our law-makers.

Notwithstanding that in the majority opinion much space is devoted in an effort to render meaningless, loose, and uncertain the statutory provision, "any such corporation failing to comply with the provisions of the foregoing section shall not be entitled

to the benefits of the laws of this state relating to corporations" (section 352, Rev. St. 1898), it does not seem difficult to comprehend its meaning. It is clear in thought and to the understanding. The words employed are plain and simple, and in interpretation, under familiar rules of construction, ought to be given the sense in which they are ordinarily used and understood in common parlance, and not be made to apply to, or be confused with, a state of things to which they have no reference, and which was manifestly not in the mind of the Legislature at the time of the enactment. Nor does it seem difficult to comprehend the meaning of the word "benefits," as used in the quotation. I apprehend that ordinarily, when we speak of benefits to us, we mean and refer to what is advantageous to us—whatever promotes our prosperity, happiness, or enhances the value of our property, or property rights, or rights as citizens, as contradistinguished from what is injurious. So, when we speak of "benefits," with reference to laws relating to corporations, we mean the advantages which accrue from the right to invoke and enforce, through proper tribunals, such laws as a means to promote the prosperity of corporations. Now, certainly, the right to sue in our courts is a benefit or advantage to a corporation doing business within our borders, the opinion of the majority to the contrary notwithstanding, because it enables it to enforce its contracts and is thus conducive to its prosperity. So, likewise, is the right to make contracts within the state which may be enforced here. These are instances of benefits or advantages, and are unquestionably, as is apparent from the context of the statute, included within the meaning of the term "benefits" as employed in the statute; but a foreign corporation has no inherent right to them, for, in the very nature of things, no state is compelled to confer benefits upon a creature of a foreign state or country, and hence, if another state confers benefits upon such a creature, it may do so upon such terms and conditions as it chooses. When, therefore, the state, through its Constitution and statutes, says that no foreign corporation shall be entitled to the benefits of our corporate laws if such corporation has failed to comply with certain specific provisions of our laws, it means that it shall not be entitled, among other things, to sue in our courts upon its contracts made in opposition to law, or contracts made while carrying on business within the state without a compliance with certain prescribed precedent conditions, and in violation of our laws.

This is a logical sequence from the Constitution itself, which, in article 12, § 9, says: "No corporation shall do business in this state, without having one or more places of business, with an authorized agent or agents, upon whom process may be served; nor without first filing a certified copy of its

articles of incorporation with the Secretary of State." These provisions are mandatory and prohibitory, not only in form but by express provision of the same instrument, where, in article 1, § 26, it declares: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." The provisions under consideration are not declared to be otherwise. So, the legislative enactments in question are mandatory and prohibitory in form and as appears from the context. When the statutory provision above quoted is read in connection with the preceding section (section 351, Rev. St. 1898), and other provisions of the laws, constitutional and statutory, upon this subject, there will readily be perceived an obvious intention on the part of the Constitution and law makers to compel a compliance with our laws by foreign corporations, the same as is required by domestic corporations, before establishing and conducting any kind of a business within this state in a corporate capacity. It is useless, therefore, to obscure and confuse this case, where the foreign corporation had in fact located within our borders, secured a place of business, had established and was actually conducting its business, when, in the regular course of its business, the transactions in controversy took place, with a case of a single transaction, or a number of single transactions, by a foreign corporation which never located here, never established a place of business here, and never conducted any continuing business here. No one contends that a single transaction made by a citizen of this state with a foreign corporation through its foreign office or place of business is not binding upon the parties without the corporation previously filing its articles here and paying the fees. Such a transaction, if otherwise valid, would be enforced by the comity of the state. This, however, is not a question of a single transaction, and therefore, in disposing of this case, an argument based on the case of a single transaction or a number of single transactions serves, like the wandering meteor, but to mystify and mislead.

Nor is it material that several of the transactions in controversy consisted of assignments of claims, since such assignments were made in the course of the business which was being conducted in violation of law. In the present prevailing opinion it is said: "The state is authorized to enforce the statute, and may do so by proper proceedings on its behalf. Sections 3610 and 3611, Rev. St. 1898." But no "proper proceedings" for the state to pursue are pointed out, sections 3610 and 3611, cited by the majority, applying only to corporations organized under the laws of this state, and the remedy or penalty prescribed by statute against the offending foreign corporation is that, if it fails to comply with the conditions precedent to its doing business here, it shall not be entitled to the benefits of our

corporate laws. But this court now in effect says that, notwithstanding such a corporation carries on and transacts business in violation of our laws, it shall be entitled to the benefits of our corporate laws. How, then, can the state enforce the statute? The other penalties of the statute are prescribed simply against the person acting as agent in the unlawful conduct of business, and do not affect the corporation itself. The fact is that this decision appears to me much more indicative of concern about the promotion of the material interests of a foreign law-defying institution than about equal justice to a domestic corporation, or to our own citizens, who are thereby left practically without a remedy to enforce, in our own courts, their claims against such a corporation while thus unlawfully transacting business in competition with those who obey the laws, and while receiving the protection of the state government without contributing to its burdens; for, under the decision, such a corporation, it seems, is not even required to appoint an agent in this state upon whom process can be served. Every principle of justice and fair dealing demands that the laws of the state be obeyed alike by foreign and domestic corporations, and this I conceive to be embraced within the mandates of our Constitution and statutes.

My Brethren have attempted to distinguish the cases cited in the former opinion of this court, but in doing so they have lost sight of the mandatory and prohibitory character of our laws, as compared with the laws of the states upon whose decisions they rely, and also of the distinction, in this class of statutes, between provisions which are merely disabling, and those which are prohibitory and mandatory, as are ours. On this point Mr. Spelling, in his valuable work on Private Corporations (section 89), says: "The effect of statutes imposing conditions precedent upon the contracts of foreign corporations made without compliance with the conditions imposed is a question upon which litigation frequently arises. There is a distinction in this respect between disabling and prohibitory provisions. In the case of the former the validity of their acts and contracts cannot be collaterally attacked. The state alone can object. If, however, the language of the constitutional provision or statute be clearly prohibitory, or if it impose a penalty for violations, then contracts made without previous compliance with the conditions imposed are void and unenforceable by the corporation, whether expressly declared to be so or not. "It is well settled that the corporation cannot itself take advantage of its noncompliance with such conditions." This statement of the law, by the learned author, has the support of an abundance of the highest authority, as may be observed from an examination of the cases cited in support of it. Nor, in order to enforce a compliance with the laws, is it necessary for the Legislature to say in express terms that contracts

made in violation of law are void and unenforceable by the offending corporation. The legislative prohibition itself renders them so. "Where a statute expressly declares that certain kinds of contracts shall be void, there is then no doubt of the legislative intention, and an agreement of the kind voided by statute is unlawful. The same is true where the contract is in violation of a statute, although not therein expressly declared to be void. It is immaterial whether the thing forbidden is *malum in se* or merely *malum prohibitum*. A statute prohibiting the making of contracts except in a certain manner *ipso facto* makes them void if made in any other way." 9 Cyc. 475.

The Supreme Court of Wisconsin, in *Aetna Insurance Co. v. Harvey*, 11 Wis. 394, upon this point said: "It was claimed for the plaintiff in error that, inasmuch as the statute does not say that any policy issued or note taken in violation of its provisions should be void, therefore they should not be so held, and that the only effect of the law would be to render the agent liable to prosecution for violating it, or to an action for damages. But we do not see how this proposition can be sustained, in view of the well-established rule of law that a contract made in violation of a statute is void and that courts will never lend aid to its enforcement. * * * It [the law] says the companies shall not transact any business in this state without they possess the requisite amount of capital, etc. And the only evidence it provides for showing this is the sworn statement of its officers, on filing which its agents are authorized to do business. And when we consider this prohibition, and the fact that a foreign corporation could not act in this state except by its agents, and that the agents are expressly prohibited, there seems no room to doubt that the intention of the statute was to entirely prohibit the transaction of any insurance business in this state until the provisions of the act had been complied with; and, this being so, the issuing of the policy and taking the note sued on was a violation of the law, and the company cannot sustain the action. It is not necessary that the law should expressly say that a contract in violation of it shall be void. It is sufficient for it to prohibit it, and its invalidity follows as a legal consequence." So in *Bartlett v. Vinor*, Carth. 251, Lord Holt said: "Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute." 9 Cyc. 475-485, and cases cited; *Chattanooga B., etc., Ass'n v. Denson*, 180 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870.

My conviction is that the former decision of this court was not only supported by the authorities cited in that opinion, but was in

line with practically all the decisions made under mandatory and prohibitory laws similar to those of this state upon this subject. For a further presentation of my views upon this important question, I refer to that opinion, reported in 28 Utah, 380, 79 Pac. 570, et seq. I cannot give my judicial sanction to an interpretation of laws which, in my judgment, does violence, not only to the mandates of the Constitution and statutes, but to the hitherto established policy of this state, and therefore dissent.

FAYTER v. NORTH et al.

(Supreme Court of Utah. Jan. 4, 1906.)

1. EVIDENCE—WRITTEN INSTRUMENTS—DEEDS—EXPLANATION BY PAROL.

Where a deed to certain land conveyed, in addition, "all tenements, hereditaments, privileges, and appurtenances thereunto belonging or therewith used and enjoyed," and it was admitted that the right to water from a certain ditch to irrigate the land passed with the same, and the grantee claimed that he was also entitled to water flowing in another ditch in addition, parol evidence of acts and declarations of the grantor with reference to such additional ditch, both prior and subsequent to the conveyance, was admissible to explain what was intended by the parties to pass under the terms "privileges and appurtenances," and was not objectionable as contradicting the deed.*

2. DEED—CONSTRUCTION—DITCHES—APPURTENANCES.

Plaintiff's grantor while the owner of an entire tract, including land subsequently conveyed to plaintiff, constructed an open ditch, in which water continually flowed which was of benefit, not only to the land conveyed, but to that retained by the grantor. At the time of the sale the drain ditch was pointed out to plaintiff, and he was charged \$25 per acre additional for land purchased as a consideration for the right to use the water in such ditch to irrigate the land, in addition to water in another ditch also conveyed. *Held*, that the right to maintain such drainage ditch was a quasi easement, which passed to plaintiff under his deed conveying "privileges and appurtenances" to the land conveyed.

Straup, J., dissenting.

Appeal from District Court, Third District; W. C. Hall, Judge.

Suit by Louis Fayter against Marian K. North and others. From a decree in favor of plaintiff, defendants appeal. Affirmed.

This is a suit in equity to restrain the defendants from interfering with a certain ditch which the plaintiff claims to own and use for irrigation, domestic and culinary purposes, and to water live stock, to require the defendants Enos N. Jacklin, Melinda H. Butterworth, and Clarence North to show what right or title they have to the ditch or the waters thereof, to quiet title to the ditch, and the water flowing therein, in the plaintiff against the defendants, and to recover damages against the defendants Marian K. North, John R. North, and James North for obstructing the ditch. From the record and the evidence it appears that Levi North, for many years prior to 1891, was the owner of

**Bartles v. Brain*, 13 Utah, 162, 44 Pac. 715; *Harrington v. Chambers*, 3 Utah, 94, 1 Pac. 362; *Alba v. Smyth*, 21 Utah, 109, 59 Pac. 756.

a tract of land in Salt Lake county, which tract included the land involved in this suit. The land was patented to his son A. C. North, who retained the legal title, while his father was the beneficial owner and had the possession and use of the property. In June, 1891, Levi North sold, by oral agreement, 2.29 acres thereof to the plaintiff for \$250 per acre, and on June 13, 1893, a deed was executed therefor by the holder of the legal title and delivered to the purchaser. Just previous to the purchase by plaintiff the defendant Jacklin bought adjoining land of the same quality from Mr. North for \$200 per acre. The land sold to the plaintiff was located in the southwest corner of the tract, and there is evidence showing that for many years previous to and at the time of the sale of this land there was a drain ditch on the tract, which is the ditch over which this controversy arose. It entered the land sold to plaintiff from the northeast, and carried percolating and spring waters, which, after leaving the plaintiff's land, flowed into a slough to the west. According to some of the witnesses, the ditch originally was but a plow furrow made for the purpose of carrying off the waste water, but others claim it was about a foot deep and a foot wide and drained the land lying north of that owned by plaintiff. That the ditch was larger than a plow furrow, at the time of plaintiff's purchase, is shown clearly by the evidence. In March, 1892, after the oral agreement of sale had been made, the ditch was made two and a half feet deep. As to this, the plaintiff in his testimony said he agreed with his vendor to "dig this ditch; he was to pay me one-half, which he did, for the time I put on it, and I was to put in my half of the labor for the increase in the flow of the stream. I deepened the ditch about 18 inches, to a total depth of about 2½ feet." There is no direct evidence that the water which flowed in this ditch was actually used to irrigate the land sold prior to the oral contract of sale, but there is testimony to the effect that the vendor did, after the making of that agreement, in 1891, use this water upon the land to irrigate his crops, which he had reserved from sale, and that at the same time, the plaintiff having taken possession of the land, his workmen used water from this ditch during the erection of his house, and ever since, until this controversy arose, the water from the drain ditch was used to irrigate crops and for domestic purposes. There is also evidence showing that the water flowing in the drain ditch is necessary to enable the plaintiff to properly irrigate his crops, although as an appurtenant to the land purchased he admittedly acquired a right to water from another ditch to irrigate two acres of land for ordinary crops. It is apparent from the evidence that the waters thus admitted to be appurtenant to the land and those flowing in the drain ditch are all reasonably necessary to irrigate the land suitably for market gar-

dening, the use to which the property has been put by the plaintiff and for which he purchased it. The deed which conveyed the land makes no specific mention of any ditch or of water, or water rights, but it does convey "all tenements, hereditaments, privileges and appurtenances thereunto belonging, or therewith used and enjoyed," and, as above stated, it is admitted that the right to water from another ditch for two acres did pass with the land. At the time the contract was made the drain ditch, with water flowing therein, was upon the land. It was open and visible, and the acts, conduct, and representations of the vendor, at that time and thereafter, indicate that the water had been used on the land for irrigation purposes and domestic use before the time of the sale. Respecting this ditch, and as to what occurred between the parties on the day the property was orally bargained for, the court, for the purpose of showing the intention of the contracting parties, and what was the subject-matter of sale, permitted the plaintiff, over the objection of the defendants that it was an attempt to vary the terms of a written instrument, to testify, as follows: "North showed me the water and how he used it on the land. He called it his little independent stream, and no person had any right to it. We went on the land together. I told him I wanted land where I could have some water whenever I pleased. He said, 'Come on down the field, then.' We went down and followed this drain ditch to the land I purchased. He had sold five acres for \$200 per acre, and I offered him the same price. He said he considered this stream of water worth \$25 a year to any one who used the land, and he charged me \$250 per acre for the two acres, with the water. There was no difference in the quality of this land and that he sold for \$200. For the \$250 an acre he said I was to have this small stream of water. He said the water ran all the year round. He reserved the crop for that season, and irrigated it with this water. I paid him \$140 on account that same day. * * * Water right in the canal is for two acres, but it will not irrigate more than half that quantity of land. The water right from the canal came with the land and also the spring water. I thought I had, in addition to both these water rights, a water right from the drain ditch as well, which is the principal one. From the drain ditch I can irrigate all the land lying west of it, a little less than an acre. When I talked with Mr. North, he said the water right went with the land, this spring water, two acres of canal water, and the drain water. Have used this canal water every year on my land, the full quantity I was entitled to, and the spring water when I could get it. North told me that this drain water was his independent stream; that I was to have it; it was to go with the land; that it ran all the year. It is seepage and

spring water." The witness also stated: "Levi North lived three years after I bought the land, and for the first two years was around the fields almost every day and saw me use this water." The witness Green, referring to a conversation he had with Levi North in August, 1891, testified that he "asked the old gentleman why it was that Fayter had come down there and bought his property, and he said it was because the water that was there he expected to use for his small fruit. The water referred to was that we were using for building purposes." The witness Cahoon testified that, when he was on the land surveying "in 1891, he noticed that the land was sloping to the southwest toward Fayter's land and in the direction of drain ditch. That the Fayter land was then being cultivated. The water from the drain ditch runs south and west to the Fayter land and was then running on it." The witness Pike testified that in the "spring or summer of 1891 the drain ditch water was used on this land of Mr. Fayter by Mr. North." There is also evidence showing that the grantee wanted to have this stream of water mentioned in the deed, but the draftsman and the grantor informed him it would pass with the land as an appurtenance. There is much other testimony of similar import in the record. The evidence shows that from the time the plaintiff moved onto the land, in 1891, up to April, 1903, when the defendants obstructed the ditch, and committed the acts which resulted in this suit, he used the water flowing in the ditch for irrigation and domestic purposes upon the land, without interruption. At the trial the court found in favor of the plaintiff, and entered a decree in accordance with the prayer of his complaint. The defendants thereupon appealed.

Sutherland, Van Cott & Allison, for appellants. J. H. Moyle and Ray Van Cott, for respondent.

BARTCH, C. J., after stating the facts, delivered the opinion of the court.

The appellant insists, among other things, that the court erred in permitting the introduction of evidence respecting the conversations between the vendor and the vendee and admissions of the vendor had and made, at the time the bargain of sale was made and when the deed was executed, concerning the drain ditch and use of the water flowing therein, because, as is urged, such evidence was inadmissible as varying the terms of a written conveyance. This objection to the admission of the testimony referred to is, under the circumstances, not well founded. We recognize the general rule, declared by many of the authorities cited by the appellants, that, where contracting parties have reduced their agreement to writing, the terms expressed cannot be varied by parol; the writing itself being the evidence of the agree-

ment. The testimony covered by the objection in this case, however, was introduced for no such purpose. It was introduced, not to vary the terms of the deed, but to explain a latent ambiguity, and to show what was in the minds of the contracting parties—what was intended should pass under the terms "privileges and appurtenances" employed in the instrument. The testimony was not only admissible for such purpose, but as evidence of the condition of the property when the bargain of sale was made, and to show how the parties themselves construed and applied the contract to the subject-matter. The trouble here is not that the terms employed are insensible, having no settled meaning, but that they are admissible of several interpretations with reference to the subject-matter in contemplation at the time of the making of the contract. The terms employed may or may not include the right to the water flowing in the ditch in question as a part of the subject of sale. It is admitted, however, that water rights in another ditch did pass under and by virtue of the same terms, without specific mention in the instrument, and, such being the case, it became properly a matter for investigation dehors the instrument, to determine whether the disputed rights in the drain ditch did not also pass. That such rights may pass with the land by conveyance was recognized by our statute (section 2783, Comp. Laws 1888).

When, therefore, the appellants claim that the right to the use of water from one ditch is not embraced in those terms, and at the same time admit that such a right in another ditch is embraced in them, both ditches being upon the same land and equally obvious to the parties while making the contract of sale, and neither one of the ditches being mentioned specifically in the conveyance, they themselves attach one meaning to the terms in the one instance and a different meaning to them in the other, and thereby admit that the terms as employed are susceptible of different meanings, and hence that there exists a latent ambiguity. Such being the case, how, or by what means, is the court to interpret those terms? How is it to ascertain what was in the minds of the contracting parties at the time of the sale—what things they intended to include in the conveyance by the use of the terms in question? The instrument itself affords no means whereby to ascertain the meaning of the parties; no specific reference to any ditch or water right being contained therein. Clearly, therefore, evidence dehors the instrument was not only admissible, but necessary to place the court in the light of the surrounding circumstances existing at the time of the transaction, so as to enable it to perceive what was in fact included in the general terms employed in the writing. Whenever the terms of a written instrument are susceptible of more than one interpretation, or a latent ambiguity arises, or the extent and object of the instrument cannot be ascertained from the language employed, parol evidence

is admissible to show the sense which the contracting parties attached to the terms or language employed in the instrument; and for this purpose the acts and conversations of the parties, at or about and subsequent to the time of the transaction, relating to the subject-matter, constitute proper evidence. "In the light of what was said and done at the time of a transaction, of the conduct of the parties thereafter, and of the interpretation which they themselves have placed upon it, a court is more likely to arrive at the real meaning and intent of the parties when the terms employed in an instrument are indefinite or ambiguous. Such evidence is not received to vary the language of the writing, but to explain what was meant by its use. It serves to explain the subject-matter, and enables the court to determine what the instrument referred to and embraced. Its object is to elucidate the meaning of the parties." *Brown v. Markland*, 16 Utah, 360, 52 Pac. 597, 67 Am. St. Rep. 629.

In *Wood's Practice Evidence*, § 25, the author says: "The rule that parol evidence is admissible to explain and apply a writing, where it does not contradict or vary it, is universal in its application, and is in accordance with another rule which is well recognized, that a writing may be read in the light of surrounding circumstances in order that the true intent and meaning of the parties may be arrived at, and that independent and collateral facts, about which the contract is silent, may be shown by parol. The surrounding circumstances, and subsequent conduct and acts of the parties, are material and competent to show the interpretation which they put on an agreement, and what conditions they have waived. It is allowable also, in many instances, to show in evidence pre-existing and contemporaneous facts and circumstances attending the negotiations of the parties in making the contract, as such facts often throw light upon the disputed contract itself." And in section 26 he says: "Parol evidence may be admitted to prove a collateral agreement connected with stipulations in a deed, and in no respect repugnant to it." So in *Taylor on Evidence*, § 1194, vol. 2, it is said: "It may be laid down as a broad and distinct rule of law that extrinsic evidence of every material fact, which will enable the court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the persons and things to which the instrument refers, must of necessity be received. Whatever the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter." In *Browne, Par. Ev.* § 54, speaking of written contracts, the author says: "The conversations and acts of the

parties, at and about the time of the making of the contract, as well as subsequent to the making of the contract, are admissible in evidence to show what sense the parties attached to any term or phrase used in the contract, which is in itself susceptible of more than one interpretation, or which, viewed in the light of the evidence explanatory of the subject-matter, the relations of the parties, and the circumstances, may reasonably be susceptible of more than one interpretation."

In *Ganson v. Madigan*, 15 Wis. 158, 82 Am. Dec. 659, Mr. Chief Justice Dixon, speaking of written contracts, said: "If evidence of surrounding facts and circumstances is admitted to explain the sense in which the words were used, certainly proof of the declarations of the parties, made at the time of their understanding of them, ought not to be excluded. And so it was held in several of the cases above cited. 2 C., M. & R. 422; [*Emery v. Webster*] 42 Me. 204 [66 Am. Dec. 274; *Waterman v. Johnson*], 13 Pick. 261. Such declarations, if satisfactorily established, would seem to be stronger and more conclusive evidence of the intention of the parties than proof of facts and circumstances, since they come more nearly to direct evidence than any to be obtained, whilst the other is but circumstantial." So in *Shore v. Wilson*, 9 Clark & F. 566, Lord Chief Justice Tindal, after stating the general rule applicable to written instruments, said: "The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or, perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party." Likewise in *Reed v. Insurance Co.*, 95 U. S. 23, 24 L. Ed. 348, Mr. Justice Bradley, delivering the opinion of the court, said: "Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument

is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities." 2 Taylor, Ev. § 1198; Wood, Pr. Ev. §§ 15, 26; Hall v. Davis, 36 N. H. 569; Bartels v. Brain, 13 Utah, 162, 44 Pac. 715; In re Curtis (Conn.) 30 Atl. 769; Harrington v. Chambers, 3 Utah, 94, 1 Pac. 362; Abba v. Smyth, 21 Utah, 109, 59 Pac. 756; Macdonald v. Longbottom, 1 E. & E. 978; Thorington v. Smith, 8 Wall. 1, 19 L. Ed. 361.

From the foregoing considerations, we are of the opinion that the testimony in question was properly admitted for the purposes indicated.

The appellants further complain that the court erred in finding that the plaintiff purchased the tract of land together with the drain ditch and stream of spring and seepage water flowing therein, and that the ditch, with right of way and stream, was conveyed to him with the land by deed. They insist that such finding is contrary to the evidence, and that the finding and decree ought to have been in their favor. This presents the decisive question in this case, which is whether the right to the water and ditch passed by the deed as an appurtenance to the land. As has already been noticed, the deed does not in express terms convey the ditch or water therein flowing, but it does convey the "privileges and appurtenances" belonging to the land. Were, then, the ditch and water appurtenances attached to the land which passed with it by the conveyance? To determine this, we must look into the evidence to see what the conditions of the premises, with respect to the ditch and water, were at the time of sale. The evidence shows that the entire tract of land, of which that in dispute formed a part, was owned by the grantor and had been owned by him for many years; that the ditch had been constructed by the owner upon the tract many years prior to the bargaining for the sale with the respondent; that at the time of sale the ditch, with water flowing therein, was open and visible to the contracting parties as a condition of the land; that the ditch was a benefit to land retained by the grantor because it drained it of spring and seepage water, and a benefit to the land sold, in that it furnished it with water for irrigation and domestic use; that the grantee informed the grantor that he wanted to purchase a piece of land with water rights that would entitle him to use the water whenever he saw fit to do so; and that the grantor, while upon the land that was being bargained for, pointed to the drain ditch and showed the grantee how he himself used it upon the land, informing him that he considered that stream of water worth \$25 per year for such use, and charged the grantee \$50 per acre more than he had charged another purchaser for adjoining land of the same quality, but which

had not the benefit of this stream. It is evident that the spring and seepage or percolating waters were natural qualities of that portion of the tract retained by the owner, and, so long as he had dominion over the entire tract, he had the undoubted right to make such disposition of those qualities as he chose. He had the right to construct the drain ditch and carry the water to any portion of his land, apply it to any beneficial use he saw fit, and thereby change the relative value of the parts affected; for he had a right to make one portion of his land subservient to another, and, so long as he had the unity of ownership, he had the same right to change the ditch to another tract, or obstruct the ditch and retain the water where it was wont to be, or do with it what the appellants have done—change the ditch and convey the water into a slough where it would benefit none of his land.

But after having constructed the ditch and carried the water upon a particular portion and applied it there, and having thus added an advantage to the land and enhanced its value by artificial means, could he in his lifetime, after selling that portion with the benefits and advantages pointed out and openly visible to the purchaser, or can his grantee of another portion of the tract to which the water had never been carried or applied, now that the grantor is dead, destroy the ditch, or can his legal representatives now, after the grantor is gone, destroy the ditch, deprive that portion of the land of those benefits and advantages, materially diminish the value of the part sold, and so change the ditch and dispose of the water as not even to benefit the land which the grantor retained? The mere statement of such a proposition would seem sufficient to refute it. It is insisted, however, for the appellants, that the owner could not create an easement in his own land, and that, so long as the grantor owned what are now claimed to be the servient estate and the dominant estate, his use of one for the benefit of the other was a mere exercise of a right of property over his own land, and in no sense an easement. Whether or not the artificial arrangement of the material properties of his estate by the owner, constituted a technical easement is, under the facts and circumstances of this case, immaterial. It clearly created a condition to the land sold partaking of the character of an easement, constituting at least a quasi easement, visible to the purchaser, and one of the things in the minds of the parties when the bargain of sale was made. The contract of sale was made with reference to it as a part of the subject-matter, and was thus treated as, and in fact became, quasi appendant to the land sold, and the vendor could not thereafter derogate from his own grant. The presumption of law is that the parties contracted with a view to the condition of the property as it actually was at the time of the transaction, and after

sale neither one had a right, without the consent of the other, to change that condition, which openly and visibly existed, to the detriment of the other. The deed conveyed the land with all the benefits and burdens appendant or quasi appendant thereto, and the vendee could neither shake off the burdens nor could the vendor take away the benefits that were open and visible at the time of sale. "The rule of the common law on this subject is well settled. The principle is that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists, so long as there is a unity of ownership, because the owner of the whole may, at any time, rearrange the qualities of the several parts; but the moment a severance occurs, by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases, and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but it is entirely reciprocal. Hence, if, instead of a benefit conferred, a burden has been imposed upon the portion sold, the purchaser, provided the marks of the burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts." *Lampman v. Milks*, 21 N. Y. 505.

But it is insisted, for the appellants, that the right to the ditch and water in this case did not pass as an easement nor as a quasi easement, because, it is urged, it was not continuous, but was discontinuous in its character, and not strictly a necessity to the enjoyment of the estate granted. This contention, it must be conceded, presents a question upon which the authorities do not all appear to be harmonious. The distinction between easements continuous and discontinuous is found in the Civil Code of France, where easements, or servitudes, are divided into continuous and discontinuous, and are defined: "Continuous are those of which the enjoyment is or may be continued, without the necessity of any actual interference by man, as a waterspout or a right of light or air. Discontinuous are those the enjoyment of which can be had only by the interference of man, as rights of way, or a right to draw water." Washburn on Easements and Servitudes (4th Ed.) 21. The same Code, it seems, also divides servitudes into "apparent" and "nonapparent," and the analogy between the

French Code and the common law in this regard would seem to indicate, as suggested by Gale & Whatley, in their work on the Law of Easements (page 40), a common origin. In many common-law cases the substance of these classifications can be distinctly traced, and the distinction is frequently recognized in American cases. Mr. Washburn, in his work above referred to (page 107), which has been cited by the appellants, says the general rule is that such easements as are noncontinuous will not pass by an implied grant; and of these, he says, the most important are rights of way. The same author says that continuous and apparent easements, such as rights of drainage, of aqueducts, of air and light, of conduits, will pass by implied grant, when, as generally held, they are "necessary to the reasonable use and enjoyment of the granted premises." Then, after explaining these rules, the author says: "A noted exception to the general rules above stated is found in the decisions of the courts in Maine and Massachusetts. It is held by them that no easement, whether continuous or noncontinuous, apparent or nonapparent, will pass by implied grant or reservation, unless it is one of strict necessity. If the grantee can procure the enjoyment of a similar easement, no matter how great the cost, or if the easement is not absolutely necessary to the enjoyment of the granted property, it will not pass." The exception thus pointed out by the eminent author serves to explain the cases cited, by appellants, as to the rule, insisted upon by them, of strict necessity, whether the easement be continuous or noncontinuous, apparent or nonapparent. In the same work, however, after a further discussion of this question and different lines of authorities, the author (on page 110) says: "To return to the general subject, the courts in the United States have generally adopted the English rule, that simultaneous sales or descents of two adjoining lots belonging to the same owner impress upon each lot the apparent and continuous servitudes which are in use over it at the time of the sale. Those states in which such easements, to pass by implied grant, must of strict necessity apply the same limitations here; while in those states in which the easements need only be reasonably necessary to the use of the granted premises such reasonable necessity is sufficient."

Tested by the rule of reasonable necessity, which commends itself as alike just and equitable, and in consonance with fair dealing, the right to the ditch and water, in this case, clearly passed by the conveyance of the premises, as an appendant or quasi appendant thereto. We fully recognize the fact that the owner of a tract of land may use one part thereof for the benefit of another, or each part for the benefit of the other in any manner he may choose, or in such a way that, if he sold one of them, he would

not desire to continue the use, and that so long as he owns the unity he may change the use at his will, or discontinue it altogether, and thereby restore to each part its natural properties or qualities; but, if the use be so obvious and of such character as to induce in the public a reasonable belief that it has been permanently established as an incident to each part, then justice and common fairness require that, if he contemplates a change in the use or state of the premises, he must make it anterior to a sale of one of the portions, or reserve the right in his deed or grant, else be bound by the servitude as to the land he retains. Where a conveyance is made by deed, the "property conveyed passes, with all the incidents then rightfully belonging to it, or actually and usually enjoyed with it at the time of the conveyance, so far as they are necessary to the full benefit and perfect enjoyment of the property, without any specification of them, and without the usual phrase, 'with all the privileges and appurtenances to the same belonging.'" *Dunklee v. Wilton R. Co.*, 24 N. H. 489. "If the owner of land," says Mr. Farnham in his work on *Water and Water Rights* (volume 3, § 831), "has artificially created upon the property a condition which is favorable to one portion of his property, and then sells that portion, the grantee will take it with the right to have the favorable condition continued. Therefore, where the owner of land across which a stream flows has diverted it through an artificial channel, so as to relieve a portion of it formerly overflowed, which he then conveys, neither he nor his grantees of the residue can return the stream to its ancient bed, to the injury of the first grantee." *Gale & Whately*, in their work on the *Law of Easements* (page 40), say: "It is true that, strictly speaking, a man cannot subject one part of his property to another by an easement, for no man can have an easement in his own property, but he obtains the same object by the exercise of another right, the general right of property, but he has not the less thereby permanently altered the quality of the two parts of his heritage; and if, after the annexation of peculiar qualities, he alien one part of his heritage, it seems but reasonable, if the alterations thus made are palpable and manifest, that a purchaser should take the land burthened or benefited, as the case may be, by the qualities which the previous owner had undoubtedly the right to attach to it." In *Gould on Waters* (3d Ed.) § 354, it is said: "The general rules relating to severance of tenements are that a grant by the owner of a tenement or part of that tenement, as it is then used and enjoyed, passes to the grantee by implication, and without the use of the word 'appurtenances,' or similar words, all those easements which the grantor can convey, which are necessary to the reasonable enjoyment of the granted property, and have been,

and are at the time of the grant, used by the owners of the entirety for the benefit of the granted tenement." In *Curtis v. Ayrault*, 43 N. Y. 73, where, as here, the controversy was over a drain ditch which was deepened from time to time, and which had been constructed to carry water, accumulating on one parcel of land, over another, while there was a unity of ownership, and where, in disposing of the case, the essential question of fact was stated to be whether the purchaser of the parcel, across which the water flowed by means of the ditch, in arriving at the price he would pay, did consider and had a right to consider, as an element of value, the ditch across the tract giving a supply of water through it, the court, after stating that neither the grantor nor the grantee had the right after sale to change the relative condition of one parcel to the injury of another, observed: "Some stress is laid upon the purpose which Newbold had in making the ditch, and it is claimed that it was naught else than to drain his lands. But the application of the rule does not depend solely upon the purpose for which the changes have been made in the tenement by the owner. It is the open and visible effect upon the parts which the execution of the purpose has wrought which presented to the view of the purchaser is presumed to influence his mind, and to move him to his bargaining."

The leading case, one of approved authority, which has uniformly been regarded as settling the law on this subject, is *Nicholas v. Chamberlain*, Cro. Jac. 121, where, using the language of Coke: "It is held by all the court upon demurrer that if one erect a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary, et quasi, appendant thereto, and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require." In *Baker v. Rice*, 56 Ohio St. 463, 47 N. E. 653, with reference to continuous and discontinuous easements, it was said: "But it is claimed that only such easements as are termed 'continuous' will pass by implication in a grant, and that such as are termed 'discontinuous' will not. This is a distinction of the civil law, and has been incorporated in the law of some of the states, particularly Maine and Massachusetts. The former are such as operate without the intervention of man, such as drains and sewers; the latter require the intervention of man in their use, such as ways. The distinction is somewhat arbitrary and is not uniformly adopted, as will appear from the cases cited. The better rule, and the one now generally adopted, is not to consider the particular kind of easement, but whether it is

apparent, designed to be permanent, and is reasonably necessary to the use of the premises granted." So, in *Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300, after a statement of the principle that, when one owns an entire heritage and grants a part thereof, there will pass to the grantee all such continuous and apparent easements as may be, at the time of the grant, in use for the beneficial enjoyment of the parcel granted, by implication, unless words are used in the grant manifesting an intent to exclude them, it was said: "Whenever, therefore, an owner has created and annexed peculiar qualities and incidents to different parts of his estate (and it matters not whether it be done by himself, or his tenant by his authority), so that one portion of his land becomes visibly dependent upon another for the supply or escape of water, or the supply of light and air, or for means of access, or for the beneficial use and occupation, and he grants the part to which such incidents are annexed, those incidents thus plainly attached to the part granted, and to which another part is made servient, will pass to the grantee, as accessorial to the beneficial use and enjoyment of the land." In *Ingals v. Plamondon*, 75 Ill. 118, a case cited by the appellants, it was said: "The rule of the common law upon the subject is that where the owner of two heritages, or of one heritage, consisting of several parts, has arranged and adapted these so that one derives a benefit or advantage from the other of a continuous and obvious character, and he sells one of them without making mention of these incidental advantages or burdens of one in respect to the other, there is, in the silence of the parties, an implied understanding and agreement that those advantages and burdens, respectively, shall continue as before the separation of the title." 3 *Far. Water & Water Rights*, §§ 831-833; *Gale & Whatley on Easements*, pp. 38-41; *Gould on Waters* (3d Ed.) §§ 318, 319, 354; *Washburn's Easements & Servitudes* (4th Ed.) 105-111; *Ellison v. Grove*, 85 Md. 215, 36 Atl. 844; *Paine v. Chandler*, 134 N. Y. 385, 32 N. E. 18, 19 L. R. A. 99; *Cave v. Crafts*, 53 Cal. 135; *Lampman v. Milks*, 21 N. Y. 505; *Kieffer v. Imhoff*, 26 Pa. 438; *Robbins v. Barnes*, Hob. 131; *Liford's Case*, 11 Co. 52; *Farmer v. Uklah Water Co.*, 56 Cal. 11; *Cihak v. Klekr*, 117 Ill. 643, 7 N. E. 111; *Newell v. Sass* (Ill.) 31 N. E. 177; *Jackson v. Trullinger*, 9 Or. 393; *Coolidge v. Hager*, 43 Vt. 9, 5 Am. Rep. 256; *Cannon v. Boyd*, 73 Pa. 179; *United States v. Appleton*, 1 Sumn. 492, Fed. Cas. No. 14,463.

While the evidence does not in direct terms show that the water was actually used upon the land for irrigation prior to the sale, it does show expressly that the ditch had been constructed over the land and that water flowed therein for many years prior to that time, and it is also shown that immediately after the sale the vendor himself did in

fact use the water to irrigate his reserved crops, and that the vendee, with the knowledge of and without objection from the vendor, continued its use for irrigation and domestic purposes, until the latter's death, and during all the years following until the interruption by the appellants, which resulted in this controversy. It further appears from the evidence that the water right from another ditch which admittedly did pass, as an appurtenant to the land, is not sufficient to irrigate all the land for the purposes for which it was sold, and that the ditch and water in question constituted rights, incidents, or conditions which, at the time of sale, were not only apparent and continuous, but obviously necessary to the reasonable enjoyment of the thing sold; and the court's finding that they were necessary to such enjoyment has ample support in the evidence. These things do not only appear from the testimony, but it is a matter of common knowledge, of which no proof is necessary, that, in this arid region, land is practically worthless in the absence of sufficient water for irrigation. Under such facts and circumstances, as are here presented, and in the light of the principles and authorities hereinbefore considered, we have no hesitancy in holding that the ditch, and water flowing therein, passed as appurtenances with the grant. And when the permanency of the ditch and the fact that the servitude was perfectly obvious and apparent, at the time of the conveyance, was of material benefit and necessary to the reasonable enjoyment of the premises, when all these things are considered in connection with the conversations, acts, and conduct of the parties, while on the land sold at the time of bargaining, and thereafter during the lifetime of the vendor, it would seem that, under practically all the authorities, the ditch and water passed by the deed.

We do not deem it important to discuss any other point presented.

The judgment is affirmed, with costs.

MCCARTY, J., concurs.

STRAUP, J. (dissenting). I dissent, not from the principles of law as stated in the cases cited in the prevailing opinion, but from the application made of them to the facts of this case. In brief, the case is this: In 1891, and prior thereto, Levi North was the owner of a certain tract of land. The north and middle portion of it was too wet for farming, and so a plow furrow, variously estimated as being 8 to 12 inches deep and spoken of by the witnesses as a drain or waste ditch, was run partially through the tract, northerly and southerly, to drain it. In June, 1891, North sold to plaintiff, Fayter, 2.29 acres off the southerly portion of the tract, at which time plaintiff made a partial payment on the purchase price and took possession of the land. The deed was not

made and delivered until June, 1893. Originally the drain ditch ran to the north boundary of the land purchased by plaintiff, and thence coursed westerly to a slough lying to the north of the land purchased by plaintiff. The water flowing in the drain or waste ditch was seepage water percolating through the soil of the land lying to the north of that sold to plaintiff. In July and August, 1891, and after he had taken possession, plaintiff built a house on the land purchased by him, and in 1892 widened and deepened portions of the drain ditch, as he says, to drain a portion of his own land, to obtain an increased water supply, and because North agreed to pay him one-half of the expense of enlarging the ditch. The defendants say plaintiff's widening and deepening the ditch was all done for hire. Plaintiff used water from the drain ditch in building his house, and later, and up to 1903, used it for irrigating portions of his land and for culinary purposes. There was also a water right sufficient to irrigate two acres, which belonged to the land and admittedly was conveyed to plaintiff by his deed of conveyance as an appurtenance, and is not here in controversy. Levy North died three years after his conveyance to plaintiff. The defendants North are his heirs, and the other defendants are his grantees, who succeeded to the ownership of the land lying to the north of that sold to plaintiff, and who acquired their title subsequent to plaintiff acquiring his. Plaintiff's deed described his land, and "together with all tenements, hereditaments, privileges and appurtenances thereunto belonging or therewith used and enjoyed." In 1903 the defendants, in order to better and more effectively drain their land, by means of a pipeline about 141 feet north of the place where the drain ditch enters plaintiff's land and where he had theretofore taken the water from it, diverted the water in a westerly course, but on their own land, to the slough. Because of this diversion the plaintiff brought this suit to enjoin the defendants from so doing, and from interfering with the water coursing down the drain ditch to his land, contending that the water in the drain ditch belonged to him because (first) conveyed to him by the deed of conveyance as an appurtenance to the land, (second) because of his possession and adverse user, and (third) because of an estoppel. The trial court, finding and concluding with the plaintiff on the contentions of an adverse user and of an estoppel, adjudged plaintiff to be the owner of the said ditch and water, enjoined the defendants from in any way diverting or at all interfering with it, directed that they permit the water to flow down the ditch as theretofore, and assessed damages against them. No finding was made by the court as to the drain ditch being an appurtenance, or that it was constructed or maintained or that the water coursing in it was for the use or benefit of the land conveyed to plaintiff, or that the water was necessary for the use or

enjoyment of the property as it existed when severed and sold.

1. The majority court has affirmed the judgment, not on the theories as found by the court, but on the theory that the drain ditch and the water coursing in it were appurtenances to the land conveyed to plaintiff. This is principally done because of the conversations between the parties and of statements made by North at the time of the sale, and because of acts and conduct with respect to the water thereafter. To support this theory, texts and cases are cited to the effect, first, that where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which, at the time of the severance, is in use and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership, by voluntary alienation, there arises, by implication of law, a grant of the right to continue such use. In such case the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage, in substantially the same condition in which it appeared and was used when the grant was made. And, second, that parol evidence is admissible to explain and apply a writing, where it does not contradict or vary it, to ascertain the nature and qualities of the subject-matter of the instrument, to identify the persons and things to which the instrument refers, and that the writing may be read in the light of surrounding circumstances, in order that the true intent and meaning of the parties may be ascertained as evidenced by the language used in the instrument. These elementary principles of law are readily conceded. But, in considering and applying the first, we are met with the proposition that there is no finding, nor is there any evidence, as is conceded by the majority court, showing that at the time of the purchase of the land by plaintiff and his taking possession, or at any time prior thereto, any water from the drain ditch was used or had been used on the land purchased by him. To the contrary, the evidence is abundant and very pointed that such water had not been used on the land prior thereto. The evidence, without conflict, shows that the drain ditch was constructed and used to drain the land lying to the north of that purchased by plaintiff and to carry the percolating and waste water therefrom to the slough, and that it was not constructed, maintained, or intended to carry water for use on the land purchased by plaintiff, and that the water coursing in it had not been used on the land prior to the sale, and had not coursed in the ditch for its use or benefit. True there is evidence showing that after plaintiff took possession of the land he used this water for irrigating it and

for culinary purposes; and there is some evidence showing that Levi North himself, late in the summer or fall of 1891, but after the sale and possession by plaintiff, used water on said land out of the drain ditch to mature the crop reserved by him, but whether it was drain or canal water the witnesses testifying thereto did not know. Whether this water was an appurtenance passing with the deed of conveyance is to be determined, however, from what use was being made or had been made of it at the time of and prior to the sale and plaintiff's taking possession, and as to whether its use on the land was then of a permanent character. In other words, it must have been an existing appurtenance at the time of the sale. An appurtenance is defined to be a thing belonging to another thing as principal and which passes as incident to the principal thing, and hence, to be an appurtenance passing with the deed, this water must have belonged and been appendant to the land at the time it was sold. 1 Words & Phrases, 477; 3 Cyc. 565; 2 Am. & Eng. Enc. L. 523. It, of course, must be conceded that during the unity of title in North, he, as owner, could subject adjoining parcels of land to such uses with respect to one another as suited his convenience without creating an easement in or an appurtenance to such parcels. Such mere convenience does not create the kind of easement here in question. Where, however, during the unity of title, an obvious or apparent permanent servitude has been imposed on one portion of an estate in favor of and for the benefit and enjoyment of another, which exists at the time of the severance of the ownership, there arises, by implication, a grant to the right to continue such use. To these propositions are the texts and the cases cited by the majority court. However, these and other authorities recognize the principle that "to justify such construction it must appear from the disposition, arrangement, and use or the several parts that it was the owner's purpose in adopting the existing arrangement to create a permanent and common use in the one part for the benefit of the other or for the mutual benefit of both, and it must be reasonably inferable from the existing disposition and use that it was intended to be continuous, notwithstanding the severance of ownership. * * * A mere temporary or provisional arrangement, however, which may have been adopted by the owner for the more convenient enjoyment of the estate cannot constitute the degree of necessity or permanency which would authorize the engrafting upon a deed by construction of a right to the enjoyment of something not within the lines described." *Hancock Mut. Life Ins. Co. v. Patterson*, 103 Ind. 582, 2 N. E. 188, 53 Am. Rep. 550.

Three things are essential to the creation of an easement in this way: First, a separation of title; second, that before the separation takes place the use which gives

rise to the easement shall then exist and shall have been so long continued and so obvious as to show that it was meant to be permanent; and, third, that the easement shall be necessary to the beneficial enjoyment of the land granted or retained. So the fact that the plaintiff used the water from the drain ditch on the land after he purchased it and went into possession is not here of controlling force, for it is essential that such an easement should have in fact been used by North during the unity of the tenements and was existing at the time of the severance of ownership, designed by him to have been permanent and for the use and benefit of the land conveyed by him to the plaintiff, and that its use was necessary for the enjoyment of the property. *Kelly v. Dunning*, 43 N. J. Eq. 62, 10 Atl. 276; *Ingals v. Plamondon*, 75 Ill. 118; *Whiting v. Gaylord*, 66 Conn. 337, 34 Atl. 85, 50 Am. St. Rep. 87; *Root v. Wadhams*, 107 N. Y. 384, 14 N. E. 281; *Brakely v. Sharp*, 9 N. J. Eq. 9, and cases cited in the prevailing opinion; *Providence Tool Co. v. Corliss*, 9 R. I. 504; *Evans v. Dana*, 7 R. I. 306.

It is not necessary here to determine whether such an easement to be an appurtenance and pass with the land shall not only be apparent, designed to be permanent, and whether it shall, also, be strictly necessary, as some authorities say, or only reasonably necessary or a mere beneficial and valuable convenience, as others say, for the evidence lacks the required proof that the water coursing in the drain ditch was at all used upon the land or belonged to it at the time of the purchase and sale, or that the drain ditch was at all constructed or maintained for the use and benefit of the land purchased by plaintiff. It is said that while the canal and spring water was sufficient to irrigate plaintiff's land for ordinary crops it was not sufficient for gardening, the use to which he put the land, and therefore the drain water became necessary for its beneficial use and enjoyment. Equally well might plaintiff make such a claim had he desired to maintain a fish pond on his land, and be heard to assert by parol evidence that North gave him not only the drain water, but all water rights owned by him. "The degree of necessity which must exist to give rise to an easement by implied grant is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made" (*Kelly v. Dunning*, supra; *Hancock Mut. Life Ins. Co. v. Patterson*, supra), and not to what use it may have been put thereafter. The evidence is wanting that prior to the severance North used any drain water on the land sold to plaintiff, or that he used or enjoyed the property in any such manner as did the plaintiff. To the contrary, the evidence shows that plaintiff completely changed the condition of the property by erecting buildings, plant-

ing trees, vines and shrubs, and doing gardening, and thereby created a necessity for more water. So, when the authorities say that the easement, such as here, shall be necessary to the beneficial enjoyment of the land, they mean "as it existed when the severance was made," and not as it may thereafter be changed or adapted to different uses. The fact, if it be a fact, that Levi North, after the sale and possession of the plaintiff, used water out of the drain ditch on the land to mature the crop reserved by him, affords no presumption that he had done so before the sale and plaintiff's possession. *Lawson's Presumptive Ev.* 230, 238. Even if it afforded any such presumption, it, however, could not prevail against the direct and positive evidence that the water had not been used on the land prior thereto.

It is also said that the situation and surrounding conditions should be considered as they were at the time when the deed was actually made and delivered, in June, 1893. I think not. The conditions and situation are to be considered as they were at the time when the parties bargained, purchased, and sold, in June, 1891, and at which time the plaintiff also took possession. The deed when made and delivered, as between the parties, by relation, took effect as of the time of the sale. *Schneider v. Botsch*, 90 Ill. 577; *Sutherland v. Goodnow*, 108 Ill. 528, 48 Am. Rep. 560. It is, however, said that it was competent to admit in evidence, as was done over defendants' objection, the statements made by North to plaintiff, and the conversations had between the parties before and at the time of the purchase, to the effect that the drain ditch was an independent stream and was to go with the land, and for that reason plaintiff paid \$250 per acre, while other land of like character had sold for only \$200, and the reason why the drain ditch was not mentioned in the deed was because North said it would go with the land. I am clearly of the opinion that this evidence was inadmissible. Not an authority cited in the prevailing opinion holds that it is admissible in this kind of an action. It is true, as stated by the cited authorities, that parol evidence is admissible to explain and apply a writing, where it does not contradict or vary it, to show the subject-matter of the instrument, to identify the persons and thing to which the instrument refers, so that the writing may be read in the light of the surrounding circumstances in order that the true intent and meaning of the parties may be ascertained as evidence by the language used in the instrument. Applying it here, it was competent to admit parol evidence to show the nature and the character of the drain ditch as it existed at the time the land was purchased, what use had been made of it, and what purpose it subserved and the like, the situation of the premises, and all the surrounding facts and circumstances then existing, to enable the court to determine whether at the time of the sale the drain ditch was an ap-

purtenance to the land; but what authority has ever declared that it is competent by parol to create an easement or an appurtenance, or to permit the grantee, as here, to assert by parol that a certain thing should be included within his deed as an appurtenance which the evidence fails to show was an appurtenance at the time of his purchase? While it was competent to show by parol what were the existing appurtenances (and that is all the cited cases hold), it was not competent to show that the grantor said, or that the parties orally agreed, that a certain thing "goes or should go with the land." As well might the plaintiff be heard to say that North led him to a knoll and showed him all the ditches and the water coursing in them on all the surrounding land owned by North, and that he said, "they all go." The doctrine announced in this case is a most dangerous one, and violates the fundamental principles of evidence.

I find no authority holding this evidence admissible. To the contrary, the authorities are numerous holding it inadmissible. "The evidence does not prove that the way in question was such an easement or privilege in the defendant's land appurtenant to the granted premises as would pass with the deed of those premises. * * * The evidence failing to prove the way claimed to have existed and been used by the owner of the severed heritage for the benefit of that part of the estate severed prior to the severance, no parol evidence of an agreement concerning such way for the purpose of showing that it passed by the deed, the deed being silent respecting it, is competent or admissible. A deed of land, or of any interest in land, must be explained by its own terms as to what passes by it, except as to the condition of the premises at the time of the purchase — what easements then existed as appurtenant, or had been annexed to or used in connection with or for the benefit of the premises so conveyed prior to the severance. This rule of law excludes all evidence of any parol agreement concerning this right of way." *Providence Tool Co. v. Corliss*, supra. "It is too clear to admit of any doubt that parol evidence could not be received to vary the terms of the deed. The situation of the subject-matter of the conveyance may, indeed, be shown by parol, to aid in the construction of the instrument; but evidence that it was verbally agreed that certain things should or should not be included in the conveyance would not be admissible." *Proctor v. Gilson*, 49 N. H. 62. "Parol evidence is inadmissible to ingraft on a deed an agreement that the grantee shall have a right of way from his lot to the street over the grantor's land." *Kruegel v. Nitschmann* (Tex.) 40 S. W. 68. "When the language of a written agreement is susceptible of more than one interpretation — that is to say, is on its face ambiguous — it has been held that the courts will look at the surrounding circumstances existing, when the contract was made, at

the situation of the parties and the subject-matter of the contract, and will sometimes even call in aid the acts done by the parties under it as affording a clue to the intention of the parties; but the court never resorts in such a case to the verbal declarations of the parties either before at the time or after the execution of the contract to aid it in giving a construction to its language." *Crislip, etc., v. Cain*, 19 W. Va. 438. To the same effect are the following cases: *Uihlein v. Matthews* (N. Y.) 64 N. E. 792; *Van Husen v. Ry. Co.*, 118 Iowa, 366, 92 N. W. 47; *Shaver v. Edgell*, 48 W. Va. 502, 37 S. E. 664; *Canal Co. v. Ryerson*, 27 N. J. Law, 457; *City of Kansas City v. Banks* (Kan. App.) 61 Pac. 333; *Armstrong v. Lake Champlain Granite Co.*, 147 N. Y. 405, 42 N. E. 186, 49 Am. St. Rep. 683; *Evans v. Dana*, 7 R. I. 306. If this were an action properly brought to reform the deed, it may be that some of this testimony would be admissible. But we have no such case before us.

2. As to the adverse user and possession: The undisputed evidence shows that the water in the drain ditch was seepage water coming from percolations through the soil of the land lying to the north of that purchased by the plaintiff, and, being therefore a part and parcel of the soil in which it was found, was not subject to appropriation and could not be acquired by adverse user. *Willow Creek Irr. Co. v. Michaelson*, 21 Utah, 248, 60 Pac. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687; *Crescent Min. Co. v. Min. Co.*, 17 Utah, 444, 54 Pac. 244, 70 Am. St. Rep. 810; *So. Pac. Ry. Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92.

3. As to an estoppel: The plaintiff claims that the defendants saw him build his house, plant trees and shrubs, deepen and widen the drain ditch, made no objection, did not deny him the right to the use of the water, and did not themselves assert title to it; therefore they should now be estopped from asserting title to the water or from in any way interfering with its flow. The mere statement of the essential elements of an equitable estoppel shows that this contention cannot prevail. "In order to constitute an equitable estoppel, there must exist a false representation or concealment of material facts. It must have been made with knowledge, actual or constructive, of the facts. The party to whom it was made must have been without knowledge or the means of knowledge of the real facts. It must have been made with the intention that it should be acted upon, and the party to whom it was made must have relied on or acted upon it to his prejudice." 16 *Cye*. 726; *Trust Co. v. Wagener*, 12 Utah, 1, 40 Pac. 764; *Smyth v. Neal*, 31 Or. 105, 49 Pac. 850; *Boggs v. Merced Min. Co.*, 14 Cal. 279. Tested by these principles, the facts are far from showing an estoppel. The plaintiff had the undoubted right to build a house on his own land and to improve it by planting trees and

shrubs and the like. Against these acts the defendants were not in duty bound to speak, and could not properly have objected thereto had they desired to do so. The use that the plaintiff made of the water was a mere permissive one. To constitute an equitable estoppel the authorities say there must be some degree of turpitude in the conduct of the party before a court of equity will estop him from the assertion of his title. The acts claimed to work an estoppel did not involve such false representations or concealment of facts, or such things done with intention to have been acted upon within the meaning of the adjudicated cases.

4. The decree adjudged the plaintiff not only to have the right to take the water out of the ditch, but adjudged him to be the absolute owner of the water itself and of the ditch, quieted the title thereto in him, adjudged that the defendants had no claim or title whatever to either the water or the ditch, directed that they permit the water to flow down the ditch as it did when it was diverted by them, and enjoined and restrained them from in any manner interfering with such waters or said ditch. Thus the plaintiff was granted, not only an easement in and to the defendants' land, but also an estate therein, for the percolating waters were and are part and parcel of the soil of their land, and, both by necessary implication and by the prohibiting and restraining provisions of the judgment, their right and power to use their own land in any manner which will result in diminishing the flow of the ditch or impair plaintiff's title to or use of the water or ditch, or which will result in any interference therewith, have been completely destroyed. It substantially obligates the defendants to maintain their lands as a reservoir for the collection and discharge of percolating waters found within and belonging to it, for the use of plaintiff. If the plaintiff, when he purchased the land, intended to purchase and thought he was purchasing this so-called water right from the drain ditch, it was incumbent upon him to show that it was then an existing appurtenance belonging to the land purchased by him, and was thus included in the granting and descriptive clauses of his deed as an appurtenance. If it did not belong to the land as an appurtenance, but was a stream of water independent of it, he should have had it expressed in his deed. Having failed on both propositions, he cannot now be heard to say by parol that it was intended to be conveyed to him, and because of the contemporaneous verbal agreement, or under the guise of an equitable estoppel, call on the chancellor, in effect, to reform his deed, and ingraft in it whatever plaintiff by parol may choose to say was intended.

For these reasons, I think the judgment ought to be reversed.

**ROGERS v. OGDEN BLDG. & SAV. ASS'N.
DRIVER v. SAME (CROSSMAN et al.
Interveners).**

(Supreme Court of Utah. Dec. 2, 1905.)

**1. APPEAL—REVIEW—ESTOPPEL TO ALLEGE
ERROR.**

Parties who admit a fact in their pleadings cannot question such fact on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1066.]

2. BUILDING AND LOAN ASSOCIATIONS—RELATION TO MEMBERS—HOLDERS OF MATURED STOCK.

Where a building and loan association issued its stock in separate and consecutive series, agreeing with the stockholders to purchase the stock of each series as it matured, and in pursuance of its agreement and of the uniform custom and course of dealing between it and its stockholders, which was to pay off matured stock of one series in preference to matured stock of a subsequent series, purchased the stock of a certain stockholder on its maturity, and began paying therefor in installments and continued such payments for several years, with the knowledge and acquiescence of purchasers and holders of subsequent issues of stock, the holder of the matured stock would be regarded as a creditor of the association to the extent of the payments due him on his stock, or at least as having equities superior to those of the subsequent purchasers and holders of stock.

3. SAME—EVIDENCE—PRESUMPTIONS—SOLVENCY.

Solvency will be presumed, in the absence of evidence of insolvency.

4. SAME—WHAT CONSTITUTES INSOLVENCY.

Insolvency denotes the insufficiency of the entire property and assets of an individual to pay his debts, and is to be determined from a comparison of all assets and resources with his liabilities, and not alone from the amount of money on hand or coming in, or from the absence of money on hand.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insolvency, § 29.]

5. SAME—SALES OF STOCK—EVIDENCE—POSSESSION OF SELLER.

Where a holder of matured stock in a building and loan association agreed to surrender the same and sell it to the association, and in pursuance of such agreement the association began to pay him therefor in installments, his continued retention of possession of the stock, while evidentiary of ownership in him, was not conclusive, and, in view of the fact that the stock was being paid for in installments by the association, was not inconsistent with the existence of a consummated sale to the association.

6. SAME—INTEREST—WHEN ALLOWED.

A stockholder in a building and loan association, who, on the maturity of his stock, sold it to the association according to agreement in the usual course of business of the association, was entitled, on the failure of the association to pay for the stock, to recover, not only the amount of his claim at the time it was due, but interest thereon from that time.*

McCarty, J., dissenting.

Appeal from District Court, Weber County; Chas. H. Hart, Judge.

Actions by L. R. Rogers and by Jesse J. Driver against the Ogden Building & Savings Association. In the latter action W. W. Crossman and L. R. Rogers intervened, after which the actions were consolidated

and tried together. From a judgment rendered in favor of Rogers, Driver and Crossman appealed. Affirmed.

A. G. Horn, for appellants. John A. Street, for respondent.

STRAUP, J. 1. The Ogden Building & Savings Association was a corporation organized in 1893 under the general incorporation act of the then territory of Utah, and, while not technically known as a building and loan association, to some extent it partook of the nature of such associations. The purpose of this organization, as stated in its articles of incorporation, was "the accumulation of a fund by the savings of the members thereof sufficient to enable each shareholder to invest his savings safely and speedily, and to purchase real estate, or to invest the same as may be deemed by him most profitable, and that each shareholder may have the benefit of the aggregate capital which co-operation produces, and loaning money to shareholders for the purpose of enabling them to erect buildings, and otherwise loaning and investing money, and the purchasing and holding real estate for the purposes and benefits of the association." It was also provided by its constitution and by-laws that "each and every shareholder, for each and every share of stock that he had subscribed for, paid the sum of fifty cents subscription fee, and the sum of one dollar each and every month thereafter, until the value of the stock in which the series to which the subscription was made became sufficient to divide to each share of the said stock the sum of one hundred dollars." It was also shown that the association had separate, distinct, and consecutive series of stock numbered from 1 to 37. Subscribers purchased of said corporation shares of its capital stock, paying therefor in monthly installments until the amount paid, as aforesaid, together with the natural earnings of said association, equaled the sum of \$100 or more per share, when, as is conceded by all parties, and as is alleged in their pleadings by the appellants, "the said shares of stock should be fully matured, and the association agreed to and with such stockholders to then and there pay them in lawful money of the United States the amount at which said shares of stock had matured." About the year 1890 respondent Rogers took out and was the holder of 35 shares of what is known as the "Fifteenth Series" of said capital stock, and from thence on continuously made monthly payments thereon until the 30th day of September, 1898, when said stock was fully paid and matured. All previous series having been theretofore matured and paid for by the association and retired, the association, on the day last aforesaid, by resolution of its board of directors in a regular meeting, declared the said 35 shares of stock matured and then and there

*Godbe v. Young, 1 Utah, 55.

payable to the said Rogers at \$102 per share, amounting in the aggregate to \$3,570. Thereafter the association made partial payments thereon, leaving on June 26, 1903, a balance due and unpaid of about \$2,700. Upon repeated demands made by respondent Rogers for his money, and upon failure of the association to pay it, on October 3, 1903, he commenced his suit against said association for the collection of the same. The defendant association appeared and demurred to the complaint, and, its demurrer being overruled, on November 19, 1903, it answered. In the meantime, and on the 2d day of November, 1903, the appellant Driver commenced an action against the defendant association, alleging its insolvency, and asked for the appointment of a receiver. On the same day the defendant association, through appellant Crossman, its president, filed an answer admitting all the allegations of Driver's said complaint, appeared in court, and consented to the appointment of a receiver, and on said day last named one Kelly was appointed receiver for said association. On November 9, 1903, respondent Rogers was given leave to file a complaint in intervention in said suit, which was done by him. Later appellant Crossman, who was a stockholder in a series subsequent to the fifteenth, for himself, and on assigned claims to him of stockholders also in series subsequent to the fifteenth, except one Tracey, who was of the fifteenth series, also filed a complaint in intervention in the said action. The actions were consolidated and brought on for trial before the court. It appears from the record that, in the filing of the various pleadings in said causes, the defendant association, the plaintiff Driver praying for the appointment of a receiver, the intervenor Crossman, and the receiver himself were all represented by one and the same counsel. The principal contest at the trial was as to whether respondent Rogers was a creditor or mere stockholder of the association, and as to whether, by reason of the premises, his claim should be preferred, and therefore should be paid out of the assets of the association before paying members in series subsequent to the fifteenth. There were no so-called general or outside creditors. The constitution and the by-laws of the association were put in evidence, and evidence was also given with respect to its series of stock, and as to the manner in which prior series were treated and preferred by the association and its members over subsequent series.

Among other things the court found as follows:

"(3) The court further finds that from the inception of the business of said defendant association its uniform, exclusive, and continuous course of business and rule of corporate action, to which all of its shareholders have at all times assented, and under which they have subscribed for their

stock in the corporation, was that it divided its subscription to its stock every six months into separate, distinct, and consecutive series, subscriptions being continuously solicited, and the subscribers in each semiannual period in which sufficient shares were subscribed being classed together as shareholders of a 'series' numbered from 1 upward to 37, commencing with the earliest subscriptions, and the subscribers to each separate series being treated alike in respect to the maturity and payment of their shares in said series, and separate from all other series; that up to the time the fifteenth series matured, as hereinafter found, the stockholders in each successive series of the 14 previous series of stock, at the time the said stock in any such series became of \$100 or more in value per share by reason of the payments and profit, if any, theretofore made upon such stock, were treated by the association as sellers of their stock to the association, and as being creditors of the association who were entitled to have the matured value of their shares paid to them in money or by credit upon loans made by the association to any of the borrowing stockholders in such matured series; that the association paid off each successive matured series in preference to any claims of its members in the subsequent or junior series (except that stock, withdrawn in accordance with the constitution and by-laws, upon notice of withdrawal given prior to the maturity of any series, was paid in preference to stock of an earlier series maturing after such withdrawn stock became payable under the rules of said company); and that after payment in full, as far as the shares in the matured series were concerned, the holders ceased to be either stockholders or creditors, while all the stockholders in all the unmatured series carried on the business of the association, and that on a number of occasions the association borrowed money to pay off the mature price of stock in matured series."

"(7) The court further finds that from the inception of its business the said association held out to its shareholders that, when the stock in a series matured, the association would purchase the said stock at the matured prices, and that the debt or obligation to pay for said stock in such matured series would have a preferred lien and preferred right of payment in cash or by credit on loans of any claims whatsoever of the stock in any subsequent or junior series, except stock withdrawn prior to maturity of an earlier series, and that this was the basis upon which L. R. Rogers subscribed and paid for his stock, and it was the condition under which all the shareholders in the association, including all the persons represented in this suit, including assignors of W. W. Crossman intervenor, subscribed for and made payments upon their stock, and that after the maturity of the stock on the

said L. R. Rogers and said S. H. Tracey in the fifteenth series, as hereinbefore found, the association, with the full knowledge of all its existing stockholders, first paid certain balances due upon the fourteenth series of stock as a preferred claim and lien, and then commenced, and continued for several years up to the 26th day of June, 1903, the making partial payments upon said matured stock of L. R. Rogers and said S. H. Tracey as claims having a preferred lien and preferred right of payment ahead of any claims of the remaining stockholders of said association, including all persons interested in this suit; and the court further finds that each and all of the said remaining stockholders were, during the time that said payments were being made on said fifteenth series, officers and directors of the said defendant association, and authorized the said payments upon the matured stock of said fifteenth series as preferred claims; that said association continuously dealt with said L. R. Rogers, after maturing his said stock, as a creditor having a preferred lien upon the assets of the association, and a preferred right of payment for the amount due him, and during the month of March, 1903, made a statement to him as a creditor who was then pressing his claim for payment, representing that the association was solvent and had a surplus profit of over \$3,700."

The court also found that on the 30th day of September, 1898, Rogers had paid upon said stock the sum of \$102 per share in cash, exclusive of any interest on payments, or any profits of the association, of which none had been paid or allowed or credited to said stock, and that on said day the association, by resolution of its board of directors in regular meeting, declared the said 35 shares of the said Rogers fully matured and then and there payable to him at the sum of \$102 per share, amounting, in the aggregate, to the sum of \$3,570, and that the association thereafter made payments on said stock from August, 1901, until June, 1903, at which time the last payment was made, leaving a balance due Rogers of about the sum of \$2,700. The court also found that there was due the assignor Tracey the sum of about \$600, and that he was also in said fifteenth series, and was similarly situated to Rogers. The court also found the amount of moneys paid in by members in the series subsequent to the fifteenth, who had made assignments to appellant Crossman. The court also found that the commencement of the suit by Driver, seeking the appointment of a receiver, and all the proceedings had in the action with respect thereto, were collusive and for the purpose of preventing respondent Rogers from securing the preference of payment claimed by him. As conclusions from the findings, the court held that respondent Rogers and assignor, Tracey, were entitled to interest on their respective claims from the time they became due and ought to have

been paid, and that their claims were entitled to priority over claims of those in series subsequent to the fifteenth, and by the decree Rogers and Tracey were given priority accordingly. Crossman and Driver appeal and assign error as to portions of finding No. 7, and as to the court giving Rogers and Tracey interest on and priority of their claims.

2. It is not claimed that finding No. 3 is unsupported by the evidence, nor is any error assigned with respect to it, nor is it in any manner assailed. Error with respect to finding No. 7 is assigned because of a want of evidence to sustain that portion of the finding wherein it is found that the association agreed to purchase the stock at its maturity, and that the debt or obligation of a prior series was entitled to preference over a subsequent one. In regard to the agreement made by the association with its stockholders to purchase the stock at its maturity, we have but to look at the complaint in intervention of appellant Crossman, where he alleges as follows: "And one of its objects was to have its stockholders purchase of its shares of its capital stock, paying therefor monthly installments until the amount paid, together with the net earnings of the association, should equal the sum of \$100 or more per share. Then the said shares of stock should be fully matured, and the association agreed to and with such stockholders to then and there pay them in lawful money of the United States the amount of which said shares of stock had matured." In the complaint of appellant Driver, after stating the general purpose and business of the association, it is alleged: "And that in that connection said defendant's business was to have the stockholders purchase of said defendant's shares of its capital stock, paying therefor in monthly installments until the amount paid, together with the net earnings of said association, should equal the sum of \$100 each or more per share, when the said shares of stock should be fully matured, and the association agreed with such shareholders to then and there pay him in lawful money of the United States the amount at which said shares of stock had matured." Having thus admitted by their pleadings that there was such an agreement, appellants are not now in position to question such fact. With respect to a preference of a prior series over a subsequent one, Kelly, who was secretary of the association from 1895 to the time of his appointment as receiver, and who was a witness for appellants, testified: "Since 1895 the earlier series of matured stock was paid in preference to the later series, and in the order in which they matured. We opened a new series every six months, which were unlimited in amount, to be subscribed for." Respondent Rogers testified: "Stock was treated separate as to its maturity. The stock in the series previous to the fifteenth were matured and paid off. I have no

knowledge of any stockholder acting as such after his stock matured, unless he had stock in junior series. The later series of stock continued the business. During all the time I was director or president the company treated matured stockholders as creditors, and borrowed money to pay them off. This was done from the Utah Loan & Trust Company. Each series of stock was treated independently of the other. I paid in the amount that my stock matured at." We then have finding No. 3 confessed, because in no manner assailed; and wherein finding No. 7 is assailed, because of a want of evidence, it is fully supported by evidence. Upon these facts we think the court was warranted in his conclusions that respondent Rogers and Tracey were creditors, and were therefore entitled to be paid out of the assets of the defendant association before payment to those in subsequent series. Appellants have cited numerous cases holding that, in the absence of any provision in the constitution or the by-laws, giving one series or class of stock preference over others, mere holders of matured stock in a building and loan association are not creditors, but, in case of insolvency and winding up of the association, they can only share pro rata with the holders of unmatured stock, and that, where such association was insolvent when notices of withdrawal were given, the shareholders giving such notices were not creditors with claims entitled to be paid in full the amounts by them paid to the loan fund, before other stockholders were entitled to anything, but were on a parity with other stockholders. *Rabbitt v. Wilcoxon*, 103 Iowa, 35, 72 N. W. 306, 38 L. R. A. 183, 64 Am. St. Rep. 152; *Coltrane v. Baltimore, etc., Loan Ass'n (C. C.)* 110 Fed. 272; *Towle v. American, etc., Loan Ass'n (C. C.)* 75 Fed. 938; *Hohenshell v. Savings Loan Ass'n*, 140 Mo. 566, 41 S. W. 948; *Leahy v. National, etc., Loan Ass'n*, 100 Wis. 555, 76 N. W. 625, 69 Am. St. Rep. 945; *Gibson v. Safety, etc., Ass'n*, 170 Ill. 44, 48 N. E. 580, 39 L. R. A. 202; *Criswell's Appeal*, 100 Pa. 488; *Christian's Appeal*, 102 Pa. 184; *Endlich on Bldg. Ass'ns*, § 514.

These principles of law, as applied to the facts in those cases, are all conceded. The findings of the court, however, here discloses a state of facts essentially different from those existing in the cited cases. Here it is found by the court that there were separate, distinct, and consecutive series; that the association agreed with its stockholders to purchase the stock of each series as it matured; that it, in effect, purchased from respondent Rogers, and he sold to it his stock in 1898, when it matured, and, in recognition thereof, the association began paying therefor, and for several years thereafter made payments thereon in preference to other matured stock of any subsequent series; that it was the uniform custom of the association, and it was its course of dealing with its

members, that, as a series matured, it was paid off in preference to any claim of members in junior or subsequent series; that from its inception the association held out to its shareholders that, when their stock in a series matured, the association would not only buy the stock at its matured value, but, also that the debt or obligation in such series would have a preferred right of payment over all and any claims of stock in a junior or subsequent one; and that upon this condition and understanding appellants and their assignors subscribed for stock of series subsequent to Rogers, and acquiesced in the association paying him and others, having matured stock of prior series, in preference to any claim of a subsequent one. Because of all these matters and conditions, as found by the court and more especially appearing in findings No. 3 and No. 7, we think the court was authorized in drawing the conclusion that the relation of respondent Rogers to the association, at the maturity of his stock and the purchase thereof by it from him in 1898, became and was that of a creditor, or at least gave him equities superior to appellants. *U. S. v. Union Pac. R. Co.*, 91 U. S. 85, 23 L. Ed. 224.

Mr. Endlich in his work on Building Associations at section 514, speaking of dissolutions and effects of dissolutions, among other things, says: "To permit one member, or one set of members, to be paid in full at the expense of others who get less, is not to carry out that scheme or agreement (mutuality, equality, and equal burdens) unless there is something which gives the former an equity superior to the latter, whereby they have a better and stronger claim upon the property of the association. Where one has subscribed to and paid up stock upon a distinct understanding that it is to be preferred over that of others who have paid less, there is such a superior equity." Where, as here, each series of stock has been treated by the association and all its members as distinct and separate, the rights of members in a particular series, and their obligations to the association, or to members in other series, must be ascertained as of the date of the maturity of the stock of that series. *Thompson, Bldg. Ass'ns (2d Ed.)* 742. It is quite apparent to us that from the time when his stock matured, his claim liquidated in 1898, and then promised by the association to be paid, Rogers was no longer, in fact or in law, a stockholder of the association, and could not rightfully, as such, have any voice in the management or conduct of its affairs; neither as a stockholder was he entitled to share in the profits of the association made thereafter no matter how great. All that he could exact was the payment of his claim, together with interest thereon from 1898. There is nothing in the constitution or by-laws of the association precluding it from making an agreement to purchase its stock from its

members, and where such an agreement is made, and such a course of dealing transacted, with the assent of its stockholders, we see no reason why the stock cannot so be purchased by the association, if creditors are paid. 1 Cook on Corp. (4th Ed.) §§ 3 and 311, and cases; *Blalock v. Mfg. Co.*, 110 N. C. 99, 14 S. E. 501; *Schilling, etc., Co. v. Schneider*, 110 Mo. 83, 19 S. W. 67. Such authority is not here questioned. The very business and pursuit of this association contemplates the purchase of its stock issued to its members at the maturity of the stock or upon notice of its withdrawal.

3. Furthermore, this case does not fall within the principles of the cited cases, for the reason that there is no finding by the court of insolvency of the association; nor do appellants at all complain because a finding thereon was not made, nor is any assignment made with respect thereto. It is, however, argued by appellants in their brief that the association was insolvent at all times since the year 1893. Upon a review of the evidence we are not satisfied that it so greatly preponderates in favor of a finding of insolvency as to preclude a contrary finding. In fact we are satisfied that the preponderance of the evidence is in favor of solvency. It will be presumed that the association was solvent until there is some evidence tending to show that it was insolvent. The only witness speaking on the subject, and who says that the association was insolvent, was the receiver, who at the time of his appointment was, and since 1895 had been, the secretary of the association. But the testimony of this witness was contradicted by the official reports and records of the association made by himself, especially as made and reported by him in March, 1903, wherein he asserted that the association was solvent. In that year in his official reports he stated that the resources of the association, consisting of bills receivable, fixtures, cash in the treasury, and real estate, amounted to \$9,162.72; and that the liabilities, consisting of the 15th, 19th, 21st, 26th, 28th, 29th, 32d, 33d, and 37th series (all others having either matured or been withdrawn, and paid), amounted to \$5,426, leaving an undivided profit of \$3,726.72. While it was shown that in 1893, owing to defalcations of some of its officers, the liabilities of the association exceeded its resources, yet in 1895, the association had retrieved itself, at which time its resources over its liabilities, and its undivided profits, were the sum of \$3,834.61; in 1896, \$2,415.18; in 1897, \$3,384.42; in 1898 (When Rogers' stock matured), \$1,817.64; in 1900, \$3,878.96; in 1903, \$3,878.96. What the conditions of the association were in 1901 and 1902 does not appear. These reports were certified to, approved, and submitted by the president, secretary, and auditor of the association. When his attention was called to his official reports, the receiver attempted to reconcile his oral testimony therewith by the

statement that the valuations of real estate, as reported by him and other officers of the association, were unreal and not true. It may be that the trier of the fact, having before him the appearance and demeanor of the witness, or some corroborating circumstance, may be persuaded that the truth of the fact is as was orally testified to by the witness on the stand, and not as appears from his official declarations and conduct covering a period of eight years; but as the record is made to appear to us, were we to weigh this testimony and determine the fact, we would be disposed to take the official declarations and conduct of the witness with respect to solvency of the association in preference to his testimony of insolvency on the stand at a time when purpose and motive may have prompted him to have the facts different from those disclosed by his official records and books. When we find the defendant association, the plaintiff Driver, asking the appointment of a receiver, the receiver himself, and the intervener Crossman, who as president represented the company, and also as assignee represented claimants in different and conflicting series of stock, all represented by one and the same counsel, and also find appellants testifying that upon a discussion of the matter they had concluded "that it would be better for the association if all the members clubbed together and try and stand off Rogers' suit," and the finding of the court that the application for a receiver and all the proceedings had with respect thereto were collusive to defeat the claim of respondent Rogers, we are not at all impressed with the equities of appellants, nor with the oral testimony of their witness. Appellant Crossman is in this position: He, as president of the association, in the suit brought by Driver against the association for the appointment of a receiver, filed an answer admitting all the allegations contained in the complaint, went into court and consented that Kelly be appointed receiver, and, upon such appointments being made, thereafter filed a complaint in intervention in the same suit, and, among other things, alleged that the said action brought by Driver was not brought or maintained by him in good faith, and "is a fraud upon the jurisdiction of the court," and then comes to this court and complains because the trial court found that said action was not brought in good faith.

It is, however, said that the earnest and repeated demands of respondent Rogers on the association for the payment of his claim, its reply that it had not sufficient money on hand with which to, and for that reason could not, pay it, are of themselves sufficient evidence of the insolvent condition of the association. It must be borne in mind that the stock, as it matured, was not payable out of any special or particular fund, as was the fact in some of the cited cases; but here the agreement to pay was absolute and unconditional. The mere fact, therefore, that

the association had not on hand money in its treasury is not at all determinative of its insolvent condition. Insolvency is not alone determined from the amount of money on hand or cash coming in, but from a comparison of assets and resources, including all kinds of property, real and personal, with liabilities. The term "insolvency" denotes the insufficiency of the entire property and assets of an individual to pay his debts. 16 A. & E. Enc. L. 637. Here it was shown that when stock prior to the fifteenth series matured, and the association had no money on hand with which to pay it, it borrowed money for that purpose. In this instance, although the claim of Rogers became due and payable in the year 1898, and although he made repeated demands for payment, and the association often acknowledged its indebtedness to him and made repeated promises to pay him, nevertheless, so far as it appears from the record, no attempt was made to borrow money with which to pay it; nor was there any inability on the part of the association to obtain a loan at all shown. It is in effect argued that notwithstanding the agreement of the association to purchase the stock, and the liquidation of Rogers' claim in 1898, the association, as matter of fact, did not purchase the stock because Rogers did not indorse nor surrender it to the association, but retained possession of it, and therefore he still remained and was a mere stockholder. While his retention and possession of the stock was evidentiary of ownership in him, yet it was not conclusive. Under the circumstances, his retention of the stock was not at all inconsistent with the fact of its sale to the association, for it was the most natural thing for him to retain it until it was paid for.

Rogers, however, in 1902 offered to surrender his stock to the association upon its executing to him a secured note for its indebtedness to him; but this the association declined to do, not because of any claim that said indebtedness was not due and owing to him, but because, as stated by it, "It would tie up the property and make a great detriment to the handling of the same when it came to selling it," and, further, because it "would make all efforts, consistent with the condition of things, to pay your indebtedness," and that it was willing to pay him as fast as the money came in. But, as before observed, the demand of Rogers was payable, not out of a particular fund, or out of a percentage of receipts or funds coming in, but his demand was payable without qualification or condition. Rogers, in May, 1903, wrote to the association: "I have waited now for this payment nearly five years, and respectfully say to you that I will not wait any longer. You have property which you can sell and pay me the proceeds of such sale, which I insist that you do at once; otherwise, I shall take such action in the matter as will, in my opinion, speedily pro-

cure me my money. I trust you will not drive me to this step." Again, in September, 1903, he wrote that he was not disposed to wait longer, and to advise him what the association proposed to do. The record shows similar demands were made by him every year from 1898 to the commencement of his action. In the correspondence between the parties both Rogers and the association treated the matter as an indebtedness of the association owing by it to him. It is conceded by all parties that the money due Rogers on this indebtedness was payable to him more than five years prior to the commencement of his action. After patiently waiting all this time for his money on an indebtedness acknowledged by the association and all parties concerned to be due him, and upon the failure of the association to pay it, when Rogers brings suit to collect it, the association and appellants together colluded to throw the association into the hands of a receiver, in order, as they themselves said, "to stand off Rogers' suit." Equity grants relief to him who does equity, not to him who comes into court and self-confesses that he was a party to an action, which was, in his own language, "a fraud upon the jurisdiction of the court." Appellants come within the maxim, "He that hath committed inequity shall not have equity."

4. Having reached the conclusion that Rogers became a creditor in 1898, and that his claim then was due and payable, and the association having failed to pay it, we see no reason why he is not entitled to interest; and the ruling of the trial court in this respect, allowing him interest, is correct. *Godbe v. Young*, 1 Utah, 55; *Young v. Godbe*, 15 Wall. 562, 21 L. Ed. 250; 16 A. & E. Enc. L. 1004-1006.

Our conclusion, therefore, is that the judgment of the trial court ought to be, and it hereby is, affirmed, with costs.

BARTCH, C. J., concurs.

McCARTY, J. (dissenting.) I am not only unable to agree with my Brethren respecting some of the propositions of law announced in the foregoing opinion, but differ with them as to what the record shows some of the material facts to be in the case. The record shows that in 1893 the association sustained severe losses. Its books were destroyed by fire, and it was uncertain as to what the financial condition of the company was at that time. An auditing committee was appointed to investigate the affairs of the company and report on its condition. The report, which is in evidence, shows that the liabilities of the association exceeded its assets by nearly \$10,000. As a result all of the stock was assessed 15 per cent. of the amount paid thereon by the stockholders. About this time Rogers, the plaintiff herein, was made president of the association for the purpose of retrieving some losses sustained

by the association, which position he held until March, 1899. Notwithstanding efforts were made to place the association upon a more solid financial basis, it continued to grow weaker in this respect, and after the losses referred to were sustained no stock matured for a greater amount than that paid in by the stockholders as subscription fees and the regular monthly payments.

It appears from the uncontradicted testimony that long before Rogers' stock matured, and while he was president, the policy was to carry on the business until the association could realize on its assets and wind up its affairs in such manner as would be least harmful to its stockholders. The auditor's report of March, 1897, showing the financial condition of the association, concludes as follows: "Should we be able to obtain new stockholders to offset the decrease by maturing stock, we will be in a position to continue. If not, the best thing to do to protect all stockholders is to have a receiver appointed and close up our affairs." To the same effect is the auditor's report of July, 1897, wherein he states: "We must increase our subscriptions or close up the business, which we are now gradually doing." One of the stockholders testified on this point as follows, and his testimony is not disputed: "At different times previous to 1898, the question of carrying the association along was discussed at meetings at which Mr. Rogers was president, and the question was discussed that, if we would go on and carry the association along, that there was a possibility of it paying out the money put in by realizing upon our assets. If not, the general opinion was that we would not get out even the money we put in. That was universally expressed by the stockholders as early as 1893 or 1894, and the policy agreed was to carry on the business with that end in view. We often discussed about winding up the company, and it was stated that a big loss would result to the stockholders if we attempted to wind up its affairs, but by carrying it on we would get our money out by an advance in the prices of real estate, and we held on for that purpose." Another witness testified on this branch of the case, in part as follows: "I attended meetings, after Mr. Rogers became president, at which the financial condition of the company was discussed. We came to the conclusion that the company's affairs were such that, if any one applied for a receiver, we would go to the wall and be unable to meet our liabilities in full." Since 1895 the subscribers for stock, with a few exceptions, as shown by the undisputed evidence in the case, were old members of the company, who took stock to qualify them to serve as directors. For several years prior to the bringing of this action there were not sufficient number of stockholders to make a full board of directors. The by-laws provided for thirteen directors, whereas the number did not exceed seven or eight. Prior and up to the

maturity of the stock of the twelfth series, when the stock in a series matured and there were not sufficient funds in the treasury to redeem or pay it off, the company, on many occasions, borrowed money for that purpose. The record shows that the last money borrowed by the association was used to pay off the twelfth series of stock, which matured in 1897, and the evidence further shows that the company has not loaned any money since October of the same year.

It is not charged that there has been fraud or mismanagement in the affairs of the company since the losses referred to occurred in 1893. In fact the record shows affirmatively that the officers in charge since said date have managed and conducted the business in an honest, straightforward manner, and have honestly endeavored to keep it a going concern until the assets were sufficient to pay each stockholder the full amount of his investment. And notwithstanding they made every reasonable effort, as shown by the record, to pay off the different series as they matured, no payments were made on the fifteenth series until September 6, 1901, three years after the stock matured, and thereafter all money collected by or paid into the association, less the running expenses, was applied to the payment of this series of stock. The different payments made to Rogers on his stock in the series up to June 26, 1903, when the last payment was made, aggregated \$2,142. When the fifteenth series of stock matured (September 15, 1898), there was due and unpaid on matured stock of the thirteenth and fourteenth series, and on stock which had been withdrawn, \$1,000. This is shown by the auditor's report bearing date of September 15, 1898, introduced in evidence by respondent. And the president's report of the financial condition of the association, bearing date of March 21, 1900 (2½ years after the fifteenth series matured), which report was also put in evidence by respondent, shows that there was then due and unpaid on the fourteenth series \$4,000. While the books of the association showed that at the time the Rogers stock matured it was solvent, and there were undivided profits, yet the undisputed evidence in the case shows there were in fact no profits, and that profits were made to appear on the books because of the overvaluations of real estate owned by the association. Plaintiff Rogers understood this, because the record shows that, during the time he was insisting upon and demanding payment of his matured stock, he stated to the secretary of the company that the real estate held by the association was not worth more than one-half of its appraised value. And, again, in answer to a communication from the secretary, bearing date of June 16, 1903, in which he was furnished a copy of the company's financial report which contained a list of the real estate owned by the association, and the value of each separate parcel as fixed by a committee appointed

for that purpose, he says: "I have had the property therein referred to appraised, and from said appraisal I would not take any of them at anything like the association's value." In fact the evidence, which is not denied or attempted to be denied, shows that after Rogers' stock matured the sales of real property made by the association showed a net loss, according to its book valuations, of \$3,747.39. The record further shows that another piece of real estate, known as the "Bates Farm," which cost the association \$2,339.92, and carried on its book at \$2,000, would not bring on the market more than \$400 or \$500. And it is further shown by the undisputed evidence in the case that the association has carried on its books several other pieces of real estate at prices far in excess of their true market value. The trial court did not find there were in fact any profits at the time Rogers' stock matured, but did find as follows: "That at the time the said fifteenth series matured, * * * the books of the association, which carried real estate of the association at the prices the same were taken in at, and not the true market value thereof, showed a profit on its business of more than \$5,000." Now this finding, as far as it goes, is in harmony with all the testimony given at the trial on this point. For the evidence conclusively shows that the "book values" represented the cost of the different properties to the association. Besides, the report made to the court by the receiver, which bears dates of November 14, 1903, shows that the entire resources of the association consist of the following assets: Cash and other personal property, \$300; six pieces of real estate, sold under contracts on the installment plan, the title of which is still in the association, \$3,682.50; and six pieces of real estate unsold, the aggregate value of which the undisputed evidence shows is not more than \$1,390—making the total resources but \$5,372.50, whereas, according to the amounts due respondent and the other stockholders, as found by the trial court, the liabilities of the association exceed \$7,000.

Appellant's first contention is that Rogers cannot recover on his action at law for the value of his stock. The authorities all agree—in fact the doctrine is elementary—that in a corporation of this kind a stockholder holding paid-up or matured stock cannot maintain an action at law for the value of his stock, but this rule cannot be invoked in this case, because Rogers intervened in the equitable action brought by J. J. Driver, on whose petition the receiver was appointed. The court, therefore, had jurisdiction to enter the decree from which this appeal is taken.

The next question presented is, did the court err in allowing interest on the claims for matured stock from the dates when the association declared such stock to be matured? I recognize the general rule to be

that when the constitution or by-laws of a corporation of this kind provide that claims represented by matured stock shall be paid out of a special fund created for that purpose, or provide that a certain per cent. of the receipts and income, or a specified proportion of the cash on hand, shall be used to liquidate this class of claims, the holder of matured stock is not entitled to interest on his claim until the association has the necessary funds on hand with which to pay the claim in the order provided by its constitution and by-laws, and payment has been demanded and refused. Neither in the constitution nor by-laws of the association under consideration is there any provision limiting payment of claims represented by matured stock to any particular fund or certain per cent. of the receipts and income. The record, however, shows that it was the uniform and continuous policy and custom of the association, prior and up to the maturity of the fifteenth series, to pay off this class of claims at the time of the maturity of the stock or within a reasonable time thereafter, and, when there was not sufficient funds in the treasury to pay these claims, the association, on several occasions, borrowed money for that purpose. In other words, these claims were held by the association to be due and payable from the time the stock was declared to be matured. Not only did the association so hold, but, as stated, it adhered to and followed this custom through its whole course of its business and dealings with the holders of stock. And failure to pay off the claims represented by the fifteenth and subsequent series of stock was not because of any change in the policy of the association in this respect, but was due to the fact that the money coming into the treasury was not sufficient for that purpose. From the time the stock of the fifteenth series was declared matured by the association, the claims of fixed and definite amounts represented by this series of stock have been regarded by the association, and in fact continually acknowledged by it, to be due and payable out of the general fund without any conditions or restrictions, with the exception that stock withdrawn before maturity, as provided by the articles of incorporation, was paid off in preference to matured stock. For five years prior to the commencement of this action the association had the use and benefit of the money paid by respondent on his stock. And under certain provisions of the constitution and by-laws, hereinafter referred to, the holders of stock withdrawn before maturity were entitled to and presumably did receive 6 per cent. interest on the amounts paid on their stock; and that, too, since the time when there ceased to be any accumulation of profits. Under these circumstances and conditions, according to every rule of equity and fair dealing, I think that the holders of claims represented by matured stock are entitled to inter-

est thereon from maturity. Endl. on Bldg. Ass'n's, 119; Appeal of Mechanics' & Workmen's Bldg. Ass'n (Pa.) 7 Atl. 728.

While the trial court failed to find on the question of insolvency, I think it is conclusively shown by the record and the evidence hereinbefore referred to that at the time respondent commenced his suit the association was insolvent. And the authorities uniformly hold that in case of insolvency of an association of this kind, and in the absence of any provision in the constitution or the by-laws giving one series of stock preference over others, all classes of stockholders shall share alike in the distribution of the assets, and neither is entitled to priority over the others, but each shareholder shall be entitled to receive his pro rata share of what is left after paying the expenses of winding up the concern, provided, as in this case, there are no outside creditors or other preferred claimants. In Endl. Bldg. Ass'n's, 514, 515, the rule is stated as follows: "It is but a logical carrying out of this principle that, in cases of insolvency of associations, in which a question of distribution can arise between holders of matured and holders of unmatured stock—e. g., in a serial association—no preference is to be accorded to the former, but both classes are to share pro rata in what is left after satisfying outside creditors: other preferred claimants being out of the way. In short the order prescribed by the by-laws of a building association for the payment of money out of its treasury to different classes of holders of ordinary stock in the regular course of its business does not apply to the distribution of its assets when insolvent, and neither would that order apply, in such cases, to the payment of different individuals in the same class of preferred stock. The basis of distribution in such cases is not the rule of the association expressed by its by-laws standing alone, but the supreme rule of equality and mutuality; and the controlling inquiry is the amount paid by the member, not the date of the issue of his stock, nor that of its maturity, or any notice to withdraw." "Whenever, therefore, a member appears as a claimant upon the estate of an insolvent building association, upon the ground of his stock interest, he is to be treated as a member, and not as a creditor." 6 Cyc. 165.

The cases cited by Justice STRAUP in the prevailing opinion declare this same rule. In fact it is conceded that such is the law. But respondent insists and the opinion in effect holds that when his stock matured he ceased to be a stockholder, and his relation to the association was that of a mere creditor only, and, as such creditor, is entitled to all the rights and preferences that the law gives to general creditors of an insolvent association of this kind. When his stock matured and was so declared by the association, Rogers maintained a dual relation to the association of both stockholder and credit-

or. Endl. Bldg. Ass'n's, 142; Thomp. Bldg. Ass'n's, 282; Criswell's Appeal, 100 Pa. 488. And at no time did he cease to be a stockholder, and the record conclusively shows that at no time did the association become the purchaser of his stock, as contended by his counsel in his oral and printed arguments. On March 19, 1902, Rogers wrote to the secretary of the association respecting his claim, in part as follows: "I request that you lay before the board of directors that I insist upon, either payment at this time of my matured stock in the fifteenth series, or that the stock be taken up, and that I be given the secured note of the association. As I have explained to you orally, this stock is almost valueless to me, because it cannot be used or negotiated as collateral, and I want something which I can use." On March 26, 1902, the association, speaking through its secretary, replied to the foregoing letter as follows: "At the last meeting of the board of directors of the Ogden Building & Savings Association, I presented your matter to them in the matter of securing the payment of your unpaid balance on your matured stock in the fifteenth series, and this they refused to do, for the reason that they never have done such a thing, and, if they had to secure the amount due when the stock matured, it would tie up the property, so that it would work a great detriment to the handling of the property on the same when it came to selling it. They directed me to say that they would make all efforts consistent with the condition of things to pay your indebtedness, and anything further than that they would be unable to do." And, again, on August 20, 1902, the secretary wrote him as follows: "At a regular meeting of the board of directors of the Ogden Building & Savings Association as of this date, I brought up the matter before them concerning the execution of the association's note to you for the unpaid balance due on the fifteenth series, and the directors declined to execute the note. They say they have never done that before, and they can see no reason why they should do it now. They desire to treat you as well as any one else, and that they are doing the best they can; that they are willing to pay you as fast as the money comes in, and that is absolutely all they can do."

From the foregoing correspondence, which was introduced in evidence by Rogers, respondent herein, it clearly appears that there was neither sale nor transfer of any kind, by him, of his stock to the association. The certificates of his stock themselves, which are in evidence, bear no mark or indorsement showing a sale or transfer, and were never offered or delivered to the association, but were held by Rogers as his own individual property. That Rogers neither believed nor acted upon the theory that he had sold and disposed of his stock to the association, and thereby ceased to be a stockholder, is evident from the fact that he does not base

his right of recovery upon that ground. The allegation upon which he bases his right to recover, so far as material here, is as follows: "That on said day [September 30, 1898] * * * defendant, by a duly passed and adopted resolution of its board of directors, in a regular meeting thereof then and there duly held, declared said thirty-five (35) shares of stock fully matured and then and there payable to plaintiff at the sum of one hundred and two dollars per share. * * * That defendant has failed to pay said amount, etc." Nowhere in his original complaint, nor in his complaint in intervention, does he allege a state of facts from which a sale can be inferred of his stock to the association. In fact the court did not find that the association purchased respondent's stock, or that he at any time ceased to be a stockholder, and there is absolutely no evidence in the record which shows or tends to show that such a sale took place or was ever contemplated by the parties. Nor is there any provision in the constitution or by-laws of the association which gives the matured stock of one series preferred right of payment over the matured stock of another and subsequent series.

The only provisions of the constitution and by-laws which in any way relate to the time and order of payment of matured stock and stock withdrawn before maturity are the following:

"Section 1. Each and every shareholder, for each and every share of stock that he may hold in this association, shall pay the sum of \$1.00 on or before the first Tuesday in each and every month thereafter, until the value of the whole stock shall be sufficient to divide to each share of stock the sum of \$100.00.

"Sec. 2. When each and every shareholder, for each and every share of stock, shall have received the sum of \$100.00, or property to that amount, this association shall close."

"Sec. 5. Stockholders wishing to withdraw from the association after the lapse of one year shall be entitled to receive, after one month's notice, the full amount of the money they have paid in, with six per cent. interest, first deducting their pro rata share for expenses and losses: Provided, however, that, if more shares shall be ordered withdrawn than the amount of money in the treasury at such time may be sufficient to pay, then the applicants for withdrawal shall receive the amounts due them in the order in which the notices required have been filed with the secretary."

It will be observed that the foregoing provisions of the constitution and by-laws make no distinction whatever respecting the order in which matured stock of the same or different series shall be paid, but section 5 fixes the priorities and order of payment of claims held for stock that has been withdrawn before maturity. It would seem from this section that, if it were intended to give

any preference or priority in time of payment to one set or class of stockholders over the others, such preference is in favor of the stockholders holding withdrawn stock. Now the record shows that during the time Rogers was president of the association, and subsequent thereto, it was the continuous and uniform custom and course of business of the association to pay off claims for withdrawn stock in preference to those held for matured stock, when there were not sufficient funds in the treasury to fully meet the demands made on it for these purposes; and that, too, regardless of the time when the paid-up stock matured, whether before or after the notice of withdrawal was given. Rogers understood and acted upon this custom, because the uncontroverted evidence in the case shows that long after the fifteenth series matured, and was so declared by the association, he availed himself of this business rule of the corporation and received payment for stock held by him in the seventeenth and twentieth series, which he had withdrawn before maturity. These claims were paid by the association in preference to the unpaid balances then due on matured stock of the earlier series. Therefore, even though we should follow, instead of the law as I understand it to be declared by the text-writers and adjudicated cases, the "uniform, exclusive, and continuous course of business and rule of corporate action to which all of its stockholders [including respondent] have at all times assented," as found by the trial court in determining the equities in this case, respondent is clearly not entitled to any priorities in the payment of his claim over other stockholders. First, he would not be entitled to interest on his claim, because the record shows that the association never at any time paid interest on claims for matured stock, notwithstanding interest was often demanded, while Rogers was president, and shareholders on some occasions were compelled to wait more than two years for their money after their stock had matured. This was the case with holders of stock in the fourteenth series, which matured more than a year prior to the time Rogers ceased to be a director and officer of the association. Second, a portion of the stock held by appellants matured more than two years before this suit was commenced, and the balance was withdrawn long before, and some immediately after, the bringing of the action. Now, it was the uniform "course of business and rule of corporate action" on the part of the association, when stock was withdrawn, to give it the preference in time of payment to matured stock, regardless of the time when the withdrawal was made. That Rogers was familiar with this rule is evident from the fact that he, as hereinbefore stated, took advantage of it. And, third, if, as held by the trial court and affirmed by this court in the opinion written by Justice

STRAUP, Rogers, when his stock matured, ceased to be a stockholder, and his relation to the association from that time on was only that of a creditor, then, in that event, J. J. Driver and Emma J. Hindley, whose stock matured long before the suit was commenced, stand in the same relation to the association as Rogers, and are creditors only, and are entitled to the same treatment in the distribution of the funds. Therefore, as heretofore stated, it matters not whether we follow the law as I understand it to be laid down by all the authorities, or use as a guide the course of business and rule of corporate action of the association in dealing with its stockholders, Rogers is not entitled to any preferences or priorities in the payment of his claim over the other stockholders.

After a careful review of the record in this case, and examination of the authorities bearing upon the questions presented, I am forced to the conclusion that the case should be remanded, with directions to the trial court to modify its findings and judgment, and enter a decree permitting all the stockholders to share equally in the distribution of the fund according to their respective interests, as asked for by all the parties to the action except respondent.

BECKSTEAD v. GRIFFITH, Sheriff, et al.
(Supreme Court of Idaho. Feb. 2, 1906.)

1. AGRICULTURE—FARM LABORERS' LIEN—EXTENT.

Any one performing labor or rendering service in the production of a crop may have a lien for his labor and services on the entire crop produced.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Agriculture, §§ 20-22.]

2. SAME—DESCRIPTION OF CROP.

A description in the lien that it is intended to cover the entire crop of hay produced for the year is not void for uncertainty.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Agriculture, § 40.]

3. SAME—ENFORCEMENT—COMPLAINT.

A complaint that alleges that plaintiff and his assignors performed labor and rendered services in the production of seven stacks of hay on a ranch, describing it, is not subject to a general demurrer that the complaint "does not state facts sufficient to constitute a cause of action," even though the lien includes other hay raised on the same premises and harvested and stacked by others under a different contract.

4. ATTACHMENT—CLAIMS OF THIRD PARTIES—JUSTIFICATION BY OFFICER.

An officer, to justify his seizure by virtue of a writ of attachment and his possession thereunder, must allege all the jurisdictional facts by which he justifies his right of possession.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sheriffs and Constables, § 285.]

(Syllabus by the Court.)

Appeal from District Court, Bannock County; Alfred Budge, Judge.

Action by Alexander Beckstead against

George Griffith, sheriff of Bannock county, and others. Judgment for plaintiff, and defendant Griffith appeals. Affirmed.

S. C. Winters, for appellant. Standrod & Terrell, Hayes & Witty, and H. W. Lockhart, for respondent.

STOCKSLAGER, C. J. This is an action commenced for the purpose of foreclosing certain farm laborers' liens filed upon a crop of hay. Defendant Griffith filed a general demurrer to the complaint, which was overruled. He then answered, and the facts were stipulated. The other defendants defaulted. The facts, as stated by counsel for appellant and conceded in the main to be correct by counsel for respondent, are: That one T. F. Scott leased a ranch of about 1,600 acres from H. O. Harkness. That said T. F. Scott subleased the same to one William F. Scott, his son, and was to receive one-half of the hay raised upon said ranch, in the stack, for his rental. In the year 1904 said sublessee, William F. Scott, commenced to harvest and put up the hay by hiring men and teams to assist him. This work commenced the latter part of June or the 1st of July, 1904, and ended on or about the 7th day of September, 1904, when about seven stacks of hay had been cut and stacked on the premises. That on or about the 7th day of September, 1904, the said William F. Scott let a contract to one W. F. Hardwick to put up and harvest the remainder of the hay, which turned out to be about 14 stacks, and that was also stacked upon the premises in different parts of the ranch, the same as that put up by Scott. That all of the said liens were filed for record about the time Hardwick completed his contract for harvesting and putting up said hay. The whole ranch is strictly a hay ranch, and nothing else is attempted to be raised thereon in the way of agricultural products. It is shown by the complaint that defendant Griffith was, at the time of the commencement of the action and prior thereto, the sheriff of Bannock county. The fact that he had served an attachment on all or some of the property in dispute as such sheriff, seems to be the reason for making him a defendant. The complaint alleges that an undivided one-half interest of the hay belongs to W. F. Scott, subject to the liens of plaintiff and his assignors, and to the lien of other claimants for like services as were performed by plaintiff and his assignors. Exhibits A to J, inclusive, purport to be liens for labor and services rendered Scott, all of which were filed and recorded and assigned to plaintiff before commencing the action.

Defendant Griffith demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled. He then answered, putting in issue the material allegations of the complaint, and justifying

his possession of the property by virtue of a writ of attachment issued by the district court of Bannock county, and placed in his hands as sheriff of Bannock county, and levied upon the property in dispute, as the property of William Scott. The other defendants defaulted. The facts are stipulated as follows:

"For the purpose of avoiding the costs of procuring evidence, and for the mutual convenience of the parties, it is hereby stipulated by and between Standrod & Terrell, as attorneys for the plaintiff, and S. C. Winters, as attorney for the defendant George Griffith, as sheriff of Bannock county, as follows: (1) That all of the allegations of each of the causes of action stated in the plaintiff's complaint are true, except the allegation as to a reasonable attorney's fee, and it is hereby agreed that, if the plaintiff is entitled to recover in this action, the sum of \$100 is a reasonable attorney's fee, and may be allowed to the plaintiff for the prosecution of said action. (2) It is further agreed that on or about the 30th day of August, 1904, the defendant George Griffith, as sheriff of Bannock county, received a writ of attachment issued out of the above-entitled district court, and that upon said writ of attachment he made the following return, to wit: 'I hereby certify that I received the within writ of attachment on the 29th day of August, 1904, and served the same on the 30th day of August, 1904, by levying, attaching, and taking into my possession the following described personal property belonging to the defendant W. F. Scott, to wit: An undivided one-half interest in and to 10 stacks of hay; one mountain spring wagon; two bull rakes; one Cooper wagon and box; one hay rack; an undivided half interest in and to all growing crops, pasture, and pasture rights. All the above property is on the ranch known as the "Catherine Harkness Ranch" near the town of Oxford, Bannock county, Idaho, now operated and controlled by the defendant W. F. Scott. [Signed] George Griffith, Sheriff, by Wm. H. Edgley, Deputy.' (3) That the said ranch, known as the 'Catherine Harkness Ranch,' is a hay ranch, and a crop of hay grew thereon during the year and season of 1904, of which crop of hay about 7 or 8 stacks of hay had been cut, harvested, and stacked when the said sheriff made or attempted to make his said levy thereon, and the whole of remainder of said crop was then standing in the field, uncut and unstacked, and which was afterward cut and stacked by one W. F. Hardwick, under a contract thereafter made with W. F. Scott; that said Hardwick thereafter cut, stacked, and harvested the remainder of said crop of hay, which amounted to about 12 or 14 additional stacks of hay; that the work, labor, and assistance rendered and performed by the plaintiff's several assignors was rendered and performed in the cutting and harvesting of the 7 or 8 stacks

of hay of said crop cut and harvested prior to the 7th day of September, 1904, that being the date when said Hardwick began work under his said contract. It is further agreed that the whole of the 800 tons of hay, stacked in about 21 stacks, mentioned in the plaintiff's complaint and the respective exhibits thereto, is one crop of hay grown upon the ranch above mentioned during the year 1904, and the only crop cut, harvested, or grown upon said ranch during said year, the said 800 tons, stacked in about 21 stacks, being the whole of said crop of hay harvested and grown upon said ranch during the year 1904, and the only crop of any kind that was grown or harvested thereon or therefrom during said year; that said ranch contains about 1,600 acres, inclosed by one fence, and all planted to hay; that said hay raised upon said ranch is produced without irrigation, but is watered by seepage, and no labor is required to irrigate same.

"Amended stipulation: For the purpose of making clear facts intended to be covered by the original stipulation on file herein, and as supplemental thereto, it is hereby stipulated and agreed by and between counsel for the plaintiff and counsel for the defendant George Griffith as follows: That this plaintiff's assignors personally rendered and performed the services and assistance mentioned in the complaint on file herein, in harvesting about seven or eight stacks of hay on the premises mentioned in the complaint, between the 15th day of June, 1904, and the 7th day of September, 1904, the said stacks of hay so harvested being the first part of said crop that was harvested, and which was so cut and harvested by the plaintiff's assignors prior to the 7th day of September, 1904, and thereafter one William F. Hardwick cut, harvested, and put up the remainder of said crop of hay under a contract with William F. Scott, which is the subject of litigation between said parties in this court in another suit, and that the hay above mentioned, which was harvested by the assignors of this plaintiff, was all cut and harvested prior to the levy upon said hay by the defendant George Griffith, sheriff, and was a part and parcel of the crop of hay grown upon said ranch during said year under the lease held by said William F. Scott."

Appellant submits three reasons why the judgment should be reversed: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that the liens and each of them, as filed, are void for uncertainty; (3) that the facts as stipulated are not sufficient upon which to enter a judgment or decree foreclosing the liens. That the remedy sought to be invoked in this action is purely statutory is not disputed by respondent, and, if his judgment is to be upheld, it must be apparent from the record that there has been a substantial compliance with the statutory provisions relative to the filing of the liens sought to be enforced.

If the liens were not filed within the statutory time, or if the description of the property as described in the liens falls short of the requirements of the statute, then respondent was not entitled to his judgment of foreclosure and decree ordering the sale of the hay in dispute to satisfy the judgment.

Counsel for respondent earnestly insists that the liens themselves, as well as the stipulations, fall short of the requirements of section 7, c. 2, p. 151, Sess. Laws 1899, to wit: "Every person within sixty days after the close of the rendition of the services, or after the close of the work or labor mentioned in sections 1 and 2 of this chapter, claiming the benefit hereof must file for record with the county recorder of the county in which such saw logs, spars, etc., * * * notice of claim containing statement of his demand, and the amount thereof, after deducting as near as possible, all just credits and offsets, with the name of the person by whom he was employed. The notice of claim shall state what such service, work or labor is reasonably worth; and it shall also contain a description of the property to be charged with the lien sufficient for identification with reasonable certainty. * * *" Section 1, c. 3, p. 153, Sess. Laws 1899, provides: "Any person who does any labor on a farm or land in tilling the same, or in cultivating, harvesting, or housing any crop or crops raised thereon has a lien on all such crop or crops for such labor, and such lien shall be a preferred and prior lien thereon to any crop or chattel mortgage placed thereon, and all chattel or crop mortgages of any crop or crops, upon which any person shall perform labor in cultivating, harvesting, or housing the said crop, shall take such mortgage subject to, and said mortgage shall be a subsequent lien. * * *" Section 2, c. 5, p. 155, Sess. Laws 1899, relating to the subject of liens, says: "This act establishes the law of this state respecting the subject to which it relates, and its provisions and all proceedings under it are to be liberally construed with a view to effect this object." The last legislation we have on the subject of farm laborers' liens may be found on page 94, Sess. Laws 1903, and is as follows: "Any person who does any labor on a farm or land in tilling the same, or in cultivating, harvesting, threshing, or housing any crop or crops raised thereon has a lien on such crop or crops for such labor, and such lien shall be a preferred and prior lien thereon to any crop or chattel mortgage placed thereon, and any mortgagee taking chattel or crop mortgage on any crop or crops, upon which any person shall perform labor in cultivating, harvesting, threshing, or housing said crop, shall take such mortgage subject to, and such mortgage shall be a subsequent lien to that of the person or persons performing such labor as to a reasonable compensation for such labor; provided, that the interest in any crop of any lessor or lessors of land where the premises are leased in consideration of a share

in the crops raised thereon is not subject to such liens." It appears, from the foregoing section of the statute, that it was the intention of the Legislature to protect the man who performs labor in producing a crop of hay or other agricultural crop in reasonable wages due him for such labor or services rendered in raising the crop, harvesting, or threshing it; in fact, it seems to us that he is entitled to his lien no matter what the work, labor, or services may have been, so long as it is shown it was for a useful purpose, the charges reasonable, and that he has not been paid, and that his lien takes precedence over all other liens, no difference of what nature or character.

In support of his contention that the description of the property contained in this lien is insufficient and void for uncertainty, counsel for appellant cites *Mohr v. Clark et al.*, 19 Pac. 28. The facts in that case differ from the one at bar in one very important particular. In stating the facts, Mr. Justice Allen says: "A finding of facts is stipulated for a decision herein upon the question 'whether a man is entitled to a lien for such work done by his servants, teams, etc., and not by his personal labor'; it being further stipulated 'that said intervener was actually present during said threshing, and directed the same, and assisted therein, but never claimed or filed any lien for his personal services.'" Speaking of the farm laborers' lien law in that territory (now state) of Washington, the court said: "It was intended to secure and protect personal earnings of laborers, beyond question, and whether a man, because he may be doing labor, yet in the same labor is employing other laborers, and is thus also an employer or contractor, can come within the scope of this act is a very important question. So far as he may actually labor, he may come within the beneficent provisions of this law, but so far as his labor consists in looking after his laborers and supervising his contract, this comes rather in the line of a business, employment, or speculation, than that of personal labor. There is a clearly defined line between the contractor, the employer, and the laborer, and, although each may labor in his own way, the class to which the 'laborer' belongs is plain, and the contractor or employer certainly does not come within it." It will readily be seen that the question discussed and passed upon by the Washington court was the right of the contractor to obtain the benefit of the laborers' lien law (which is very similar to ours) by claiming in his own name for the labor of others. The last sentence of the opinion says: "He relies squarely upon his right as an employer to claim a lien covering his employes' labor. This he cannot do." We think a correct construction of the law was announced in this case, and were the facts the same in the case at bar, we would perhaps follow it without hesitancy.

Again, it is urged by counsel for appellant that the demurrer to the complaint should have been sustained, for the reason that it does not comply with the provisions of the statute providing for laborers' liens, in that "it does not state that he performed labor in caring for the crops to any amount or price, or that the labor performed was reasonably worth any amount or sum. It does not describe the property to be charged with any certainty whatever, nor could it be ascertained from the description. An officer could not find it to sell it under the decree." He says the liens are in the same condition. The third paragraph of the complaint says: "That between the 30th day of June and the 7th day of September, 1904, at the special instance and request of defendant William Scott, William Pilgrim rendered and performed labor and services and assistance to said defendant William F. Scott in harvesting said crop of hay growing and grown upon said ranch during the said year 1904, to the amount and value of \$16.87, which said services were then and now are reasonably worth the said sum of \$16.87, and under the terms and conditions of such employment on or about the 7th day of September, 1904, the said defendant and the said William Pilgrim had a settlement, and the balance then found to be due to the said William Pilgrim was determined, ascertained, and agreed upon, and found to be the sum of \$16.87, which said sum said defendant agreed and promised to pay." This paragraph is reiterated in each cause of action stated in the complaint with reference to the various assigned liens to plaintiff. This statement is a substantial compliance with the statutes. It not only says that the services were reasonably worth the amount stated to be due, but also says that on settlement with defendant William F. Scott the amount claimed in the license was settled and agreed upon by said Scott, for whom the service was rendered, and the claimant, and that the same has not been paid. There was no error in overruling the general demurrer.

It is also urged that the description of the property described in the liens is too indefinite, in that "the liens, and each of them, cover 21 stacks of hay, being about 800 tons, 14 of which were harvested and cared for some time after the lienholders in this action had ceased to labor, and was harvested and cared for by one Hardwick under contract." It is shown by the agreed statement of facts that the ranch from which the hay was cut consists of about 1,600 acres, all under one fence, and that no crop was harvested from this ranch excepting the 21 stacks of hay, which was harvested and stacked during the summer and fall months of 1904. So far as the record discloses, we are unable to ascertain whether the hay was stacked promiscuously over the acreage of the entire ranch, or whether in a stack yard or yards. It is stipulated, however, that the 7 stacks harvested,

upon which plaintiff and his assignors contributed their labor and services, were in the stack prior to the levy of the attachment by defendant as sheriff. Appellant asks: "What stack or stacks of hay did either of these lienholders perform labor upon? The ones stacked in June, the ones stacked in July, the ones stacked in August, the ones stacked in September, or the ones stacked in October? On what part of the 1,600 acres of land is the hay stacked upon which they or either of them worked?" We think section 1, c. 3, p. 153, Sess. Laws 1899, answers all these questions. It says the laborer shall have a preferred lien on all the crops produced. Complying with this provision of our statute, respondent and his assignors filed their liens on all the hay produced on the Harkness ranch in the year 1904. The word "all," as used in this provision of our law, has but one common and accepted meaning; it means the entire quantity, the whole amount, and when it says the laborer shall have a lien on all the crop produced, it does not mean that he shall file his lien on any particular or specified portion of the crop. He is not required to designate any particular stack or stacks of hay produced, or on what particular portion of the land the crop was produced or in what month it was harvested. If such had been the intent of the Legislature, the language would have been: "The laborer shall have his lien on such portion of the crop produced as his labor contributed to produce or harvest, and his said lien shall describe with sufficient particularity such portion," etc. Either this language or language of similar import would have been employed.

Another question arises as to the sufficiency of the answer filed by defendant sheriff to raise a number of the questions urged by counsel for appellant. It will be observed that, both in the answer and the stipulated facts, he does not pretend to inform the court the nature of the claim sued upon, and upon which the attachment was issued. The lower court and this court are only informed that he levied upon the hay by virtue of an attachment issued out of the district court of Bannock county. The allegation in the answer is as follows: "Further answering, defendant alleges that on or about the 3d day of September, 1904, the said defendant, as sheriff of Bannock county, and by virtue of a writ of attachment is sued out of this the said district court and directed to him as such sheriff, levied upon the hay mentioned in said complaint to the amount of about 8 stacks, together with other property; that at that time and up to about the 7th day of September, 1904, defendant is informed and believes that there were only about 8 stacks of hay cut and harvested upon the premises mentioned in the complaint; that thereafter, and up to about the 15th day of October, 1904, there were about 13 stacks of hay, additional, harvested and stacked by one F. W. Hardwick

and his employes under a contract with the defendant William F. Scott, and that neither the plaintiff nor either of his assignors were a party to said contract or had any interest therein or performed any labor thereunder whatever; and that what particular part of the said crop of hay raised and harvested upon said premises the plaintiff or his assignors or either of them performed any labor or services upon is unknown to the defendant, and it cannot be ascertained by an inspection of the claim of liens filed by the sheriff and his assignors, or from the complaint in this action. He therefore says that each and every of said claims of liens is absolutely void for uncertainty." The stipulated facts add no additional force to the answer. Thus we have the defendant sheriff, who is merely brought into this action by reason of being sheriff of Bannock county and required to set up and present to the court whatever right or claim he may have to the property in controversy in his answer, challenging the sufficiency of the liens and every material allegation of the complaint. This he may not do until he has first shown all the jurisdictional facts. He does not show that he has any interest in the property other than that he levied an attachment on a portion of the property in controversy. He does not even inform the respondent who the attaching creditor is, the amount due on the debt, or who the debtor is. It is not apparent that the attachment is against the property of any of the parties to the action at bar. All this being true, how could respondent prepare himself to meet the issues appellant tenders or attempts to tender? We think the rule is well settled that an officer who seeks to justify a seizure of chattel property under a writ of attachment must show a valid writ, and the existence of all the jurisdictional facts that must exist before the writ can issue, and, in *Sears v. Lydon*, 49 Pac. 122, this court said: "He must do this by the record, or a duly authorized copy thereof, of the attachment suit."

In *Fisher v. Kelly*, Sheriff, 46 Pac. 146, in an opinion by Chief Justice Moore of the Supreme Court of Oregon, in discussing the question of the sufficiency of the answer of an officer who attempts to justify his possession and right thereof by virtue of a seizure and levy under a writ of attachment, at page 148, he says: "And the officer who acts for such creditor, in justifying an attachment of the property and his right to hold the possession thereof, must allege and show a debt due to his principal from the defendant in the writ. *Damon v. Bryant*, 2 Pick. 411. The rule is universal that an officer, in justifying his right to hold the possession of attached property claimed by a stranger, must allege and prove all the facts necessary to support the writ, and also that a debt existed in favor of the attaching plaintiff against the defendant therein; and having thus established the fact that the person for whom he acted

is a creditor of such defendant, and by his lien upon the property had become in privity with it, he may then attack the title of the person claiming the property so attached." In support of this conclusion he cites: *Manufacturing Co. v. Wiggin*, 14 N. H. 441, 40 Am. Dec. 198; *Thornburgh v. Hand*, 7 Cal. 554; *Noble v. Holmes*, 5 Hill, 194; *Newton v. Brown*, 2 Utah, 126; *Trowbridge v. Bullard* (Mich.) 45 N. W. 1013; *Glazer v. Clift*, 10 Cal. 303; *Braley v. Byrnes*, 20 Minn. 435 (Gil. 389); *Howard v. Manderfield*, 31 Minn. 337, 17 N. W. 946. Many other authorities might be cited supporting this rule, but we deem it unnecessary. The reasons for it are so obvious and the justice so apparent that further citations or further discussion seems unwarranted.

We conclude that neither the answer of defendant Griffith nor the stipulated facts as shown by the record are sufficient to enable him to question the validity of the liens of plaintiff and his assignors; and hence the judgment must be affirmed, and it is so ordered. Costs to respondent.

AILSHIE, J., concurs. SULLIVAN, J., concurs in the conclusion that the judgment must be affirmed on the facts of this case.

HARDWICK v. GRIFFITH, Sheriff, et al.
(Supreme Court of Idaho. Feb. 6, 1906.)

Appeal from District Court, Bannock County; James M. Stevens, Judge.

Action by William T. Hardwick against George Griffith, sheriff of Bannock county, and others. Judgment for plaintiff, and defendant Griffith appeals. Dismissed.

S. C. Winters, for appellant. Standrod & Terrell, for respondent.

STOCKSLAGER, C. J. By stipulation filed in this court on the 9th day of December, 1905, this appeal is to follow the final determination of the case of Alexander Beckstead, Respondent, v. Geo. Griffith, Sheriff, Appellant, and Wm. F. Scott, T. F. Scott, and Katie Scott, Defendants, 83 Pac. 764; the stipulation providing that if the judgment in the above-entitled cause shall be affirmed this case shall be dismissed, and if the judgment should be reversed this judgment should likewise be reversed. This appeal is dismissed, in compliance with such stipulation. Costs to respondent.

AILSHIE and SULLIVAN, JJ., concur.

HURBER et al. v. ST. JOSEPH'S HOSPITAL.
(Supreme Court of Idaho. Dec. 28, 1905. On Rehearing, Jan. 23, 1906.)

1. CONTRACT—ERECTION OF BUILDING—CONSTRUCTION—DELAY—LIABILITIES.

In a building contract, where it is stipulated that no allowance for delay in the com-

pletion of the building shall be made unless a claim therefor is presented in writing within 24 hours after the occurrence of such delay, where all delays are occasioned by the architect, who is the agent of the owner, and he leads the contractors to believe that the required extension of time will be given without an application in writing therefor, held, that the application in writing is waived, and the owner is not entitled to any deductions from the contract price because of such delays.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1378.]

2. SAME—WAIVER OF CONDITIONS.

It was error for the court to reject any testimony offered showing that the owner by her own acts or the acts of her agent had waived the stipulation in the contract requiring a written application for an extension of time.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 1385, 1386.]

3. SAME—ARCHITECT'S CERTIFICATE—CONCLUSIVENESS.

Under the contracts in question, the final certificate or estimate of the architect was not conclusive on the appellants.

4. SAME—VOID PROVISIONS—PUBLIC POLICY.

Under the provisions of section 3220, Rev. St., the stipulation in a contract by which any party thereto is restricted from enforcing his right under the contract by the usual proceedings in the ordinary tribunals of the state is void.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 611.]

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

Action by Jacob M. Huber and others against the St. Joseph's Hospital. Judgment for plaintiffs for less than the amount claimed, and they appeal. Reversed.

Geo. W. Tannahill, for appellants. Chas. L. McDonald, for respondent.

SULLIVAN, J. This action was brought to foreclose two liens for a balance of about \$2,000 claimed to be due for the erection of a hospital and power house in connection therewith at the city of Lewiston. It appears from the record that on May 6, 1902, the appellants entered into a contract whereby they agreed, for the consideration of a certain sum therein mentioned, to furnish certain of the materials for and erect, according to the plans and specifications furnished by the architect, said hospital building, and agreed to fully complete and have the same ready for occupancy by October 1, 1902; that another contract was entered into by the appellants on the 14th of October, 1902, whereby they agreed to erect a building to be used as a power house in connection with said hospital building, which building they agreed to fully complete and have ready for occupancy by December 25, 1902. Said contracts are set forth in the record. A stated sum is fixed as liquidated damages for the noncompletion of the buildings within the time provided for in the contract. On the hospital building \$10 per day, and on the power house \$15 per day, were the sums

agreed upon as liquidated damages. It is also stipulated that the work should be done under the direction and superintendency of the architect, who was the agent of the owner, and that all payments must be certified by him, and that the time for the completion of the work was to be extended only when written application for such extension was made to the architect within 24 hours after the happening of the event which would warrant the demand for such extension. All extensions were to be certified by the architect. Said contracts also provide that in the event of disagreement between the architect and the contractors as to the extension of the time for the completion of the work, or the amount to be allowed for extra work, the matter was to be submitted to arbitration in the manner prescribed in the contract. The appellants allege in their complaint a full compliance with all the terms and conditions of the contract on their part. They also allege that they did not complete either structure within the time provided in the contract, but that they applied to defendants and to defendants' architect for an extension of time under the terms of said contract, and that defendants and said architect extended the time for the completion of said buildings under the terms and conditions of the contract. Appellants allege the performance of extra work, and claim compensation for the same. Liens were filed by appellants on both buildings, and this action was brought to foreclose them. Judgment is prayed for in a sum aggregating \$1,900, together with interests, costs, and attorney's fee. Respondents in their answer admit the execution of the contracts and the allegations that the buildings were not completed within the time provided therein, but deny that the time for the completion of the building was ever extended under the terms of the contract or otherwise, and claim as an offset or counterclaim the amount as provided for in the contract as liquidated damages. Upon the issues thus made the action was tried by the court without a jury. The court found that there was due to the plaintiffs the sum of \$257.83, with interest thereon from February 9, 1903, and an attorney's fee of \$100 and costs of suit, and ordered the foreclosure of said liens for that amount. A motion was made for a new trial by the plaintiffs, and denied. This appeal is from the judgment and the order denying a new trial. Numerous errors are assigned, and a reversal of said order and judgment is demanded.

Many of the errors assigned go to the rejection of certain testimony offered by the appellants, which testimony showed that the architect, who was the agent of the owner, made frequent changes in the plans of the hospital building, which changes occasioned all of the delays in the completion of that building at the time specified for its completion in the contract. The trial court evi-

dently rejected this testimony on the theory that the appellants were not entitled to any extension of time unless they made application for it in writing within 24 hours after it was known that an extension would be required. The architect changed his plans many times, and ordered changes made in the building to conform thereto. He stated to the appellants in the presence of others that the matter would be made right, giving them to understand that, when changes were made by him which delayed the completion of the building, proper extensions of time would be made. Under the contract the hospital building was to have been completed by the 1st of October, and it is shown that it was not completed or was not accepted until the 9th day of February following. The time between and including those two dates would make 132 days, and it is shown that the combined delays occasioned by the owner and architect amounted to more than that number of days. One delay of six weeks was caused by reason of the failure of the owner to pay the fourth estimate, as provided by the contract. Another delay was occasioned by reason of the owner's failure to furnish the hardware which she was to furnish; another by failure of the owner to have the boiler set in the power house; another by a change in the elevator shaft; a change in steam fitting; contractors waiting under the order of the architect for the plastering to dry, and for certain painting to be done; a change in the floor, a drop in the platform, additional shelving, cutting certain holes in the walls of the basement and putting in ventilators; cutting through floors of basement for pipes, and the excavation of the basement for foundation two or three feet lower than was called for by the original plans. All of those changes, which were occasioned and directed to be made by the architect, delayed the completion of the building. The delays amounted in all to 132 days, from and including the 1st day of October to the 9th day of February following, when the building was accepted. The architect claims that he gave the contractors an extension of time of 66 days, but he must have been mistaken in this, as according to one of his estimates he has charged up to the contractors 30 days' delay at \$15 per day on the power house, and 106 days' delay at \$10 per day on the hospital building, making a total of 136 days, amounting to \$1,510, for delays. It is clear to us from the testimony that the architect did not do his duty in the matter, and has not acted fairly with the contractors. Counsel for the appellants testified that he saw the architect and talked with him about the matter, and the architect said, among other things: "Yes, they [the contractors] have got a splendid building and it is all right, and they ought to have their money, every cent of it. They are entitled to it, and they should have it; but the owner is stubborn,

and she won't permit me to settle a cent of it, and I am going to abide by her orders and will do what she says." And again the witness testified he asked the architect, "Why don't you settle this and give the boys their money?" and he answered, "I would like to, but the owner is headstrong and won't do anything of the kind." The architect testified on the trial and denied none of that testimony. When we take into consideration all of the evidence offered, rejected, and admitted, and that provision of the contract whereby the owner agrees to provide all labor and material for the construction of the building not included in the contract in such manner as not to delay the progress of the building, and that all delays were occasioned by changes made by the owner's architect in his plans, and by the failure of the owner to comply with her part of the contract, I conclude that the court erred in not admitting all evidence offered tending to establish the fact that the owner had waived that provision of the contract requiring the contractors to make application in writing for an extension of time. As before stated, the evidence offered and that introduced clearly shows that there was a waiver of that provision of the contract requiring the contractors to present their application in writing for an extension of time. And under the facts it would be unjust to permit the owner to take advantage of the acts of her agent by leading the contractors to believe that an application in writing for an extension of time would not be required, and thus be relieved of an obligation to pay more than \$1,500, which she would have been required to pay under the contract if the application for extensions of time had been made in writing.

The contract referred to contains a provision that in case of a disagreement in regard to the valuation of the work added or omitted, or in case of a disagreement as to the extension of time, or as to the amount of loss or damage to either party, such matters "shall be referred to three disinterested arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen; the decision of any two of whom shall be final and binding. * * *"

It is contended by counsel for respondents that in the matters referred to and agreed to be submitted to arbitration the right of action did not accrue until after a submission of such matters to arbitrators, as provided in said contract, and that this action was prematurely brought, as such matters had not been submitted to arbitration. It will be observed from the stipulation of the contract above quoted that it is agreed that the parties thereto shall submit their questions of difference to arbitrators, and that the arbitrators' decision shall be final. That provision of the contract is in direct conflict with the provisions of section 3229 of the Revised Statutes of Idaho of 1887. Said section is

as follows: "Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void." We are aware that it has been held in many states that a stipulation in a contract to submit differences arising thereunder to arbitration is valid, and that neither party can appeal to the court without previous tender of arbitration and a refusal by the other. But those cases, as we understand them, are not applicable to the case under consideration. In this case they have stipulated to submit certain matters to arbitration, and have also stipulated that the decision of such arbitrators should be final, which they could not legally do under the provisions of the said section 3229. Taking those provisions of the contract together, they are repugnant to the provisions of said section 3229, and we are not prepared to say that the parties would have agreed to arbitrate said matters provided the last clause of said stipulation had been left out, to wit: "The decision of any two of whom [arbitrators] shall be final and binding." We here pass upon that stipulation as it appears in the contract. We do not hold that a valid contract to arbitrate could not be made, but that such stipulation cannot make the award of the arbitrators final. From the entire record, we conclude that the respondents are not entitled to any deduction from the contract price of the said buildings, because of the failure to have them completed within the time specified in the contracts, as the delays were occasioned by the owner and her agent, and by their acts they waived the application in writing for an extension of time, and the appellants are entitled to recover the reasonable value of extra work done by them, occasioned by the change of the plans of said buildings, and done under the direction of the architect.

The judgment is reversed, and a new trial granted, or, if either party does not care to introduce other testimony, the court may make findings of fact, conclusions of law, and enter judgment in accordance with the views herein expressed. Costs are awarded to appellant.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

On Petition for Rehearing.

AILSHIE, J. The petition for rehearing urges that the opinion of the court amounts to a holding that, "where delays are occasioned by reason of extra work ordered done by the owner or architect, this of itself waives the provision in the contract fixing the time for the completion of the building." Such is not the holding of the court, and we fail to find anything in the opinion that leaves it open to the construction respondent suggests. We hold that the facts of this case

show that the owner and its agent have by their actions and conduct in these transactions waived the requirement that applications for extensions be made in writing within 24 hours after the happening of the event which demands the extension. We also hold that evidence tending to establish the fact of waiver was admissible. Delays in construction of a building caused by the owner or architect do not necessarily, of themselves, constitute a waiver of any part of the contract to be complied with by the contractor. They may subject the owner to liabilities for a breach of the contract, and under the peculiar circumstances of the particular case, such as the one at bar, tend to establish the fact of a waiver.

The petition for a rehearing will be denied, and it is so ordered.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

(11 Idaho, 591)

GUMAER et ux. v. WHITE PINE LUMBER CO., Limited.

(Supreme Court of Idaho. Dec. 23, 1905.)

1. FRAUDS, STATUTE OF — PURCHASE OF REALTY.

Contracts to purchase real estate must be in writing, and only convey such rights as are shown by the contract.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 113-139.]

2. VENDOR AND PURCHASER—SALE OF REALTY — CONTRACT—CONSTRUCTION.

A party, accepting a contract to purchase real estate that provides that no timber shall be cut or removed from the ground until the contract has been complied with in its entirety, has no power or right to sell the timber growing on the land, with permission to remove the same, until the contract is fully completed.

3. APPEAL — REVIEW — SUFFICIENCY OF EVIDENCE.

Where the evidence is sufficient to support the verdict, or there is a material or substantial conflict in the evidence, the judgment will not be reversed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3928-3937.]

4. SAME—INSTRUCTIONS.

Where it is shown that the trial court refused to give requests to charge the jury on certain issues, and the record does not show the instructions given by the court on its own motion, this court cannot determine whether there was error in such refusal, as it is presumed the court fully and fairly instructs on all the issues involved.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; R. T. Morgan, Judge.

Action by Howard S. Gumaer and wife against the White Pine Lumber Company, Limited. Judgment for plaintiffs, and defendant appeals. Affirmed.

Charles L. Heitman, for appellant. Edwin McBee Robertson and Miller & Rosenhaupt, for respondents.

STOCKSLAGER, C. J. This complaint alleges that the plaintiffs (respondents) are husband and wife; that defendant (appellant) is a private corporation under authority of the state of Washington; that plaintiffs are the owners of certain lands in Kootenai county, which is community property, and that they are in possession of such lands; that the defendant at divers and sundry times within the past twelve months, wrongfully, unlawfully, and willfully, without any title or authority so to do, entered upon said lands above described, cut and removed therefrom and off of said lands quantities of valuable timber then and there growing upon said lands, and belonging to and being the property of the plaintiffs, with full knowledge of the ownership of said lands and timber by plaintiffs, and full knowledge of the fact that defendant had no right or title to said lands or timber or any authority to enter upon said lands or cut or remove any of said timber therefrom. Then follows an estimate of the kind, quantity, and quality, and value of such timber alleged to have been cut and removed from said lands to the said mill of appellant, and there sawed said timber into lumber and converted the same to its own use. Another allegation is that defendant at the same time and times of cutting and removing said timber from plaintiffs' lands, destroyed and converted to its own use, 80 rods of rail fencing on said lands belonging to plaintiffs, which fencing was at the time of said conversion and destruction of the value of \$100; also at the same time and times defendant took, destroyed, and converted to its own use 2,000 seedling apple trees, the same then and there being in a nursery on plaintiffs' land, the value of which is alleged to be \$500. Plaintiffs pray for judgment as follows: For the timber, \$5,527.25; fence, \$100; apple trees, \$500.

The answer admits that respondents are husband and wife, and that the defendant is a private corporation as alleged in the complaint. All the other allegations are denied. As affirmative defense, the defendant avers that at a time long prior to the dates mentioned in plaintiffs' complaint, and at a time prior to plaintiffs becoming possessed of any right, title, claim, or interest in or to said lands, to wit, November 12, 1901, and for a long time prior thereto, the North Idaho Land Company, Limited, a corporation, was the sole and exclusive owner and holder of a contract for the purchase of the premises described in plaintiffs' complaint, including all timber growing or being upon said premises from the Northern Pacific Railway Company, a corporation, being then the owner in fee of the whole of said premises, and the said North Idaho Land Company, Limited, was upon said date and for a long time prior thereto, had been in full, complete, and absolute possession of said premises, and that on said date, November 12, 1901, said North Idaho Land Company, Limited, for a valuable

consideration, sold, assigned, transferred, and delivered, by good and sufficient bill of sale to the White Pine Lumber Company, a corporation, all its right, title, claim, and interest, in and to all the growing, standing, or down timber upon said lands suitable for sawing purposes, down to the size of 10 inches in diameter, 16 feet from the ground, together with the privilege and right to go upon and across said premises for the purpose of cutting and removing said timber therefrom, which bill of sale is annexed to this answer, marked "Exhibit A." and made a part, etc., and the said defendant then and there entered into the possession and occupancy of said lands for the purpose of cutting and removing said timber therefrom, and thereafter continued in the sole and exclusive possession and occupancy of said lands at all times prior to the 1st day of September, 1903; and defendant alleges that said Howard B. Gumaer was on the 12th day of November, 1901, and for a long time prior thereto had been and is now, an officer, to wit, a trustee, of the North Idaho Land Company, Limited, and that the said sale and delivery of said timber to defendant, as hereinbefore alleged, was made with the full knowledge and consent, and the acquiescence and approval of the said Gumaer and his wife; and defendant alleges that whatever right, title or interest said plaintiffs, or either of them, have or claim to have in said premises was acquired with full knowledge and information concerning this defendant's right, title, and interest in and to the timber growing, and being thereon; and defendant alleges that said plaintiffs, and each of them, have repeatedly, both before and after they began to claim and assert that they had acquired some right, title, claim, or interest in or to said premises, or some portion or part thereof, recognized and confessed to this defendant by word and action that this defendant was the owner and entitled to cut and remove all timber from said lands measuring in diameter over and above 10 inches at a distance of 16 feet from the ground; and defendant alleges that said North Idaho Land Company, Limited, continued during all the time hereinbefore mentioned, from the 15th day of December, 1902, to be the sole and exclusive owner and holder of said contract for the purchase of said lands, and the whole thereof from the Northern Pacific Railway Company, save and except the timber standing, growing and being on said lands above 10 inches in diameter, 16 feet from the ground theretofore sold and assigned to the White Pine Lumber Company as above alleged, on the 12th day of November, 1901; and defendant alleges that on the 15th day of December, 1902, said North Idaho Land Company sold, assigned, transferred, and delivered, the said contract for the purchase of said lands and the whole thereof to Lucy J. Gumaer, save and except, however, the timber standing, growing, and being thereon, theretofore sold and assigned

to the White Pine Lumber Company as above alleged; and defendant alleges that said plaintiff Lucy J. Gumaer purchased, took, and received said contract for the purchase of said lands with full and complete notice and knowledge of the fact that the said North Idaho Land Company, Limited, a corporation, had theretofore, by good and sufficient bill of sale and transfer of possession, for a valuable consideration, sold and assigned to the White Pine Lumber Company all the right, claim, and interest in and to the timber standing, growing, and being on said lands of the size above 10 inches and could not therefore transfer or assign any interest in or to said described timber or any portion thereof to said plaintiff Lucy J. Gumaer; and defendant alleges that whatever right, title, claim, or interest in and to said lands, or any portion thereof which plaintiffs or either of them may have or claim to have, is derived through the above-described contract for the purchase of said lands, and was acquired with full knowledge, notice, and recognition of the defendant's claim, interest in, and title to, the timber growing thereon; that whatever right, title, claim, or interest in or to said premises, or any portion or part thereof, which said parties, or either of them, may have, is secondary, subservient, inferior, and subject to defendant's right and title to said described timber growing, and being upon said lands. The bill of sale attached to and made a part of the affirmative answer as Exhibit A is in the usual form, and purport to convey "all of the growing, standing, and down timber suitable for sawing or milling purposes, down to a size of 10 inches in diameter, 16 feet from the ground; all other timber to be left and remain on the lands." The consideration named is \$350.

On these issues the case was tried with a jury, and a verdict for \$1,000 damages was returned in favor of the plaintiffs, and judgment ordered entered in compliance with the verdict. A motion for a new trial was filed, statement settled, and motion overruled. The appeal is from the order overruling the motion for a new trial. The record contains 11 assignments of error occurring at the trial, and specifies 6 reasons why the evidence is insufficient to justify the verdict. The first 6 assignments of alleged error occurring at the trial relate to the admission and rejection of evidence, and may be disposed of later if considered necessary to a final disposition of the case in this court. The seventh assignment is based on the refusal of the court to sustain a motion for nonsuit. It is shown by the record that on the trial before any evidence was taken, plaintiffs waived claim for treble damages, and there does not appear to have been any objection to such waiver on behalf of appellant.

The motion for nonsuit is as follows: "Now comes the defendant in the above-entitled cause, and moves the court for a

nonsuit for the following reasons, to wit: (1) That the complaint of the plaintiffs herein is based upon section 4531 of the Revised Statutes of Idaho of 1887, which is a penal statute, and this action being brought upon said statute, a purely statutory remedy is sought to be enforced. (2) That plaintiffs in open court have expressly waived their right to rely upon this statutory remedy, and by waiving that remedy, their complaint does not state a cause of action, and there is no longer any issue of law or fact to be determined by the court or jury." The section of the statute above referred to is as follows: "Any person who cuts down or carries off any wood or underwood, tree, or timber, or girdles, or otherwise injures any trees or timber on the land of another person, or on the street or highway in front of any person's house, village, or city lot, or cultivated ground; or on the common or public grounds of or in any city or town; or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction."

Counsel for appellant insists that this motion should have been sustained. He calls attention to McDonald et al. v. Montana Wood Company (Mont.) 35 Pac. 668, 43 Am. St. Rep. 616, in support of his contention; but we do not think this decision is comforting to appellant. The jury returned a verdict for plaintiffs for \$549.63, which, being trebled, amounted to \$1,648.49, for which amount judgment was entered. Appeal was prosecuted in the Supreme Court, and there it was held that: "The evidence in the case does not support the contention that there was any willfulness, wantonness, or maliciousness in the acts or conduct of the defendant. We therefore think that the evidence did not justify the rendering of judgment for treble damages against defendant in this case. It is ordered that the judgment of the court below be modified, by rendering judgment in favor of plaintiff and against defendant for the amount of actual damages found by the jury, and in other respects the judgment is affirmed as modified." In the case at bar, the question of treble damages is not before us for modification of the judgment; that question having been disposed of by waiver of any claim for treble damages by plaintiffs before any evidence was introduced.

Counsel for appellant in his brief states: "The complaint being in express language, based upon a penal statute, the fact that plaintiffs at the opening of the trial waived treble damages would not entitle them to judgment without amending their complaint." We cannot give our assent to this contention. The complaint informed the defendant of the demand for actual damages, then asked that the amount so found should be trebled under

the statutes. Before the trial this latter demand was waived. How could this waiver result in injury or in any way prejudice the rights of or mislead the defendant in the trial of the action? The complaint had been accepted as sufficient by the defendant as no demurrer seems to have been filed. It met the issue presented by the plaintiffs in their complaint by denying title in plaintiffs prejudicial to the defendant's right to cut and remove the timber of a certain size from the land in controversy under and by virtue of the bill of sale which is made a part of their affirmative answer. This being true, and it is shown by the record, the only effect of the waiver was likely to benefit defendant. The same issues were to meet whether the judgment should be for actual damages or whether it were to be trebled under the statute. See sections 4225, 4231, Rev. St. 1887; Kelly v. Clark, 21 Mont. 291, 53 Pac. 959, 42 L. R. A. 621, 69 Am. St. Rep. 638. In *Hawkins v. Pocatello Water Works* (Idaho) 35 Pac. 711, section 4231 above referred to is construed. Again, if counsel for appellant believed that the waiver of treble damages would in any way affect his rights or prejudice him in his trial of the issue involved, it was his duty to notify the court then and there of that fact, and ask for relief. *Aulbach v. Dahler et al.* (Idaho) 43 Pac. 322. The motion for nonsuit was properly denied.

The next question we will consider is the rights of appellant, if any, under the bill of sale from the North Idaho Land Company, Limited. It will be remembered that the Northern Pacific Railway Co. was the owner in fee of the land in dispute, and on the 13th day of May, 1897, contracted to sell the same with certain restrictions and conditions, to one John Lockhart. Thereafter, and on the 1st day of December, 1899, said Lockhart by and with the approval of Thomas Cooper, who signs himself "Western Land Agent," evidently of the Northern Pacific Railway Company, for a consideration of \$60.10, assigned all of his right, title, interest, and claim in and to the North Idaho Land Company, Limited. This assignment is acknowledged on the 11th day of February, 1902. The North Idaho Land Company, Limited, for a consideration of \$300, assigned its contract of purchase of the land in dispute to Lucy J. Gumaer, with all its rights, title, interest, and claim, to said land. This assignment is acknowledged. Afterward, and on the 15th day of December, 1902, an assignment from the same party to Mrs. Gumaer, same consideration and conditions, was acknowledged, and is a part of the record before us.

This brings us to the bill of sale, defendant's Exhibit 2. It is in the usual form, and purports to convey all the right, title, interest, and claim of the North Idaho Land Company, Limited, in and to all the growing, standing, or down timber, suitable for

sawing or milling purposes down to the size of 10 inches in diameter, 16 feet from the ground, all other timber of smaller size to be left standing and remain on the land. It further provides that: "All of said timber is to be cut and removed within a reasonable time and on or before five years from date." Gives right to enter on said lands and remove said timber at all times, and privilege to cut and build roads on the land. This bill of sale is signed as follows: "North Idaho Land Company, by M. S. Lindsay, Manager. Signed, sealed, and delivered in presence of A. V. Bradrick. Attest: E. A. Lindsay, Secretary." M. S. Lindsay signs the instrument as manager, and then as notary public for Kootenai county takes the acknowledgment of E. A. Lindsay as secretary of the company, who signs the instrument as above indicated. The original contract between the Northern Pacific Railway Company and John Lockhart contains, among numerous others, the following provision: "The party of the second part will not cut and remove or allow to be cut and removed, any timber from the said lands without permission from the western land agent of the party of the first part until the land shall have been paid for in full." It does not appear from the record that anyone ever had the permission from the Northern Pacific Railway Company to cut or remove any timber from this land. All assignments are based on the original contract of Lockhart to purchase the land from the Northern Railway Company. By the terms of this contract, Mr. Lockhart was not permitted to cut the timber until the entire purchase price was paid. This being true, we are at a loss to understand how he could, by assignment, bill of sale, quitclaim deed or any other conveyance known to the law, convey a right which his contract did not give or grant to him. That is to give a conveyance that would permit the timber to be cut and removed before the contract was completed.

It is urged by counsel for respondents that the timber growing upon the land in dispute was a part of the realty; and hence could not be conveyed by bill of sale. This is perhaps true, but unimportant to a determination of the issue involved. It is not claimed that appellant had purchased the timber from the Gumaers, or either of them, only that they had notice of such purchase from the North Idaho Land Company, by appellant, of timber of certain dimensions growing or being on the land, including down timber, within certain dimensions. It is shown that final payment was made by Lucy J. Gumaer, and that the deed from the railway company was delivered to her under the terms of the contract, by which appellant claims the right to cut and remove the timber it is expressly prohibited; and whilst the railway company through its Western

agent, Mr. Cooper, approves the assignment by Lockhart to the North Idaho Land Company, of all its right, title, interest, and claim to the land, it is not shown, neither is it claimed that his sanction or approval of the assignment carried with it the right to cut the timber. In our view of the case, no one ever had the right to cut or remove any of the timber growing on this land (unless it be for domestic use, and then only by the occupant), until the final payment was made; and this it is conceded to have been made by Mrs. Gumaer. If this is true, no one prior to that time had the right to either cut or in any manner dispose of such timber, and the bill of sale from the North Idaho Land Company to appellant, or any other conveyance purporting to convey the right to cut the timber before final payment was made as provided for in the contract, was a nullity.

It is urged that the verdict of the jury is excessive. The plaintiffs ask for damages in excess of \$5,000, and the jury returned a verdict for \$1,000, less than one-fifth of the demand. We have no way of ascertaining how the jury reached its conclusion. It is sufficient to say that evidence was introduced amply supporting the verdict, and, as has been so frequently said by this court, where there is evidence to support the verdict or there is a substantial conflict, the verdict of the jury will not be disturbed. We can see no reason to modify or change the rule now.

Other assignments are urged by counsel for appellant as to the admission and rejection of evidence and the giving and refusal to give certain instructions. We are not furnished with all the instructions given by the court, and hence cannot determine whether appellant's requests should have been given or not. It is presumed that the court fully and fairly instructed the jury on all the issues involved, and unless the record shows the instructions as given by the court, we cannot know whether error was committed or not. If the court gave the instructions covering all the issues, but in different language, it was not error to refuse these requests. In so far as the assignments of error are based upon the refusal of the court to permit certain questions to be answered, in our view of the case they were properly rejected, as the only question to be determined was: What, if any, was the damage sustained by the plaintiffs in cutting and removing the timber and breaking down the fence and permitting the destruction of the apple trees? These questions were all fairly before the jury, and they determined the questions by their verdict; and we think it is sustained by the evidence.

The judgment is affirmed, with costs to respondents.

AILSHIE and SULLIVAN, JJ., concur.

WHITMER v. SCHENK (ANGEL, Intervener).

(Supreme Court of Idaho. Jan. 18, 1906.)

1. TRUST — RESULTING TRUST — OPTION TO PURCHASE MINING PROPERTY—FORFEITURE.

Where B. executes a deed in favor of A. for certain mining property, and places it in escrow to be delivered to A. upon his payment to the holder of the escrow the purchase price to the credit of the grantor within a specified time, and prior to the expiration of the time in which such payment may be made B. sells and conveys the property to S., a third party, who has notice of the escrow to A., and of the terms and conditions thereof, and A. fails and neglects to make the payment due on the escrow, and makes no demand for the escrow deed, and makes no offer of payment either to the grantor or holder of the escrow, and is not hindered or dissuaded from so doing by either B. or S., *held*, that A. forfeited and lost all his rights under the escrow, and that S. cannot be held as trustee of a resulting trust for the use and benefit of A.

2. ESCROW—FULFILLMENT OF CONDITIONS—EFFECT.

Upon fulfillment of the conditions of an escrow agreement and the delivery of the deed to the grantee, the deed will relate back to the date of making the escrow agreement for the purpose of cutting off any intervening rights or equities acquired by a third party, who had notice of the terms and conditions of the escrow.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Escrows, § 14.]

(Syllabus by the Court.)

Appeal from District Court, Blaine County; Littleton Price, Judge.

Action by David Whitmer against J. A. Schenk to establish a resulting trust. Mary E. Angel intervened in the court below, asking to have a resulting trust decreed in her favor against the defendant. Judgment for intervener, and against plaintiff and defendant. Defendant appeals. Reversed.

R. F. Buller, for appellant. McFadden & Brodhead, for respondent Whitmer. R. M. Angel, for respondent Angel.

AILSHIE, J. In December, 1901, the plaintiff, David Whitmer, and Texas Angel, now deceased, entered into an agreement with one W. C. Picking, whereby they contracted and agreed to sell him the First and Second West Extension claims to the Queen of the Hills lode mining claim, for the consideration of \$35,000, to be paid on or before December 4, 1903. Picking thereafter assigned his interest in this contract to the Bellevue Mining & Reduction Company. At the time of this transaction the First National Bank of Halley owned an undivided one-third interest in the First West Extension and a one-half interest in the Second West Extension, for which Angel had previously secured a deed to be executed by the bank and placed in escrow with E. E. Stewart Hardware Company, of Halley, to be delivered to Angel upon the payment by him to the holder of the escrow, on or before Decem-

ber 4, 1901, the sum of \$2,500 to the credit of the bank. On June 27, 1901, in consideration of the performance of certain assessment work, the bank agreed with Angel to extend the escrow agreement to July 1, 1902. On June 12, 1902, Angel paid the bank the sum of \$750 on this escrow agreement, for which the bank issued its receipt, in which it was recited that "in consideration of which [the payment and assessment work] the option heretofore given on such extension is hereby extended for one year, subject to all the conditions therein contained." No further payment was ever made, offered, or tendered by Angel or on his account under this agreement. The Bellevue Mining & Reduction Company continued to work and develop the property and expended something upward of \$10,000, and finally in the month of June, 1903, quit work, abandoned the property, and apparently forfeited their option. About this time the appellant, Schenk, who was secretary of the Bellevue Mining & Deduction Company, came to Idaho, and after looking over the situation and conferring with Whitmer, and being advised that the company refused to put up any more money for the purchase of the property or development thereof, concluded that he would individually negotiate with the bank with a view to the purchase of its interest in the property, in the hope that he might eventually save what he had invested in the enterprise. He accordingly engaged Whitmer to negotiate with the bank, and on the 26th day of June, 1903, the bank made, executed, and delivered a deed to Whitmer in favor of Schenk for all its interest in the First and Second West Extension claims for and in consideration of the sum of \$1,750.

This suit was commenced in the lower court by Whitmer to obtain a conveyance from Schenk to the plaintiff of all the interest conveyed by the bank, on the theory that the purchase price paid should have been credited on the option from Whitmer and Angel, and that the title received thereunder should inure to the benefit of the plaintiff. The administratrix of Angel's estate intervened and alleged that the \$750 previously paid by Angel to the bank on his escrow agreement was a part of the purchase price paid for the bank's interest in these claims, and that Schenk should be held as a trustee for the estate to the extent of $\frac{750}{2500}$ interest in the property. The court found against the plaintiff, Whitmer and the defendant, Schenk, and in favor of the intervener, and decreed that defendant holds a $\frac{750}{2500}$ interest in the property as trustee for the Angel estate. It has been argued that the last extension granted by the bank on Angel's option had expired at the time the bank deeded the property to the appellant. This extension was made on June 12, 1903, and recites that the option is "hereby extended for one year." The appellant contends

that the option had expired on June 12th, and introduced considerable oral evidence to that effect. In fact all the evidence in the case was to that effect, unless it be said that the writing itself contradicts such evidence. The respondent contends that since the option didn't expire until July 1, 1902, and the extension was granted for one year, that it was intended that the year should run from the date on which the option would have expired instead of the date on which the extension was made. The court found, however, that the extension was to run one year from July 1, 1902, and that the option did not expire until July 1, 1903. The respondent contends in this court that Angel's option had not expired at the time the bank deeded this property to Schenk, and that therefore Schenk must be considered in law to have taken up the option in the interest of and for the use and benefit of Angel, and that Angel's equity in the property was therefore saved and preserved to the extent of \$750, which he had previously paid thereon. It is admitted that appellant had notice of the escrow agreement which was in the hands of the E. E. Stewart Hardware Company, and that any purchase he made was with notice of the existence, terms and conditions thereof. It clearly appears from the evidence that both the bank and Schenk at least understood and believed that the option to Angel had expired on the 12th of June and prior to the execution of the deed to Schenk. As we view the case, however, it is unnecessary for us to consider or discuss but one point involved.

The question upon which we rest our decision and which is decisive of this case is this: Angel allowed his option to lapse and become forfeited without offering or attempting to make payment or comply with the escrow agreement. Neither does it appear that he either knew of or relied on the conveyance to Schenk. He never offered to pay the holders of the escrow agreement the balance due either before or after the time it became due. He was in no wise hindered, dissuaded, or deceived by the sale to Schenk or the action of the bank. Schenk had notice of the option to Angel, and if it did not in fact expire until July 1st, then Angel could not have been in any manner injured or prejudiced by a prior sale to a purchaser with notice. A payment to the holder of the escrow in accordance with the requirements thereof, and within the time allowed would have entitled Angel to the deed, and this deed, after its delivery, would have related back to its execution for the purpose of cutting off any and all intervening rights acquired by a third party with notice of the existence and terms of the escrow. *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499. Angel having failed to comply or offer to comply with the terms of the option or escrow agreement, and this without any fault of the grantor or the appellant herein, all his rights and privileges thereunder lapsed. The ap-

pellant did not stand in any relation of trust or confidence toward Angel, and was under no duty to share with him in the fruits of this purchase. The fact that Schenk secured the property from the bank for a less price than Angel had agreed to pay for it cannot affect either the legal or equitable rights of the parties in this suit. Angel's contract was an entirety. He was in no position to acquire a part interest to the bank's title nor an equity thereto without making a full payment. He was not prevented from making full payment therefor either by the conduct of the bank or the appellant to whom the bank sold, nor did the conduct of either the bank or appellant make it impossible or any more difficult for him to acquire a perfect title thereto.

The judgment is reversed, and the cause remanded, with directions to the trial court to make findings and enter judgment in accordance with the views herein expressed. Costs awarded to appellant.

SULLIVAN, J., concurs. STOCKSLAGER, C. J., sat at the hearing but took no part in the decision.

COLORADO & S. RY. CO. v. DAVIS.

(Supreme Court of Colorado. Dec. 4, 1905.)

APPEAL—BRIEFS—STRIKING OUT.

The fact that appellant's brief contains improper remarks regarding the judge who tried the case is not necessarily ground for striking the brief from the files and dismissing the appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3102.]

Appeal from District Court, City and County of Denver; S. L. Carpenter, Judge.

Controversy between the Colorado & Southern Railway Company and Calvert J. Davis. From the judgment, the railway company appeals. On motion to strike appellant's brief from files and dismiss the appeal. Motion denied.

Dines, Whitted & Dines, for appellant. Tolles & Cobbe, for appellee.

PER CURIAM. Appellee moves to strike brief of appellant from the files and dismiss the appeal because the brief contains improper remarks with respect to the judge who tried the case. The brief is certainly objectionable in the particulars mentioned in the motion, but not to such an extent as will justify the court in striking it from the files. A proper respect and regard for the trial judge demands that counsel bringing causes here for review should not attack the trial court, or criticise rulings disrespectfully, although they may be assigned as error. *Diamond, etc., M. Co. v. Faulkner*, 17 Colo. 9, 28 Pac. 472.

The motion is denied.
Motion denied.

FRAZIER v. SHOUP.

(Supreme Court of Colorado. Dec. 4, 1905.)

APPEAL—SUFFICIENCY OF EVIDENCE.

Findings will not be disturbed on appeal, there being evidence to sustain either them or opposite findings, according as the testimony for the one or the other party was believed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3983.]

Appeal from District Court, Chaffee County; M. S. Bailey, Judge.

Action by Margaret Shoup against Kate Frazier. Decree for plaintiff. Defendant appeals. Affirmed.

J. G. Taylor and Wells, Thompson & Chiles, for appellant. Schoolfield & Chamberlin and A. R. Miller, for appellee.

GUNTER, J. This was an action by appellee, Margaret Shoup, to set aside a deed made by her to appellant, Kate Frazier. After a trial to the court, and its findings for appellee, a decree was entered granting the relief prayed, to review which is this appeal.

The court found that Margaret Shoup was the owner in fee of certain real estate; that while she was such owner, appellant, "being the trusted and confidential friend and business agent and adviser of" appellee, "in violation of her trust, and by fraud and undue influence and oppression, did unjustly and unlawfully induce" appellee "to execute and deliver to her, appellant, a warranty deed" to said real estate; that the purpose of appellant in procuring the deed was to cheat and defraud appellee; that appellee at the time she was so fraudulently imposed upon by appellant "was old and illiterate, infirm in mind and body, and mentally incapable of intelligently attending to business or protecting her financial interests." It is urged by appellant that the evidence was insufficient to sustain such findings and the consequent decree.

It would serve no useful purpose to set out the evidence in detail. It must suffice to say that the evidence for the appellee, if credited, sustained the findings of the trial court, while the evidence for appellant, if believed, sustained her defense of a traverse of the matters charged in the complaint, and by the findings of the trial court declared to be true. This question of credibility was for the trial court. It had advantages for passing upon the evidence this court has not. Among the aids it possessed was having before it and hearing the testimony of the aged appellee, whom the lower court found to be "infirm in mind and body and mentally incapable of intelligently attending to business or protecting her financial interests." It also heard the testimony of the appellant to the entire transaction, and at the conclusion of the evidence in the case found that "the purpose of appellant in procuring the deed was to cheat and defraud appellee." There was evidence to support the findings of the trial

court. By these we are bound. The findings justified the decree.

We do not understand that it is seriously contended that any error was committed in the disallowance of the counterclaim of appellee. There was no error, however, in such disallowance, and the judgment should be affirmed.

Affirmed.

The CHIEF JUSTICE and MAXWELL, J., concur.

35 Colo. 142

VAN BUSKIRK v. STATE BANK OF ROCKY FORD.

(Supreme Court of Colorado. Dec. 4, 1905.)

1. BILLS AND NOTES—CHECKS—WRITTEN ACCEPTANCE—STATUTES.

Under Negotiable Instrument Law (Laws 1897, p. 235, c. 64) § 126, defining a bill of exchange, section 185, p. 246, declaring that a check is a bill of exchange drawn on a bank and subject to the law applicable to a bill of exchange, section 143, p. 238, providing that a check need not be presented for acceptance, and section 189, p. 246, providing that a bank is not liable to the holder until it accepts or certifies it, a drawee of a check is not liable to the holder until it accepts or promises to pay it in writing.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 20, 21.]

2. FRAUD—FALSE REPRESENTATION—FAILURE OF DRAWEE TO PAY CHECK.

Where the only claim of the holder of a check to recover from the drawee is based on the drawee's statement, in response to an inquiry whether the check was good, that it was good as being in legal effect a promise to pay the check on presentment, and there was no pretense that the information given was false, but it was conceded that it was true, there could be no recovery from the drawee in an action for fraud on its failure to pay.

Appeal from Otero County Court; Marlon F. Miller, Judge.

Action by the State Bank of Rocky Ford against H. Van Buskirk. From a judgment for plaintiff, defendant appeals. Reversed.

Fred A. Sabin and R. I. Beall (Calvin E. Reed, of counsel), for appellant. O. G. Hess, for appellee.

CAMPBELL, J. The parties are doing a separate banking business in the same town. A check drawn on the appellant by one of its depositors was by the payee presented for payment to the appellee. Appellee telephoned to appellant, asking if the check was good, and was informed that it was "good," or "all right." This was the extent of the information given, and there was no promise by appellant that it would accept or pay the check, unless the information given is in law that promise. Appellee then paid the check upon the strength of the foregoing reply to its question, but otherwise would not have cashed it. A few minutes thereafter the drawer appeared before the drawee (appellant) and stopped payment, of which appellant immediately advised the appellee.

Afterwards, and on the same day, when appellee presented the check, duly indorsed, to appellant for payment, the latter refused to pay it because it had been directed by its depositor not to do so, although at the time, the drawer had, and still has, with appellant sufficient funds for such payment. Thereupon this action was brought by appellee against appellant to recover the amount of the check, upon the ground that appellant had promised to pay it. The trial court submitted the case to the jury, upon the theory that the cause of action stated in the complaint, setting up the foregoing facts, was based upon an implied parol promise to pay. The verdict and judgment were for the plaintiff, and the defendant appeals.

The two chief points relied upon by defendant below (appellant here) are (1) that under our negotiable instrument law passed in 1897 (Sess. Laws 1897, p. 210, c. 64) an action will not lie in favor of the holder of a check against the drawee, unless and until the same is accepted or certified by the drawee, which acceptance or certification must be in writing; and (2) that, if a parol acceptance or promise to pay is binding, no such promise was established by the evidence.

1. The courts of England and America have often held that, at the common law, though many of the rules and principles applicable to bills of exchange apply to bank checks, the two kinds of instruments are not identical. Regardless of the common-law rights of the parties under the facts of this case, we think there can be no doubt as to the correctness of appellant's leading contention that, under our negotiable instrument law, the drawee of a check is not liable to the holder, unless and until he accepts or promises to pay the same, and such assent to his liability must be in writing. Section 126 of our act defines a bill of exchange as "an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer." Section 185 reads: "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." At the common law, a bill of exchange payable on demand need not be presented for acceptance. Indeed, strictly speaking, there is no such thing as acceptance of a check in the ordinary sense of the term; yet, by consent of the holder, the drawee bank may enter into an engagement quite similar to that of acceptance by certifying the check to be good, instead of paying it. 2 Daniel on Negotiable Instruments (4th Ed.) § 1601; section 143 of our act. A check is a species of bill of exchange, viz., that particular kind of a bill which is drawn on a bank

and payable on demand. Under our act, it need not be presented for acceptance, unless it contains an express stipulation to that effect. Section 143.

Before the passage of our negotiable instrument law, this court had ruled, in accordance with the weight of authority, that a right of action does not exist in favor of the holder of a check against the drawee bank where there has been by the latter no acceptance or promise to pay. *Colo. Nat. Bank v. Boettcher*, 5 Colo. 185, 40 Am. Rep. 142, reaffirmed in *Boettcher v. Colo. Nat. Bank*, 15 Colo. 16, 24 Pac. 582. Our statute has expressly so enacted. Section 189. The same cases, at least tacitly, recognized the doctrine that such acceptance or implied promise might, in the absence of a statute to the contrary, be proved by parol testimony, but this doctrine is abrogated by our statute as we proceed to show. According to this statute, though all bills of exchange are not checks, yet, as a check is therein expressly said to be a bill of exchange drawn on a bank, and payable on demand, every check is a bill; that is, it is a species of a bill. So that, though a check need not be presented for acceptance in order to render the parties thereto liable, still, as the check itself does not operate as an assignment of any part of the fund to the credit of the drawer with the bank, and the drawee bank is not liable to the holder, unless and until it accepts or certifies the check (section 189) and as (section 185), except as in the act otherwise provided, all of its provisions applicable to a bill of exchange payable on demand apply to a check, and as no contrary provision for the acceptance of or promise to pay, a check has been made, the provision applicable to a bill of exchange that acceptance or certification, when made, must be in writing, applies also to a check. There being no pretense in this case that the promise to pay, or certification, or acceptance, of the check sued upon was in writing, the holder was not entitled to sue the bank upon it. There are distinctions between an action on a bill or check as an accepted bill and one founded on a breach of promise to accept. *Boyce v. Edwards*, 4 Pet. 111, 7 L. Ed. 799; *Henrietta Nat. Bank v. State Nat. Bank*, 80 Tex. 648, 16 S. W. 321, 26 Am. St. Rep. 773. But we do not consider that such distinctions are important here. This action was based upon a parol promise to pay the check. Acceptance of a bill at common law, and under our statute, is merely the signification by the drawee of his assent to the order of the drawer. The legal meaning of an acceptance is that the acceptor engages to pay the instrument according to the tenor of his acceptance. In other words, it is a promise to pay. *Sess. Laws 1897*, pp. 223, 230, c. 64, §§ 62, 132; 1 *Daniel on Neg. Inst.* (4th Ed.) § 475. This action is one by a holder of a check against the drawee, based upon a

parol promise of the latter to pay, and it cannot be maintained.

2. It is well to observe that this is not an action to recover money lost by the fraud or wrongdoing of another, and if such were the cause of action pleaded—the evidence would not support it. The only claim made by plaintiff is that the information which the appellant gave in response to an inquiry was, in legal effect, a promise to pay the check when the same was presented for that purpose. There is no pretense that the information given was false; it is conceded that the answer to plaintiff's inquiry, on which the promise rests, was true; hence there is present here no element of an action *ex delicto*. In thus disposing of the case, upon the ground that a promise such as here relied upon must be in writing, we are relieved of the necessity of considering whether the mere oral statement by the drawee bank that a check drawn upon it is "good" or "all right," gives rise to an action in favor of one who parts with money upon the faith of it.

The judgment should be reversed, and the cause remanded, with instructions to the trial court to dismiss the action.

Reversed.

GABBERT, C. J., and STEELE, J., concur.

35 Colo. 68

MOTT v. SCOTT.

(Supreme Court of Colorado. Dec. 4, 1905.)

1. TRESPASS — PLEADING — VARIANCE — BASIS OF RECOVERY.

Where a complaint for damages caused by the trespass of cattle bases the right of recovery solely on plaintiff's ownership of the premises on which the trespass was committed, evidence of an assignment of the cause of action for the trespass to plaintiff from an alleged lessee of a portion of the premises is inadmissible.

2. ANIMALS — TRESPASSES — LIABILITY OF OWNER.

An owner of cattle, who makes a contract with a tenant in possession of a ranch to pasture the cattle, and intrusts the possession and control of the cattle to such tenant, is not liable to the owner of the demised premises for the act of the tenant in wrongfully turning the cattle upon the land.

[Ed. Note.—For cases in point, see vol. 2, *Cent. Dig. Animals*, §§ 350-352.]

Error to Weld County Court; John T. Jacobs, Judge.

Action by Adoniram J. Scott against Henry Mott. There was a judgment in favor of plaintiff, and defendant brings error. Reversed.

H. M. Minor, for plaintiff in error. T. W. Hoyt, for defendant in error.

MAXWELL, J. Defendant in error, as plaintiff below, recovered judgment against plaintiff in error for damages alleged to have been sustained by reason of the fact that plaintiff in error, without permission, turned into and upon a ranch, alleged to

have been owned by and in the possession of defendant in error, a herd of cattle which destroyed and damaged growing crops, pasturage, and hay land to the amount sued for. It appears from the evidence that, January 2, 1899, Walter I. Scott, by A. J. Scott (defendant in error), his agent, leased the ranch for a term of one year to one Miller; that Scott, the agent, became dissatisfied with the manner in which Miller was conducting operations upon the ranch, and sought to have Miller surrender or release to him a portion of the ranch comprising the meadow, hay, and pasturage lands. As to the terms of this arrangement there is an irreconcilable conflict in the testimony of Scott and Miller; Scott contending that Miller released all the land, except 60 acres which he had theretofore seeded to wheat; Miller contending he only released the right to make the hay crop, reserving the right to the possession of the ranch and the pasturage and meadow land.

It is undisputed that Miller remained in possession of the ranch until after the acts complained of, out of which the damage is alleged to have arisen.

Miller and Mott, plaintiff in error, testified that Mott delivered the herd of cattle to Miller to pasture, who turned the cattle into and upon the land. This testimony is undisputed. At or about the time Scott attempted to secure from Miller a release of a portion of the ranch he (Scott), by a verbal lease, attempted to let the hay, meadow, and pasture lands to one Waddell. It is not at all clear from the evidence just what this arrangement with Waddell was. There is no evidence whatever in the record to show that Waddell took or had possession of the premises, except so far as necessary to irrigate the land and make the hay crop. Prior to the commencement of this suit Waddell assigned in writing to Scott all his right, title, and interest in and to any damages due or to become due him from Mott (plaintiff in error) on account of matters alleged in the complaint. The court found that Scott had no cause of action under his deed, and that the only cause of action he had was by virtue of the assignment from Waddell. The judgment against plaintiff in error was for \$40, to reverse which a writ of error was sued out of the Court of Appeals. This judgment cannot be sustained.

1. The complaint, which is one count, alleged "that at all times herein mentioned plaintiff was the owner of a certain farm in said county and state consisting of 160 acres of land, etc." There is no averment in the complaint that plaintiff claimed or relied upon the assignment from Waddell. Such allegation was necessary to admit proof thereof. It is a familiar rule that the allegations and proof must correspond, and that the defendant is not required to meet and overcome evidence not responsive to the

pleading. *Miller v. Hallock*, 9 Colo. 553, 13 Pac. 541; *Tucker v. Parks*, 7 Colo. 62-68, 1 Pac. 427.

Plaintiff in error objected to the admission of evidence relating to the assignment upon the ground that it had not been plead, and also moved a nonsuit on the same ground. Leave to amend the complaint was not requested. There was no waiver of the variance.

2. The undisputed evidence showed that plaintiff in error did not turn the cattle into or upon the ranch; that he made a contract with Miller, the tenant in possession of the ranch, to pasture the cattle; and that Miller, as bailee of plaintiff in error, turned the cattle upon the land, and that he had possession and control of the cattle. "The liability for the trespass of animals arises, not from ownership, but from possession, for only the person having possession of the animals can exercise control over them and prevent them from doing mischief. It follows that the owner of animals in charge of an agistor is not liable for their trespasses." 2 Am. & Eng. Ency. 10, and authorities there cited; *Ward v. Brown*, 64 Ill. 307, 16 Am. Rep. 561; *Rossell v. Cotton*, 31 Pa. 525. The complaint having been framed upon the theory that defendant was liable for damages and injuries suffered by reason of the fact that he turned the cattle into and upon the premises, there being no evidence in the record to sustain this position, under the rule last above stated, the defendant was not liable for the damages occasioned by the cattle.

For the reasons above stated, the judgment must be reversed.

Reversed.

The CHIEF JUSTICE and GUNTER, J., concur.

35 Colo. 127

WILLIAMS et al. v. ELDORA-ENTERPRISE GOLD MINING CO.

(Supreme Court of Colorado. Dec. 4, 1905.)

1. MINES AND MINERALS—LEASE—OPTION TO PURCHASE—VALIDITY.

Though a mining lease, containing also an option to the lessee to purchase, was not signed by the lessee, so that the part relating to the sale was originally nudum pactum, it nevertheless became, on payment of part of the purchase price, converted into an enforceable contract of sale.

2. SAME—LIENS FOR LABOR AND MATERIALS.

Where there was no requirement, in a contract of sale contained in a mining lease giving the lessee the option to purchase, that the proposed purchaser should do any work or make any improvements on the mine, and possession of the mine was not given thereunder, but under the contract of leasing, at a stipulated rent in the nature of a royalty, a lien for labor and material could not be enforced against the vendor on the ground that the labor and material furnished were contracted for by a vendee in possession under a contract of sale which required him to make improvements.

3. SAME.

Where labor was performed and material furnished to one in possession of and developing mining property, whose only relation to the property, so far as concerned any requirement of work thereon, was that of a mere lessee, no lien therefor could be enforced against the owner of the mine.

Appeal from District Court, Boulder County; Christian A. Bennett, Judge.

Action by C. L. Williams and others against the Eldora-Enterprise Gold Mining Company, impleaded with the Enterprise Mining, Milling & Reduction Company and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Giffin & Rowland and Young & Luethi, for appellants. Sylvester S. Downer, for appellees.

CAMPBELL, J. Action to enforce a mechanic's lien on mining property. The defendant reduction company held a bond and lease on the defendant mining company's mine. The consideration for the property, under the option to purchase, was the payment of certain sums at designated times and one-half the expenses to be incurred in procuring a patent. Provision was made for possession of the mine under the contract of leasing, which permitted the lessee to mine, remove, and sell ore therefrom, and contained the usual clauses for mining in a workmanlike manner, keeping the mine in safe condition, allowing the lessor to inspect the mine and the lessee's books, and a forfeiture for failure by the lessee to keep its covenants under the lease. The lessee was required to commence work within three days from the date of the contract, and agreed to work two shifts continuously, with at least five men on each shift, except when delayed by unavoidable accidents. There was reserved as rent a royalty of 15 per cent. of the net proceeds of ore mined, and this royalty formed no part of the purchase price, under the option. There were clauses in the writing providing that, upon default in the prescribed payments under the option at the times specified, or for default in keeping the covenants of the lease, the reduction company forfeited previous payments if any, and also the right of possession. The reduction company made one or more, but not all, the payments upon the purchase price, under the option, and, by failing fully to perform, forfeited its rights thereunder. It took possession of the mine under the lease. In working the property certain material was furnished to, and work and labor done for, the lessee, for which material and work a lien is sought to be enforced on the interest of the lessor mining company, the owner of the mine. The district court held that our statute does not give it as against the owner, and the lien claimants have brought the case here by appeal.

The instrument which evidenced the agreement of the parties is, in form, the ordinary

Colo. Rep. 78-83 P.—30

mining lease in general use in this state, with an option of purchase. Though there was but one writing, it concerned two entirely separate and independent transactions, the one a lease with rent reserved as royalty, the other an option to buy. The writing was not signed by the reduction company. That part of it relating to the sale was originally nudum pactum but upon the payment of the whole, or part, of the purchase price, became an enforceable contract of sale against the vendor. In *Wilkins v. Abell*, 26 Colo. 402, 58 Pac. 612, it was decided that a mechanic's lien will not attach to the interests of an owner of a mine for work done or material furnished in working or developing the same, where the work is done or material furnished at the instance of, or under contract with, one whose only interest is that of a lessee. The claimants here say that this case is not controlled by that decision, but falls within the doctrine declared in *Shapleigh v. Hull*, 21 Colo. 419, 41 Pac. 1108, and *Colo. Iron Works v. Taylor* 12 Colo. App. 451, 55 Pac. 942. In these two cases it was held that under a contract of sale of real estate which requires the purchaser to make certain improvements thereon as a part of the consideration, the purchaser becomes the agent of the vendor for that purpose, and both the title of the vendor and the vendee is subject to a lien for materials furnished and labor performed in the erection of such improvements by the purchaser. In the subsequent case of *Antlers Park R. M. Co. v. Cunningham et al.*, 29 Colo. 284, 68 Pac. 226, it was sought to extend this doctrine to a lease of mining property, where, as a part consideration for its execution, the lessee was required to make permanent improvements and erect buildings on the leased premises. It was not necessary in the last-cited case to decide whether the doctrine contended for applied, because the evidence did not show what part, if any, of the material furnished or labor performed was furnished or done in the erection of the improvements contemplated.

The case at bar does not come within the principles of the *Shapleigh Case*, *supra*, though we concede that the option was, by payments, converted into an enforceable contract of sale. There was no requirement in the contract of sale that the proposed purchaser should do any work, or make any improvements, on the mine, nor was possession of the mine given thereunder. The possession of the reduction company was under the contract of leasing, and was solely for the purpose of working and developing the mine, under the lease, at a stipulated rent in the nature of royalty. A lien, therefore, does not exist as against the vendor owner, on the ground that the work and material were contracted for by a vendee in possession under a contract of sale which required him to make improvements. Nor can a lien be asserted as against the lessor owner on the

ground that the lessee here occupied some relation to the mine, with respect to the working of it, other than that of lessee. The contract of leasing did not call for the erection of any permanent improvements. Its only requirement of the lessee in respect to work was that it should begin development work within a certain time, and continuously employ two shifts of five men each. In the nature of things, a lease of a mine contemplates that the lessee must do, at least, ordinary development work. A mine is valuable principally, if not wholly, on account of the ore it contains, and to extract the same necessarily requires work to be done upon it. The work required here was merely ordinary development work, which brings the case within the holding in *Wilkins v. Abell*, supra. In other words, the labor performed and materials furnished by the claimants, for which a lien is sought, were done for, and furnished to, one who was in possession and developing the same, whose only relation to the property, so far as concerns any requirement of work thereon, was that of a mere lessee. Other cases in line with our conclusion are *Maher v. Shull*, 11 Colo. App. 322, 52 Pac. 1115; *Schweitzer v. Mansfield*, 14 Colo. App. 236, 59 Pac. 843; *Little Valeria M. & M. Co. v. Ingersoll*, 14 Colo. App. 240, 59 Pac. 970. In *Couch v. Welsh*, 24 Utah, 36, 66 Pac. 600, an instrument quite like that under consideration was held to be a lease with an option to purchase.

The judgment below is right, and should be affirmed.

Affirmed.

GABBERT, C. J. and STEELE, J., concur.

FULLER et al. v. HAGER.

(Supreme Court of Oregon. Dec. 4, 1905.)

1. STATUTES — RETROACTIVE OPERATION — CURATIVE ACTS.

The Legislature may, unless prohibited by the Constitution, retrospectively validate or legalize judicial or execution sales, although the defects or irregularities therein are such as to render such sales inoperative, provided it does not undertake to infuse life into proceedings utterly void for want of jurisdiction.

2. GUARDIAN AND WARD — SALES BY GUARDIAN—IRREGULARITIES—VALIDATION.

The failure of a guardian, in making a sale of his ward's land, to take the oath prescribed by B. & C. Comp. §§ 5602, 5611, before fixing the time and place of sale, as required by such sections, did not affect the jurisdiction of the court to license or confirm the sale, or of the guardian to make it, but was an irregularity in a matter of procedure, which the Legislature could and did cure by Laws 1899, p. 64, § 3, validating guardians' sales made to purchasers in good faith and confirmed or acquiesced in by the county or probate court, notwithstanding irregularities in making or conducting the same.

Appeal from Circuit Court, Morrow County; W. L. Bradshaw, Judge.

Action by Arthur T. Fuller and another, minors, by Kate A. Foor, their next friend,

against James M. Hager. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

A. M. Cannon, for appellants. James A. Fee and G. W. Phelps, for appellee.

BEAN, J. This is an action of ejectment to recover the possession of certain real property in Morrow county. The only question raised is as to the validity of a guardian's sale of plaintiffs' interest in the land. The sale was made December 14, 1889, by the guardian to the defendant at public auction, in pursuance of a license or order of the county court, and the purchase was made and the purchase price paid to the guardian in good faith. The sale was reported to and regularly confirmed by the county court on January 7, 1890, a guardian's deed made to the purchaser on January 10th, and he has ever since been in possession of the property. The contention is that the sale was invalid because the guardian did not take the oath required by law before fixing the time and place of sale, or at all until four days before the sale. Section 5602, B. & C. Comp., provides that the guardian shall, "before fixing on the time and place of sale, take and subscribe an oath, before the county judge or some other officer competent to administer the same, in substance as follows: That in disposing of the estate which he is licensed to sell, he will use his best judgment in fixing the time and place of sale, and that he will exert his utmost endeavors to dispose of the same in such manner as will be most for the advantage of all persons interested therein." And section 5611 declares, "In case of an action relating to any estate sold by a guardian under the provisions of this chapter, in which the ward or any person claiming under him shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings: Provided, it shall appear (1) that the guardian was licensed to make the sale by a county court of competent jurisdiction; (2) that he gave a bond that was approved by the county judge; (3) that he took the oath prescribed in this chapter; (4) that he gave notice of the time and place of sale as prescribed by law; and (5) that the premises were sold accordingly at public auction, and are held by one who purchased them in good faith."

The selection of the time and place of sale by a guardian in advance of taking the prescribed oath is, under the decisions construing similar statutes, fatal to the purchaser's title; *Freeman*, *Void Judicial Sales*, § 22; *Gager v. Henry*, 5 Sawy. 237, 9 Fed. Cas. No. 5,172; *Blackman v. Baumann*, 22 Wis. 611; *Wilkinson v. Filby*, 24 Wis. 441; *Ryder v. Flanders*, 30 Mich. 336; *Bachelor v. Korb*, 58 Neb. 122, 78 N. W. 485, 76 Am. St. Rep. 70. But the defect or irregularity in the proceedings complained of in this case was, we think, cured, and the sale validated, by a subsequent curative act of the Legislature

which provides: "All sales by * * * guardians of their wards' real property in this state to purchasers for a valuable consideration, which has been paid by such purchasers to such guardians or their successors in good faith, and such sales shall not have been set aside by the county or probate court, but shall have been confirmed or acquiesced in by such county or probate court, shall be sufficient to sustain a * * * guardian's deed to such purchaser for such real property; * * * and all irregularities in obtaining the order of the court for such sale, and all irregularities in making or conducting the same by such * * * guardian, shall be disregarded." Laws 1890, p. 64, § 3.

It is a well-recognized rule of law that the Legislature may, unless prohibited by the Constitution, validate or legalize, retrospectively, judicial or execution sales, even though the defects or irregularities therein are of so grave a character as to render them inoperative, so long as it does not undertake to infuse life into proceedings utterly void for want of jurisdiction. Freeman, *Vold Judicial Sales*, 57; Endlich, *Interpretation of Statutes*, § 291; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542; *Sohier v. Mass. Gen. Hospital*, 3 Cush. 483; *Sanders v. Greenstreet*, 23 Kan. 425; *Smith v. Callaghan*, 66 Iowa, 552, 24 N. W. 50; *Boyce v. Sinclair*, 3 Bush, 261. Mr. Cooley says: "There is no doubt of the right of the Legislature to pass statutes which reach back to and change or modify the effect of prior transactions, provided retrospective laws are not forbidden, eo nomine, by the state Constitution, and provided, further, that no other objection exists to them than their retrospective character. * * * The rule applicable to cases of this description is substantially the following: If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the Legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." Cooley, *Constitutional Lim.* (6th Ed.) 455-457; *Id.* (7th Ed.) 529-531. See, also, *Stanley v. Smith*, 15 Or. 505, 16 Pac. 174; *Grady v. Dundon*, 30 Or. 333, 47 Pac. 915; *Nottage v. Portland*, 35 Or. 539, 58 Pac. 883, 76 Am. St. Rep. 513.

Now, the taking by a guardian of an oath after obtaining a license for the sale of his ward's property, and before fixing the time and place of sale, was a matter which the Legislature might have dispensed with entirely in the first instance. It did not affect the jurisdiction of the court to license or confirm the sale, or the guardian to make it, but was merely a matter of procedure. It

was therefore within the power of the Legislature to validate by subsequent act a departure from the prescribed method. It could have authorized the sale in the first instance without requiring the oath, and so could render a failure to take it immaterial by subsequent law. This is the effect and construction given the curative act now under consideration by this court in *McCulloch v. Estes*, 20 Or. 349, 25 Pac. 724. That was an action by a ward to recover lands sold by his guardian. The objection to the validity of the sale was that the guardian did not give "notice of the time and place of sale as prescribed by law"—a matter made as important and essential by section 5611 as the taking of the oath. The court said: "The case before us comes directly within the purview of this statute, which was intended to obviate or cure such defects or irregularities as is sought to be made available in this action." The curative act of 1899 did not attempt to amend, repeal, or modify the law governing a sale by a guardian of his ward's property, but was intended to, and did, cure such defects in proceedings already had as did not go to the question of jurisdiction.

It follows that the judgment must be affirmed, and it is so ordered.

STEEL v. ISLAND CITY MERCANTILE & MILLING CO.

(Supreme Court of Oregon. Jan. 2, 1906.)

1. CORPORATIONS — STOCK — DIVIDENDS — TO WHOM PAYABLE.

A corporation paying a dividend on stock to a person appearing on its books as owner, after it has received notice that the stock has been transferred to a third person, is liable to the third person for the amount of the dividend, though at the time it declared the dividend it had no such notice, and though it passed the amount thereof to the credit of the stockholder on its books.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 569-580.]

2. SAME — RIGHTS OF STOCKHOLDER.

A corporation on declaring a dividend becomes indebted to each stockholder for his share, and each is in the same position as any other creditor of the corporation, and may enforce or assign his demand in like manner.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 562, 569, 593-595.]

Appeal from Circuit Court, Union County; Robert Eakin, Judge.

Action by Cora Steel against the Island City Mercantile & Milling Company. From a judgment for plaintiff, defendant appeals. Affirmed.

C. H. Finn, for appellant. J. D. Slater, for respondent.

BEAN, C. J. This is a suit by a stockholder against a corporation for an accounting for dividends declared on its capital stock. On January 15, 1890, the defendant issued and delivered to R. M. Steel 100 shares of its capital stock; the certificate

thereof providing that the shares "are only transferable upon the books of the company, subject to the provisions of the by-laws, by indorsement hereon and surrender of this certificate." On March 16, 1896, Steel sold and transferred the stock and certificate to the R. M. Steel Company, and on the next day the R. M. Steel Company transferred the same as a pledge or collateral security to George A. Steel. The debt for which the stock was held by George A. Steel as security was not paid, and on May 28, 1901, the stock was sold in pursuance of law in foreclosure of such pledge to the plaintiff Cora Steel. None of the transfers referred to were made on the books of the company, nor was the corporation advised thereof until June 14, 1901, when the original certificate, together with the several transfers attached thereto, was delivered by the plaintiff to the company and a new certificate issued to her in lieu thereof. The proceeds of the sale of the stock on the foreclosure were not sufficient to satisfy the debt for which it was held as security by George A. Steel, and some time after the sale and prior to January 30, 1903, Steel assigned and transferred his interest in all dividends declared by the company after March 17, 1896, to the plaintiff, and in February of that year she notified the defendant of such transfer and demanded the payment by it of all dividends declared after the date of the assignment by the R. M. Steel Company to George A. Steel, but it refused to make such payments, and hence this suit.

The plaintiff alleges that a dividend of \$25 a share was declared by the corporation on January 27, 1900, payable, one-half on June 1st, and the remainder on September 1st following, and that she had reason to believe and did believe that since that date other and different dividends had been declared, but that the officers of the corporation refused to give her any information thereof, and that no payments of any such dividends had been made to her, although lawfully demanded. Upon the coming in of the answer and proofs, it was shown and is admitted that a dividend of \$25 a share was declared in January, 1900, but that no dividends had been declared since that time. The defense is that the dividend declared in January, 1900, was paid by the company to the administrator of the estate of R. M. Steel, in whose name the stock stood on its book, without notice or knowledge of the several transfers, or of any of them, and before any demand was made therefor by the plaintiff or any one else. The evidence shows that at or about the time the dividend was declared the amount thereof was passed to the credit of R. M. Steel's estate on the books of the company, but the money was not actually paid to the administrator of the estate until June 6, 1903, after the corporation had been notified of the purchase of the stock by the plaintiff and the assignment to

her of George A. Steel's right to the dividends, and a demand for the payment thereof had been made. At the time the dividend was declared George A. Steel was the holder of the stock as pledgee and had a right to receive it, notwithstanding the certificate on its face stated that the shares were only transferable on the books of the company, and no such transfer had been made, and unless the defendant has paid the amount of such dividend to the representative of the person who appeared on its books to be the owner thereof, without notice of the transfer, his assignee, the plaintiff, is entitled to recover the same. 22 Am. & Eng. Enc. Law (2d Ed.) 907. "Where, for the protection of the corporation, it is expressly provided in its certificates of stock," say Messrs. Clark and Marshall, "that the shares are not transferable, except on the books of the corporation, the corporation is not bound to look beyond its books, assuming that they have been kept properly, to determine who is entitled to dividends, but it may safely pay them to those persons who appear on the books to be shareholders, and it will be protected in such payment, notwithstanding transfers made before the dividend was declared, but which had not been entered upon its books, and of which it had no notice. It is otherwise, however, if it has notice of the transfer. In such a case, if it pays the dividend to the person appearing on its books as owner, it remains liable to the transferee, whether the transfer was absolute or merely as collateral, notwithstanding his omission to have the transfer registered." 2 Clark & M. Priv. Corp. p. 1612. And, again, it is said by the same authors (page 1611): "In the absence of agreement to the contrary, a pledge of shares of stock as collateral security carries with it, as an incident of the pledgee's special ownership, the right to receive dividends afterwards declared, to be applied on the debt, or held in trust for the pledgor; and, if the transfer has been registered on the books of the corporation, or, although not so registered, if the corporation has notice thereof, it will be liable to the pledgee if it pays such dividends to the pledgor." To the same effect see *Central National Bank v. Wilder*, 32 Neb. 454, 49 N. W. 369; *Farmers' & Merchants' National Bank v. Mosher*, 63 Neb. 130, 88 N. W. 552; *Clark v. Campbell*, 23 Utah, 569, 65 Pac. 496, 54 L. R. A. 508, 90 Am. St. Rep. 716. *National Bank v. Wilder*, supra, was much like the case at bar. The stock pledged had been sold by the pledgee and the proceeds applied on the debt, leaving a balance unpaid. The pledgee thereafter brought an action to recover of the corporation a dividend declared before the sale, and while the stock was held by him in pledge, and it was decided that he was entitled to recover.

Unless, therefore, the defendant corporation paid the dividend to the administrator of the estate of R. M. Steel before receiving

notice of the assignment and transfer to the plaintiff, she is entitled to recover. Now, the evidence shows that the dividend was not paid, in fact, at the time it was declared or until long after the corporation had received notice of the plaintiff's ownership and right thereto. The passing of the amount thereof to the credit of the stockholder on the books of the company was a mere matter of bookkeeping, and in no sense amounted to a payment. The payment of a pecuniary obligation is made by the delivery of money or something which is accepted by the creditor as equivalent thereto. 22 Am. & Eng. Enc. Law (2d Ed.) 517; Tolman v. Manufacturers' Insurance Co., 1 Cush. 73; Beals v. Home Ins. Co., 36 N. Y. 522. When the dividend was declared, the defendant became indebted to each stockholder for his share, and each was in the same position as any other creditor of the corporation and had a right to enforce or assign his demand in like manner. If the corporation, without notice of the transfer or assignment of the dividend, had paid the same to the apparent holder of the stock, it would be discharged, but after such notice it was bound to pay the true owner.

The court below will therefore be affirmed.

BOOTHE v. FARMERS' & TRADERS' NAT. BANK OF LA GRANDE.

(Supreme Court of Oregon. Jan. 2, 1906.)

1. JUDGMENT—CONFORMITY TO ISSUES.

In an action to recover specific deposits in a bank in which there was a counterclaim for certain payments made by the bank on behalf of the plaintiff, where the court found that the deposits sued on had been paid, but that the bank owed the plaintiff a certain sum on other deposits, the action being one at law, the plaintiff was not entitled to recover judgment for the amount due him.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 436, 437.]

2. TRIAL—FINDINGS BY COURT.

Findings by the court outside the issues made by the pleadings are mere nullities, and will not sustain a judgment.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 935-938.]

Appeal from Circuit Court, Union County; Robert Eakin, Judge.

Action by S. S. Boothe against the Farmers' & Traders' National Bank of La Grande. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Gustave Anderson, for appellant. R. J. Slater, for respondent.

BEAN, C. J. This is an action at law to recover a balance alleged to be due the plaintiff on certain deposits made by him with the defendant bank. The complaint alleges: That the plaintiff deposited with the defendant on October 21, 1897, \$10,350; on October 26th, \$2,540; on October 28th, \$670; on November 2, 1898, \$276; on November

28th, \$4,626.80; and on April 5, 1899, \$1,050. That it was understood and agreed between them that all deposits should bear 5 per cent. interest to November 28, 1898, and 4 per cent. thereafter. That no part of the money so deposited by plaintiff with the defendant, or interest thereon, has been paid, except the sum of \$9,014, and judgment is demanded for the balance. The answer admits the receipt of the several amounts by the defendant substantially as alleged in the complaint, but avers that a portion of the money so deposited was repaid in cash to the plaintiff and that certificates of deposit were issued to him for the remainder, which certificates have been paid and canceled by it. By way of counterclaim it is alleged that between the 18th of November, 1897, and May 27, 1903, divers sums of money were deposited with the defendant to the credit of plaintiff on open account, subject to his check, amounting in the aggregate to \$12,441.39, and that it has paid to him on his checks and orders, interest on overdrafts, and in satisfaction of promissory notes held by defendant against him, \$12,624.23, leaving a balance due it of \$182.84, for which it prays judgment. The reply denies the allegations of the answer, and affirmatively alleges that, if the several items of deposit stated in the answer to have been made with the defendant on plaintiff's account between December 28, 1898, and May 27, 1903, were made as therein alleged, it was without the knowledge of the plaintiff, and was a part of the original fund mentioned in the complaint, and that, if certificates of deposit were issued by the defendant for any portion of such fund, such certificates were left with the defendant bank, and have never been assigned, indorsed, or transferred by him, or by any one in his behalf, or taken from the bank but were retained and used by it. The cause was, by agreement of the parties, tried by the court without the intervention of a jury, and the court found: That the several sums alleged in the complaint were deposited with the defendant on plaintiff's account, except the item of October 26, 1897, was \$1,440 in place of \$2,540, as stated in the complaint, and that the item of October 28th for \$670 was the amount of a certificate of deposit issued by it to plaintiff for a part of the \$1,440 item. That certificates of deposit were issued by the bank for the several amounts so deposited at the time the deposits were made, except \$800 of the deposit of October 26, 1897, which was paid to him in cash. That on November 28, 1898, plaintiff and defendant had a settlement and accounting, at which time the plaintiff surrendered to defendant, for cancellation the several certificates of deposit held by him, and there was issued in lieu thereof one certificate in favor of McDaniels for \$150, another in favor of J. W. Scriber for \$10,625, and three in favor of the plaintiff for \$2,000, \$1,000, and \$307.30, respectively. That the balance found due the plaintiff was applied.

In payment of his promissory notes to the bank, except \$119.17, which was placed to the credit of his general account and subject to check. That on April 7, 1899, the defendant received for and on account of plaintiff \$1,050, for which it issued to him a certificate of deposit for \$646.31, and applied the balance by his permission on his notes, and the certificate of deposit so issued to him was paid on July 19, 1899. That on December 28, 1898, plaintiff deposited with the defendant the two certificates issued to him on that day for \$1,000 and \$307.30, respectively, subsequently drawing the amount thereof by check. That the certificate for \$2,000, issued to plaintiff on November 28, 1898, was left by him with J. W. Scriber, the cashier of the bank, and on July 28, 1899, Scriber indorsed plaintiff's name thereon, and the same was surrendered to and canceled by the bank. That of the amount due on such certificate \$468.48 was deposited with the bank to plaintiff's credit, subject to his check, and, as to the remainder, the finding is: "Mr. Scriber claims this certificate was settled for with Mr. Boothe on January 26, 1900, but how it was settled for does not appear, and, as Boothe did not indorse the certificate, no presumption can arise against him, and the bank should be charged with the amount of the certificate and \$80 interest for one year, less the deposit of \$468.48, viz., \$1,611.52." That from November 16, 1898, to August 22, 1904, the defendant received on open account for plaintiff \$11,898.02, and between such dates paid to him, on his checks and orders, \$12,080.86, from which should be deducted \$419.12 for errors in bookkeeping and overcharges, which would leave a balance of \$236.28 due plaintiff on his general account, which, together with \$1,611.52 above referred to, would make a total balance due plaintiff from the defendant of \$1,847.80.

A judgment was rendered in favor of the defendant, notwithstanding the finding that it was indebted to the plaintiff in the sum of \$1,847.80, because the action is at law, and defendant is not liable on any of the causes of action set out in the complaint. In this conclusion we are constrained to concur. This is not a suit for an accounting, but an ordinary action at law to recover on certain specified items of indebtedness. The plaintiff is bound to recover, if at all, upon the causes of action alleged, and not upon some separate and distinct cause of action which may be disclosed by the evidence. *Hammer v. Downing*, 39 Or. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30; *Union St. Ry. Co. v. First Nat. Bank*, 42 Or. 606, 72 Pac. 586, 73 Pac. 341. And a finding of fact outside the issues made by the pleadings is a mere nullity, and will not sustain a judgment. *Male v. Schaut*, 41 Or. 425, 69 Pac. 137; *Gamache v. South School Dist.*, 133 Cal. 145, 65 Pac. 301. The plaintiff sues for the recovery of certain specified items of indebtedness. The findings show that each and

every one of them has been paid and discharged by the defendant. In addition to finding upon the issues made by the pleadings, the court made a number of findings, presumably based upon the evidence, from which it would appear that the defendant is indebted to the plaintiff upon a certificate of deposit issued to him on November 28, 1898, and on overcharges for interest and the like; but these matters were entirely outside the issues, and will not support a judgment in this cause in plaintiff's favor. It follows, therefore, that the judgment as rendered must be affirmed, but it will be so framed as not to bar any subsequent proceeding instituted by the plaintiff to recover whatever may be due him.

POPE v. POPE.

(Supreme Court of Oregon. Jan. 2, 1906.)

DIVORCE—ALIMONY—AMOUNT.

Where a decree of divorce was granted on the grounds of cruelty and adultery by the husband, who was the owner of \$4,500 worth of personal property and real estate worth \$8,000, and pending the suit it was stipulated that the defendant would pay \$200 for the expenses of the suit, and \$20 a month during its pendency, and the final decree allowed plaintiff \$1,000 permanent alimony, but no monthly payments were made after the decree of the trial court, on appeal the permanent alimony will be increased, so as to cover \$20 a month from the date of the decree in the court below till the date of the final decree on appeal.

Appeal from Circuit Court, Grant County; Robert Aiken, Judge.

Suit by Mary Agnes Pope against William M. Pope. From a decree in favor of plaintiff, defendant appeals. Affirmed.

M. D. Clifford and Errett Hicks, for appellant. A. D. Leedy, for respondent.

PER CURIAM. This is a suit for a divorce. The complaint charges cruelty and unhuman treatment, and the commission of adultery by the defendant. The defendant is the owner of about \$4,500 worth of personal property, and real estate of the probable value of \$8,000. Soon after the commencement of the suit it was stipulated between the parties that the defendant would pay \$200 to enable the plaintiff to prosecute her suit, and \$20 a month during the pendency of the suit. The \$200 was paid as agreed upon, and the alimony until the decree of the court below on January 15, 1905. Since that time no payment of alimony has been made. The court below granted a decree in favor of the plaintiff, dissolving the bonds of matrimony existing between her and the defendant, and gave her \$1,000 permanent alimony and an undivided one-third interest in the defendant's real estate. From this decree, the defendant appeals. The question for decision is one of fact, and it is sufficient that from an examination of the testimony we concur with the trial court in the conclusion reached.

The decree will therefore be affirmed, but

the amount of the permanent alimony will be increased, so as to cover \$20 a month from the date of the decree in the court below until the final decree here; the defendant to pay the costs of the appeal, but the decree of the court below to stand as to the costs in that court.

QUACKENBUSH et al. v. ARTESIAN LAND CO. et al.

(Supreme Court of Oregon. Jan. 9, 1906.)

MECHANICS' LIENS—LIENS OF SUBCONTRACTOR—AGENCY OF CONTRACTOR FOR OWNER.

B. & C. Comp. § 5640, which declares every contractor and subcontractor having charge of the construction of any improvement the agent of the owner for the purpose of binding the property with a lien for the reasonable value of materials furnished or labor performed upon the improvement, does not make the contractor the owner's agent to determine the value of the materials furnished or labor performed; and where a subcontractor sues the contractor and owner to enforce a lien, and the owner puts in issue the amount and value of the work performed by the subcontractor and the validity of his lien, an arbitration agreement between the subcontractor and the contractor to which the owner is not a party is not binding on the latter, but he is entitled to a trial of the issues raised by him.

Appeal from Circuit Court, Malheur County; Geo. E. Davis, Judge.

Suit by A. J. Quackenbush and another against the Artesian Springs Water & Land Company and others. From a decree for plaintiffs, defendant named appeals. Reversed.

Oliver O. Haga, for appellant. McCulloch & Norwood, for respondents.

BEAN, C. J. The defendant the Artesian Springs Water & Land Company is the owner of a ditch or canal and water right in Malheur county. In 1902 it entered into a contract with the defendants Hoskins & Harkins for the construction of such ditch or canal. Hoskins & Harkins sublet a portion of the work to plaintiffs, and, failing to pay for the work done by them, plaintiffs filed a lien upon the ditch and water right, and subsequently brought this suit to foreclose it. In their complaint they allege that they were to receive a certain rate per cubic yard for removing earth and a certain rate per cubic yard for removing material that could not be removed without breaking or blasting; that they removed a certain quantity of dirt and a certain amount of other material; that the aggregate value of the work so performed by them, according to the contract price, was \$2,788.63, no part of which has been paid, except the sum of \$945.90. The defendant the Artesian Springs Water & Land Company and the defendants Hoskins & Harkins answered separately. The water and land company admitted making a contract with Hoskins & Harkins for the construction of the ditch, but put in is-

sue the amount and value of the work performed by the plaintiffs, and the validity of their alleged lien. Hoskins & Harkins admitted that the water and land company is the owner of the ditch and water right, and that they entered into a contract with the plaintiffs to perform a part of the work, but put in issue the amount of work performed by them, the price to be paid therefor, the payments made, the amount due, and the validity of their lien. Issue was joined on the answers by replies, and the cause referred for the purpose of taking testimony. Before any testimony was taken a stipulation was entered into between the plaintiffs and the defendants Hoskins & Harkins whereby it was agreed that the question in dispute, as to the amount, character, and classification of the work performed, should be submitted to an arbitrator, who should by measurement on the ground ascertain and estimate the cost of the work done by the plaintiffs at a certain price agreed upon by the parties; that the amount so found by the arbitrator should be a final and conclusive determination of the amount due from the defendants to plaintiffs, for which they should have a lien upon the ditch and water right; and that such lien should be foreclosed and the property sold to satisfy the same. The report of the arbitrator was unsatisfactory to the plaintiffs, and upon their motion it was amended by the court and a decree rendered in their favor, adjudging that they had a valid lien on the ditch and water right of the water and land company for the amount appearing to be due them from the report as so amended, and foreclosing the same. From this decree the water and land company appeals, on the ground that it was not a party to the stipulation and agreement for arbitration or bound by the report of the arbitrator, and that such report formed no basis for a decree for the sale of its property.

The decree against the water and land company was, in our opinion, erroneous. It is admittedly the owner of the property ordered to be sold to satisfy the plaintiffs' claim. It had by its answer put in issue the amount and character of the work done by the plaintiffs, the value thereof, and the validity of plaintiffs' lien. Upon these questions it had a right to be heard, and was not bound by the stipulation entered into between the plaintiffs and the defendants Hoskins & Harkins. The stipulation on its face recites that it is entered into between "the plaintiffs by themselves and J. W. McCulloch, their attorney, and the defendants Hoskins & Harkins by themselves and by Solles and Bryan, their attorneys." It does not purport to have been made on behalf of the water and land company, and it was not bound thereby, although it was represented in the suit by the same attorneys who appeared for its codefendants and signed the stipulation as such. The statute makes every contractor and subcontractor having

charge of the construction of any building, wharf, bridge, ditch, etc., the agent of the owner for the purpose of binding the property with a lien for the reasonable value of materials furnished to be used in or labor performed upon such improvement at the request of the former. *B. & C. Comp. § 5040; Flitch v. Howitt*, 32 Or. 396, 52 Pac. 192; *Cooper Mfg. Co. v. Delahunt*, 36 Or. 402, 51 Pac. 649, 60 Pac. 1. But it does not make him an agent of the owner with power to determine the value of the materials furnished or labor performed. Upon this question the owner is entitled to be heard when it is sought to enforce a lien against his property.

For these reasons, the judgment will be reversed, and the cause remanded to the court below for such further proceedings as may be proper, not inconsistent with this opinion

METZ v. TIERNEY.

(Supreme Court of New Mexico. Jan. 31, 1906.)

ADJOINING LANDOWNERS — INJUNCTION — ERECTION OF FENCE—MALICE—EVIDENCE.

The record in this case examined, and found to contain no evidence of malice in the erection of a fence which obstructed the light and air from appellant's building, and consequently no relief could be granted, even under appellant's view of the law.

(Syllabus by the Court.)

Appeal from District Court, Bernalillo County; before Justice Ira A. Abbott.

Action by Nick Metz against Martin S. Tierney. Judgment for plaintiff and defendant appeals. Affirmed.

B. F. Adams, for appellant. Summers Burkhardt, for appellee.

PARKER, J. This was a bill for injunction by appellant to restrain appellee from erecting a fence along the line between their adjoining property. Appellant alleged that such fence overlapped on his land and was of no beneficial use to appellee, but was erected for malicious purposes and to obstruct appellant's light and air and to be a menace to his building from fire and other causes. Appellee answered, and denied that he was erecting the fence for malicious purposes, and averred that he was erecting the same for the purpose of securing the privacy of his own premises, where he resided with his family, from the observation of the occupants of the second story of appellant's building. Appellant replied that the fence at the height it had reached at the time of service of the writ of injunction prevented any occupant of his building from overlooking appellee's yard, and that appellee proposed to erect the same five feet higher, which was unnecessary and was proposed to be done maliciously.

Appellant proved the erection of the fence by the placing of a frame of timbers on appel-

lee's land and by nailing thereon planks commencing at a point 14 feet from the ground and on a level with the bottom of the second-story windows of appellant's building and extending upward for a distance of 3 feet and 7 inches; that the fence at this point was sufficiently high to obstruct all view of appellee's premises from appellant's building, except a small portion of the roof of appellee's house; that the prosecution of the work to a still greater height was engaged in by appellee when served with a writ of injunction, to the still greater obstruction of the light and air from appellant's building; that said fence greatly increased the danger of fire to appellant's building. Appellee offered no evidence, and moved for dissolution of the injunction and dismissal of the bill, which was done. The transcript does not contain the testimony of the witnesses, but merely a statement of the substance of the same, agreed to by both parties.

It is not contended by appellant that appellee did not have the right to protect his own privacy by a structure of the kind erected. His claim is, however, that the fence was about to be erected to an unnecessary height for that purpose, and he relies upon that fact alone to show malicious intent to injure his property. It is to be noticed that no direct evidence of motive was submitted. The framework of the fence was 21 feet high, and planks had been nailed to it, beginning 14 feet from the ground, and extending upward 3 feet and 7 inches, leaving 3 feet and 5 inches as the utmost additional height to which the fence could be extended, and against which appellant sought restraint. It is to the fact of the lack of necessity of this additional height of the fence and the additional injury to his property that appellant looks for proof of bad motive on the part of appellee. Appellee alleged in his answer that the second story of the building was to be used as a rooming house, and the allegation was not denied in the reply. It may be that a structure of this kind might, under some circumstances, be so grossly unsuited or disproportionate to the uses claimed for it as to amount to proof of malice, but we cannot determine that this one was such a structure. Under the facts we fail to see how malice has been established by the evidence, and the court below, in finding the facts in favor of the defendant, appellee here, found there was none.

We understand the position of appellant to be that the erection of a structure of this kind may be restrained only when the same serves no useful purpose, and is with intent to maliciously injure the property, of another. We do not understand him to claim that, in the absence of either one of the foregoing characteristics, a court of equity will interfere. This being so, it is clear that he can have no relief in his court and that the judgment below was correct. This conclusion renders it unnecessary to consider whether

in this jurisdiction, and in the absence of statute, there is any right, under any circumstances, to restrain the erection on one's own property of structures which cut off light and air from adjoining owners. See 12 Am. & Eng. Ency. of Law (2d. Ed.) 1058, where the cases are collected.

There being no error in the decree of the court below, it will be affirmed; and it is so ordered.

MILLS, C. J., and POPE, MANN, and McFIE, JJ., concur. ABBOTT, J. having tried the case below, did not participate in this decision.

CUNNINGHAM et al. v. FISKE.

(Supreme Court of New Mexico. Jan. 26, 1906.)

1. REWARDS—ACTIONS—PLEADINGS—AMENDMENT—DISCRETION OF COURT.

The power of the district courts to permit amendments of the pleadings is discretionary, except as limited by statute, and it was not an abuse of discretion to overrule a motion to amend the complaint in the case at bar under the circumstances stated in the opinion.

2. LIMITATION OF ACTIONS—REWARD—ACTION TO RECOVER.

An allegation in the complaint that the plaintiffs on June 1, 1893, "discovered" the murderers for the "discovery" of whom the reward was offered which they seek to recover in this action, fixed the time at which their cause of action accrued.

3. SAME—REWARD—CONTRACT IN WRITING..

An offer of a reward, by publication, for the "discovery of all or any one of the parties concerned in" a certain murder, becomes a valid contract between the offerors and those who accept it by performance upon the discovery required; but it does not become a "contract in writing" within the meaning of those words in section 2915 of the Compiled Laws of 1897.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 113.]

(Syllabus by the Court.)

Error to District Court, Santa Fé County; before Justice John R. McFie.

Action by William P. Cunningham and others against Eugene A. Fiske. Judgment for defendant, and plaintiffs bring error. Affirmed.

A. B. Renahan, for plaintiffs in error. Eugene A. Fiske, pro se.

ABBOTT, J. This is an action in which the plaintiffs in error seek to recover from the defendant in error a portion of a reward which he, with others, offered, through a published notice, "for the discovery of all or any one of the parties concerned in the murder of Francisco Chaves, in the city of Santa Fé, on the night of May 29, 1892." The offer was made over the names of those who joined in it, and was of the sums set against their respective names. The complaint alleged that the plaintiffs on June 1, 1893, "discovered" certain persons, "one or all of them to have been the murderers of the said Francisco Chaves," and that on May 29,

1895, those persons were tried and convicted of said murder, and were duly executed April 2, 1897. May 28, 1898, the suit in question was begun. About five years later, and about a year after the answer had been filed, which, with other defenses, set up the statute of limitations, the plaintiffs asked leave to so amend their complaint that it should in effect allege the discovery on or about June 1, 1893, of "evidence which led them to believe" certain persons were the murderers of said Chaves, and that said persons were on May 29, 1895, determined by verdict and judgment of court to have been such murderers. The court below refused to permit amendment as requested, and that refusal is claimed by the plaintiffs to have been an abuse of the discretionary power over amendments, which it is not denied the court had at that stage of the case.

We are unable to perceive how the refusal to allow an amendment offered at so late a day, at such a stage of the proceedings, and for the purpose stated in the motion to amend, was an abuse of discretion. Obviously, it was intended by the proposed amendment to leave it open to the plaintiffs to claim that they "discovered" the murderers of Chaves only when they were convicted May 28, 1895, and thus carry forward the accruing of their cause of action to a time within four years of the date when they brought suit. But the offer of the reward was not for the discovery of evidence or information which should lead to the conviction of the murderers, but for the discovery of the murderers themselves. The use of such language may have been inadvertent, or it may well have been that those who offered the reward did not wish to impose a condition so difficult of performance as conviction often is. The language of the offer would justify the inference that they were willing upon the "discovery" of the murderers of the sheriff of the county to assume the burden of securing their punishment in some way. At all events, a conviction was not, we think, essential to acceptance of and compliance with the terms of their offer. That the plaintiffs had "discovered" the murderers might have been proved without evidence of a conviction, and even against evidence of a failure to convict, since that might result from causes entirely independent of the fact that the actual murderers were discovered and tried. The cause of action, therefore, accrued when the murderers were discovered, and that time the complaint alleges was June 1, 1893.

The plaintiffs further allege that the offer of the reward and its acceptance by their action made it a contract in writing, so that they had the right to bring suit at any time within six years from the time when the cause of action accrued. That proposition, we think, is not sustained by the authorities, and is not sound in principle. The plaintiffs

cite in support of it, *Ryer v. Stockwell*, 14 Cal. 134, 73 Am. Dec. 634, which does adopt that view, basing its decision, however, on cases which do not sustain it, but only hold that the acceptance of such an offer by performance according to its terms creates a valid contract, which unquestionably is the case. The opposite, and, as we hold, the true view of the law, is well expressed by Worden, J., in *Board of Commissioners of Marion County v. Shipley*, 77 Ind. 553: "A contract cannot be said to be in writing * * * so as to run 20 years, unless the parties thereto, as well as its entire terms and stipulations, can be gathered from the instrument itself or from some other written instrument referred to therein, without the aid of parol evidence to ascertain either. If parol evidence has to be resorted to in order to ascertain the parties to a contract or its terms, the reason for extending the period of limitation for 20 years fails; and, though the contract be partly in writing, yet, as it rests partly in parol, the 6-year period of limitations applies as well as if the contract had rested entirely in parol." That case, which explicitly overruled a former decision of the same court, has since been followed in that state in several cases which are referred to in *Hackleman v. Board of Co. Commissioners, etc.*, 94 Ind. 36. See, also, *Hulbert v. Atherton*, 59 Iowa, 91, 12 N. W. 780; *Loring v. City of Boston*, 7 Metc. (Mass.) 412.

Judgment of the district court affirmed.

MILLS, C. J., and PARKER and MANN, JJ., concur. McFIE, J., having decided this case, and POPE, J., having been of counsel, took no part in this decision.

(15 Okl. 564)

LITZ v. EXCHANGE BANK OF ALVA.
(Supreme Court of Oklahoma. Sept. 6, 1905.)

1. CHATTEL MORTGAGE—LIEN.

A mortgage does not convey title to the mortgaged property, but only creates a lien thereon.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 216.]

2. SAME—PAYMENT.

A mortgagor has the right to pay the indebtedness secured by the mortgage and extinguish the lien at any time before the property is sold by the mortgagee.

3. EXECUTORS AND ADMINISTRATORS—PERSONAL PROPERTY—POSSESSION.

Personal property of one who dies intestate passes to the heirs of such intestate, subject to the control of the probate court and to the possession of any administrator appointed by the court for the purposes of administration.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 270.]

4. SAME—DIVERSION OF ASSETS—ACTION BY ADMINISTRATOR.

Where a person or corporation, before the granting of letters of administration, sells or alienates any of the property of a decedent which is covered by a chattel mortgage, he, or

it, is chargeable therewith, and liable to an action by the administrator of the estate for double the value of the property so sold or alienated.

(Syllabus by the Court.)

Error from District Court, Woods County; before Justice J. L. Pancoast.

Action by James R. Litz, administrator of John R. Covey, against the Exchange Bank of Alva. Judgment for defendant, and plaintiff brings error. Reversed.

On April 15, 1895, John R. Covey executed and delivered his promissory note to the Exchange Bank of Alva in the sum of \$1,451.40 due 90 days after date, and to secure the payment thereof executed a chattel mortgage to said bank upon 147 head of cattle. On May 14, 1895, said John R. Covey was killed. On May 15, 1895, the bank proceeded to take possession of the cattle covered by said mortgage. On the 17th or 18th of May, 1895, the bank gave the statutory notice of the foreclosure of its mortgage, and on the 28th of May, 1895, the cattle covered by said mortgage were sold to one J. W. Maxey for \$632.10, being \$4.30 per head. On May 29, 1895, there was a special administrator appointed by the probate court of Woods county. The decedent, John R. Covey, died intestate. This action was instituted against the Exchange Bank of Alva by the administrator of the estate of John R. Covey to recover double the value of the property sold and alienated by the bank, the holder of said chattel mortgage, after the death of said Covey, and before a special or general administrator was appointed. The issues having been joined, the cause was submitted to the court without a jury upon the following agreed statement of facts:

"Agreed Statement of Facts. It is hereby stipulated and agreed by and between the parties to this action, by their respective attorneys, that the facts relevant to the issues herein are as follows: That one John R. Covey, of Woods county, Okl. T., did on April 15, 1895, execute and deliver his certain chattel mortgage to the Exchange Bank of Alva, Okl., a corporation, upon 147 head of native yearling steers branded $\frac{1}{2}$ on left hip, and 35 head of native yearling steers branded $\frac{1}{2}$ on left side, to secure the payment of a promissory note of even date therewith for \$1,451.40, due 90 days after date of said note; and that said note was made payable to the order of said the Exchange Bank of Alva. That John R. Covey was then the said owner of said cattle. That afterwards, on the 14th day of May, 1895, the said John R. Covey was killed. That on the succeeding day the cattle were scattered, and no person was in charge of them; and that at that time the conditions in the neighborhood, and in the locality in which the cattle described in said mortgage were then being held, were such as furnished reasonable grounds in the minds of the officers of the said the Exchange Bank of Alva that its security was liable to be, and was

being, impaired, and that there actually was danger of the security being impaired by the loss of the property, or a part thereof, described in said mortgage. That on the said 15th day of May, 1895, the said Exchange Bank of Alva took charge of all of said cattle that could then be found, and began active work to get all of the same together, and and succeeded during the following two weeks in finding 147 head of said cattle. That all the said cattle were taken possession of by the said the Alva Exchange Bank under and by virtue of the chattel mortgage heretofore mentioned, a copy of which is attached to the plaintiff's petition and also to defendant's answer, each being marked 'Exhibit A,' and that such copy is hereby made a part of this agreed statement of facts as fully as if hereto attached and made a part hereof. That the defendant, the Exchange Bank of Alva, at the time of taking possession of the property described herein, had a valid and subsisting mortgage thereon, and that the amount of money for which it was given to secure was wholly unpaid; and, by reason of the conditions herein mentioned, the said defendant, the Exchange Bank of Alva, had reasonable grounds to believe, and did believe in good faith, that its security was impaired and was in great danger of depreciation in the loss and removal of cattle therein described, unless it immediately took possession of said property. That afterwards, on the 17th or 18th day of May, 1895, the said defendant, the Exchange Bank of Alva, gave notice by posting notices of the sale of said cattle under said chattel mortgage in five public places in the county where the property was to be sold, which said notices contained the names of the mortgagor and mortgagee, the date of the mortgage, the nature of the default, and the amount claimed to be due thereon at the date of the notice, a description of the mortgaged property conforming substantially to that contained in the mortgage, the time and place of the sale, and the name of the agent and attorney foreclosing such mortgage, as provided by the laws of the territory of Oklahoma for the foreclosure of the chattel mortgages by advertisements; and that said notices were posted, as above set forth, 10 days before the time specified therein for such sale. That notices of the sale of said cattle at public auction were posted; one on the front and north of the United States Land Office on the public square in Alva, Okl. T.; one on the north and west end of Carter's livery barn on the east side of the public square in Alva; one on the south bridge crossing Eaglechief, south of Alva; one on the north bridge crossing the north fork of Eaglechief, south of Alva; and one notice on the front of the building used as the post office in the city of Alva, Okl.; and that each of said notices were duly posted more than 10 days prior to the date of the sale named therein. That on the 28th day of May, 1895, the 147 head

of said cattle heretofore described were sold at public sale by George T. Parry, the duly authorized agent of the defendant, the Exchange Bank of Alva, under and by virtue of the said chattel mortgage, to the highest and best bidder therefor, and at the time and place mentioned in the notices posted of said sale. That the said 147 head of cattle heretofore mentioned were sold to one J. W. Maxey for the sum of \$4.30 per head, and for the total sum of \$632.10, he the said J. W. Maxey being the highest and best bidder therefor; and that the possession of said cattle was then and there delivered to the purchaser, and that the cattle were immediately moved by the purchaser from Woods county, Okl. T., to Barber county, Kan., and have not since come into possession of the said estate or its administrator. That on the 29th day of May, 1895, there was appointed by the probate court of Woods county, Okl. T., a special administrator for said estate, one James R. Litz, the plaintiff herein, who immediately, on said 29th day of May, 1895, duly qualified as such special administrator by taking the oath of office and giving the bond required therefor. The said administrator, James R. Litz, did on the 29th day of May, 1895, demand possession of the said cattle from the said purchaser, J. W. Maxey, which said demand was then and there refused. That neither the special administrator of said estate nor the general administrator therefor, afterwards appointed on the 27th day of July, 1895, ever received possession of said cattle. That the plaintiff herein, James R. Litz, was and is the duly appointed administrator of the estate of John R. Covey, deceased, and has been such administrator at all times since the 27th day of July, 1895. That it is further agreed that the deposition of George T. Parry, now on file in the office of the clerk of the district court of Woods county, may be read, in so far as it relates to the foreclosure and sale of the property described in the mortgage from John R. Covey, deceased, to the Exchange Bank of Alva, and the conditions then surrounding the property described in said mortgage, the same as if the statements therein made were fully written and embodied in this stipulation. That no administrator of said estate, either special or general, was appointed prior to May 29, 1895; and that the plaintiff herein, James R. Litz, held his trust as special administrator until his appointment as general administrator on July 27, 1895. That the decedent, John R. Covey, died intestate. That the value of the 147 head of cattle hereinbefore mentioned at the time and place where sold was \$12 per head."

The court found the issues in favor of the defendant, and against the plaintiff. Motion for new trial was duly filed and overruled, and exceptions saved; and the plaintiff brings the case here, on case-made, for review.

H. A. Noah, for plaintiff in error. T. J. Womack and Strang & Devereux, for defendant in error.

HAINER, J. (after stating the facts). The question presented to this court is whether or not the holder of a chattel mortgage, who in good faith deems himself insecure, after the death of the mortgagor, who dies intestate, before the debt is due, and prior to the appointment of an administrator, either special or general, can take possession of and sell the property covered by said mortgage.

This action is based upon section 1603, Wilson's Rev. & Ann. St. Okl. 1903, which provides as follows: "If any person before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels or effects of a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate, for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate." Section 6894 of the same statutes, in regard to the disposition of the property of a decedent who dies intestate, provides as follows: "The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court for the purpose of administration." Under the provisions of our statute, a mortgage does not convey title to the property mortgaged, but only creates a lien thereon. Hence a mortgagor has the undoubted right to pay the indebtedness and thereby extinguish the lien at any time before the property is sold by the mortgagee. One of the objects of the statutory notice of 10 days, which is required to be given in case the mortgagee attempts to foreclose his mortgage, is to give the mortgagor an opportunity to pay the indebtedness and thereby extinguish the lien upon the property. It will thus be seen that, under the provisions of our statute in regard to the descent of property of a decedent who dies intestate, the personal property, as well as the real estate, passes to the heirs of the intestate, subject to the control of the probate court, and thence to the possession of the administrator appointed by the court, for the purposes of administration. Hence the right to the possession of personal property between the time of the death of the intestate and the granting of letters of administration is by operation of law suspended and held in abeyance. In 11 Am. & Eng. Encyc. of Law (2d Ed.) p. 985, the rule is thus stated: "The title of an administrator, on the other hand, is derived solely from the court by which his letters are granted, and therefore his title to the decedent's estate does not vest until the letters are granted." And on the following page, in a note, this doctrine is announced: "Between the death of the intestate and the granting of letters, the legal

title to personal property of the intestate is suspended and vested in no one." See authorities there cited.

In the case at bar the mortgagee proceeded to take possession of the property covered by the chattel mortgage the day following the death of the mortgagor, who died intestate on the 14th day of May, 1895, and on the 17th day of May the mortgagee proceeded to advertise the property for sale, and sold the property on the 28th day of May, 1895, before a special or general administrator had been appointed, and before any application for appointment had been made. But, since the property of a decedent passed the moment of his death to the heirs, subject to the control of the probate court, the right of the mortgagee to foreclose and sell the property was suspended and held in abeyance until a special or general administrator was appointed by the probate court; and any attempt to sell or alienate the property during that period was a wrongful intermeddling with the property of the intestate. 22 Cent. Dig. 3549. It is true that by the agreed statement of facts it is admitted that the mortgagee "had reasonable grounds to believe, and did believe in good faith, that its security was impaired and was in great danger of depreciation in the loss and removal of cattle therein described, unless it immediately took possession of said property." But this fact would not warrant the mortgagee in advertising and selling the property before a special or general administrator was appointed. Under the strict provisions of the common law, any intermeddling with the possession of the property, however slight, was wrongful, and the person so intermeddling was known as an executor de son tort. But this strict doctrine of the common law has been relaxed by modern authorities, and by virtue of the statutes of most of the states; and we think the rule has been modified in this territory. A mortgagee, if he has reasonable grounds to apprehend, and in good faith believes, that the security is about to be lost or materially impaired, has a right to take possession of the property for the purpose of preserving it, but has no right to sell or alienate the same until a special or general administrator has been appointed, whose duty it is to protect the interests and rights of the estate. We think the manifest purpose of the act of the Legislature, which provides that if any person, before the granting of letters testamentary or of administration, alienates any of the moneys, goods, chattels, or effects of a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate for double the value of the property so alienated, was to prohibit the doing of just such acts as are alleged to have been committed in this action. In other words, from the agreed statement of facts in this case, we think the defendant comes clearly within the letter and spirit of said act.

We have examined the doctrine as an-

nounced by the Supreme Court of Iowa in the case of *Cocke v. Montgomery*, 39 N. W. 386, and the other authorities cited by counsel for defendant in error. In these cases the question under consideration was whether or not the claim should be presented to the administrator before the mortgagee had a right to foreclose his mortgage; and it was there held that it was not necessary to present the claim to the administrator, on the theory that the mortgagor's contract did not terminate with his death, and that there was no provision of the statute which required a mortgagee of chattels to file his claim and await the slow process of administration to adjust priorities and determine his rights; and that if the foreclosure was wrongful, or the debt had been paid, the administrator had ample authority for protecting the estate by injunction, or other appropriate action. In all these cases cited by counsel it appears that an administrator had been appointed, and the sole question was whether or not it was necessary to present the claim to the administrator, and whether a person who had an interest in the estate was a wrongdoer and intermeddler from the mere fact of taking possession of the property in good faith for the purpose of preserving the same. We think there is no conflict between the authorities cited and the doctrine announced herein. Manifestly, the contract of the mortgagor does not terminate with his death; but by operation of law it is suspended and held in abeyance until an administrator is appointed.

Our conclusion, then, is that the court below erred in holding that, prior to the appointment of a special or general administrator, the mortgagee had the power and authority to sell or alienate the property.

For the reasons herein stated, the judgment of the district court is reversed, and the cause remanded with directions to grant a new trial.

PANCOAST, J., who presided in the court below, not sitting. All the other Justices concurring.

NATIONAL CASH REGISTER CO. v. PAULSON.

(Supreme Court of Oklahoma. Sept. 7, 1905.)

SALES—CONDITIONAL SALES—RECORD—FOREIGN CONTRACT.

Where property in the hands of a vendee, the title to which is in a vendor by reason of a conditional sale in the state of Arkansas, is removed to the territory of Oklahoma, the vendor consenting to the retention in Oklahoma by the vendee of such property, and the conditional sale notes are so changed as to make them Oklahoma obligations, payable in Oklahoma, such transaction brings the property and rights of the parties within and under the jurisdiction of the laws of Oklahoma, and a failure on the part of the vendor to record his reservation of title in Oklahoma, as re-

quired by its laws, bars him from a recovery thereof in the hands of an innocent purchaser for value.

(Syllabus by the Court.)

Error from District Court, Canadian County; before Justice C. F. Irwin.

Action by the National Cash Register Company against Hans Paulson. Judgment for defendant, and plaintiff brings error. Affirmed.

This is an action of replevin commenced in the probate court of Canadian county to recover a cash register valued at \$150, the petition therein reading as follows: "Plaintiff alleges: That at all times hereinafter mentioned it was a corporation duly organized and existing under the laws of the state of Ohio. That it has a special ownership in and is entitled to the immediate possession of the following described personal property, to wit: One No. 47 total adding national cash register (239,791), name place 'Thomas Sanders,' of the value of one hundred fifty (\$150.00) dollars. That plaintiff's special ownership consists in that on the 1st day of July, 1901, in Little Rock, Arkansas, plaintiff sold and delivered to the said Thomas Sanders at his special instance and request the above named and described cash register for the sum of one hundred seventy-five (\$175.00) dollars, under a conditional sale whereby the plaintiff retained the title until the purchase price should be paid in full. That thereafter and before said purchase price was paid, the said Thomas Sanders, without the knowledge or consent of plaintiff, wrongfully took the said cash register out of the state of Arkansas, and brought the same to El Reno in Canadian county, Oklahoma, and before plaintiff knew the same had been removed from the state of Arkansas, wrongfully disposed of the same. That under the laws of the state of Arkansas a conditional sale of personal property, wherein title is retained by the seller, is valid not only between the parties thereto, but as to innocent purchasers as well; and the laws of the state of Arkansas at the time this contract was made did not require that the contract itself, or a copy thereof, should be recorded in any of the public offices thereof, and such continued to be the law to the time of the bringing of this action. That there is due plaintiff on said register the sum of eighty-five dollars (\$85.00). The defendant herein has purchased the same from Thomas Sanders, or his vendees, and that though demanded has refused and still refuses to surrender the said cash register, and unlawfully detains the same from plaintiff, from the 15th day of September, 1902, to his damage \$25.00. Wherefore plaintiff prays judgment against the defendant that the defendant do return to plaintiff the said cash register so unlawfully detained and for the sum of \$25.00, his damages as aforesaid, and costs of this action." The writ was issued

as prayed for, and upon service of the same defendant gave a redelivery bond and retained possession of the property, and thereafter in due time filed his answer in said cause, which, omitting caption, is as follows: "Comes now the defendant in the above-entitled cause and answering plaintiff's petition on file herein says: Defendant admits the corporate existence of plaintiff as alleged. Defendant further admits the execution and delivery of the contract and notes referred to in said petition. Defendant denies each and every allegation of plaintiff's said petition not hereinbefore specifically admitted."

The cause was tried to the court without a jury, and that court rendered and entered judgment therein in favor of the defendant and against the plaintiff, for the costs therein. Thereupon the plaintiff in due time appealed said cause to the district court of said county, where, at the February, 1904, term of said court the cause again came regularly on for trial. A jury was waived, and the cause was presented to the court below upon the following stipulated facts: "It is hereby stipulated and agreed by and between Blake and Blake, attorneys for plaintiff herein, and Forrest and Smith, attorneys for defendant herein: That the above numbered and entitled cause be submitted for the consideration and judgment of the court, upon the following agreed statement of facts: That the cash register in question, No. 239,791, was purchased from plaintiff herein by Thomas Sanders at Little Rock, Arkansas, on July 1, 1901, for the agreed price of one hundred and seventy-five dollars (\$75.00). That Sanders paid thirty dollars (\$30.00) cash and executed notes payable every thirty days for twenty dollars (\$20.00) each, for the balance of said purchase price, and signed a conditional sale contract whereby the title to said cash register was reserved in the vendor until the purchase price was paid in full. That it was contracted and agreed in writing by and between plaintiff herein and Thomas Sanders that said register was to be placed and used on the front counter of Sanders' restaurant in the city of Little Rock, Arkansas. That a part of said price and notes were paid to plaintiff while Thomas Sanders remained in Little Rock, Arkansas. That without the knowledge or consent of plaintiff herein, Thomas Sanders removed the said cash register from Little Rock, Arkansas, to El Reno, Oklahoma. That after the removal of said cash register to El Reno, Oklahoma, plaintiff learned of its removal to El Reno, Oklahoma, and consented that the same might be retained by Sanders and used in his place of business in El Reno, Oklahoma, and changed the place of making said notes from Little Rock to El Reno, Okl. Ter.; and thereafter plaintiff collected from said Sanders one of the above-mentioned notes for the purchase price of said register, at El Reno, Okl. Ter. That Frank Shull was employed by Thomas Sanders as bartender in Sanders'

saloon in El Reno, Oklahoma, and knew Sanders paid twenty dollars (\$20.00) to the agent of plaintiff for said cash register. That said Frank Shull did not know that there was an unpaid balance due on said purchase price, but believed the representations of Sanders that the National Cash Register Company had been paid in full and that his title to said register was clear. That Shull, before purchasing said register from Sanders, examined the records in the office of the register of deeds of Canadian county, Oklahoma, for the purpose of ascertaining if any conditional sale contract or other evidence of title or equities or incumbrances were recorded against said cash register, and found nothing against said register on the records of Canadian county. That said Frank Shull thereafter purchased said cash register from said Thomas Sanders for a valuable consideration and without any knowledge of plaintiff's interest therein. That no further payments were ever made to the plaintiff herein by Thomas Sanders or his vendee. That shortly afterwards said Frank Shull sold said cash register to the defendant herein for a valuable consideration, and this defendant had no knowledge whatever of the claim or demand of the plaintiff in said register. That said conditional sale contract between plaintiff and Sanders was never recorded in Canadian county, Oklahoma Territory, by plaintiff after learning of the removal of said cash register from Little Rock, Ark., to El Reno, or at any time whatsoever. That there is a balance due this plaintiff on the purchase price of said cash register of eighty-five dollars (\$85.00), and was at the date of the sale by Sanders to Shull, evidenced by four promissory notes signed by Thomas Sanders and dated, Little Rock, Ark., July 1, 1901. That prior to the commencement of this action, the said four notes and conditional sale contract were duly presented to Frank Shull, the vendee of Thomas Sanders, and payment demanded or the return of the cash register. That payment of the same or the return of cash register were refused by said Frank Shull. That after the sale of said cash register to Hans Paulson the defendant by Frank Shull, the duly authorized agent of plaintiff, presented said notes and conditional sale contract to Hans Paulson and demanded payment of the notes or the return of the cash register, which payment and demand for the cash register were by Paulson refused. That the value of said register at the commencement of this action was one hundred fifty dollars (\$150.00). That after demand and refusal this plaintiff replevied said National cash register from the defendant by virtue of title reserved in said conditional contract. That, when defendant was served with writ of replevin in said action, he gave a redelivery bond to the sheriff of this county and retained possession of said cash register. That the trial was had in said action of replevin in probate court of

Canadian county, Oklahoma. Evidence was submitted by both parties and the judgment of the court was "that the defendant have judgment adjudging him to have title to the cash register sought to be recovered by the plaintiff in this action and for costs herein taxed at \$13.40." That thereafter said action was brought to the district court on appeal by plaintiff from the judgment of said probate court."

Thereafter the court rendered and entered judgment therein as follows, to wit: "Now on this 11th day of April, 1904, the same being one of the regular judicial days of the February adjourned term, 1904, the above-entitled cause came on for trial, the court having taken the same under advisement on the agreed statement of facts and briefs of counsel, the court having fully considered the same finds for the defendant, that he was entitled to the possession of the said cash register at the time of the institution of this action, October 17, 1902, and that the plaintiff pay the cost of this action taxed at _____ dollars." From the foregoing judgment of the district court the case comes to this court upon error.

C. O. Blake and E. E. Blake, for plaintiff in error. R. B. Forrest, for defendant in error.

GILLETTE, J. (after stating the facts). It is manifest from the foregoing record that but a single question is presented to this court for determination, viz.: Are the rights of the parties to this controversy to be governed and determined by the law of the territory of Oklahoma or by that of the state of Arkansas? Under the statement of facts above set out there can be no question but that this was originally an Arkansas contract, made and to be performed in the state of Arkansas. In Clark on Contracts, p. 610 et seq., it is said: "A contract may be discharged by the substitution of a new contract"; and this results "where new terms are agreed upon, in which case a new contract results, consisting of the new terms and of the terms of the old contract which are consistent with them." Upon the removal of the property in question to El Reno, Okl. Ter., a new arrangement was entered into between the parties, which is evidenced in the statement of facts in the following words: "That after removal of said cash register from Little Rock, Arkansas, to El Reno, Oklahoma, plaintiff learned of its removal to El Reno, and consented that the same might be retained by Sanders and used in his place of business in El Reno, Oklahoma, and changed the place of making said notes from Little Rock to El Reno, O. T.; and thereafter plaintiff collected from said Sanders one of the above-mentioned notes for the purchase price of said register, at El Reno, O. T. If this language means anything it means that the notes then re-

maining unpaid were made at El Reno to be paid at El Reno, O. T. Plaintiff in error admits this in his brief, but urges that there was a contract left back at Little Rock, Ark., which was not affected by this change in the place of making the notes. If this contention be conceded, we do not perceive how the situation is altered or the plaintiff benefited thereby. At the utmost this would only show a contract made in Arkansas to be performed in Oklahoma, which under our own statute would be an Oklahoma contract. Wilson's Rev. & Ann. St. 1903, vol. 1, p. 315, § 797. But we are not inclined to consider that there was any contract left in Arkansas not affected by the new agreement in reference to the notes. There was but one contract, and the terms of that were printed upon and made a part of the notes which were made at El Reno to be paid at El Reno. Clearly so far as the notes were concerned or any contract connected with them at the time of bringing this action, it was an Oklahoma transaction and governed by the provisions of our statute, viz.: "That any and all instruments in writing, or promissory notes now in existence or hereafter executed, evidencing the conditional sale of personal property, and that retains the title to the same in the vendor until the purchase price is paid in full, shall be void as against innocent purchaser, or the creditors of the vendee, unless the original instrument, or a true copy thereof, shall have been deposited in the office of the register of deeds in and for the county wherein the property shall be kept, and when so deposited, shall be subject to the law applicable to the filing of chattel mortgages; and any conditional verbal sale of personal property, reserving to the vendor any title in the property sold, shall be void as to creditors and innocent purchasers for value." Wilson's Rev. & Ann. St. 1903, § 4179.

Had this statute been heeded, this action would never have arisen. The case of the Greenville National Bank v. Evans-Snyder Buel Co., 60 Pac. 249, is not applicable to the facts in this case nor are the views herein expressed in conflict with that case. The note was then an Arkansas contract pure and simple, and under the comity of states would have been enforced in this territory. But when it entered into the new arrangement at El Reno, O. T., and changed the place of making and place of payment of the notes, it thereby substituted the new contract in place of the old one, and thereafter the transaction was as purely an Oklahoma contract, as if there had never been any other. For the same reason, the case of Bennett Bros. v. Tam, 62 Pac. 708, a Montana case cited by plaintiff, is not applicable to the facts as stipulated in this case.

We find no error in the record, and the judgment of the court below will be affirmed. All the Justices concurring, except IRWIN, J., who tried the case below, not sitting.

LINDERMAN v. NOLAN.

(Supreme Court of Oklahoma. Sept. 11, 1905.)

1. APPEAL—REVIEW—VERDICT—NEW TRIAL.

It is the duty of a trial judge to set aside the verdict of a jury unless he is satisfied that substantial justice has been done. An appellate court should not set aside a verdict unless it is manifest that injustice has been done.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 19.]

2. SAME—GRANT OF NEW TRIAL.

Where a trial has been had in the district court and a verdict returned in favor of the defendant, and the court, on motion of the plaintiff, grants a new trial, to which ruling the defendant excepts, the defendant may either appeal to the Supreme Court at once, without waiting for the result of the second trial, or he may participate in the second trial, and if the judgment is adverse to him appeal from the final judgment, and, if one year has not elapsed from the time the first motion for new trial was granted, he may include in his petition in error the assignment that the trial court erred in granting the first new trial, and have reviewed the question as to whether the action of the trial court in granting such new trial was erroneous.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 740-748; vol. 3, Cent. Dig. Appeal and Error, §§ 3461, 3486.]

3. SAME.

The Supreme Court will not reverse the order of the trial court granting a new trial, unless the Supreme Court can see beyond all reasonable doubt that the trial court has manifestly and materially erred with respect to some pure, simple, and unmixed question of law, and that, except for such error, the ruling of the trial court would not have been made as it was made, and that it ought not to have been so made.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3862.]

4. TRIAL — ORDER OF TRIAL — ABSENCE OF COUNSEL.

The statute prescribing the order of trial for cases upon the trial calendar is not mandatory, but vests large discretion in the trial court to dispose of the causes in such order as will the most economically and speedily dispose of the business before the court. While courts ordinarily, through courtesy, will call counsel when their cases are reached for trial, such is not a duty, and it is no abuse of discretion to proceed to trial with a cause when it is reached for trial in the absence of one of the parties or his counsel, where no postponement has been granted or permission given to be absent.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 34, 35, 39.]

(Syllabus by the Court.)

Error from District Court, Noble County; before Justice Bayard T. Hainer.

Action by J. T. Nolan against C. J. Linderman. Judgment for plaintiff. Defendant brings error. Affirmed.

H. A. Johnson, for plaintiff in error. H. B. Martin, Chas. R. Bostick, Jr., and Green & Martin, for defendant in error.

BURFORD, C. J. The plaintiff in error, C. J. Linderman, was sued in the district court of Noble county by the defendant in error, John T. Nolan, upon three several promissory notes, of the aggregate face value

of \$198.79, executed by Linderman to Nolan. The answer alleged partial failure of consideration, and also that the notes had been materially altered after their execution and delivery. The cause was tried to a jury on April 18, 1903, and verdict returned and judgment rendered in favor of the defendant. The court, on motion of the plaintiff, granted a new trial. The defendant excepted to the order granting a new trial, and asked and was granted time to make and serve a case. Before the expiration of the time last granted he applied for an extension of the time upon the ground that the court stenographer had been unable to transcribe the notes of the trial. The court denied this application, and no case was served or settled and no appeal was perfected. The cause was regularly assigned for trial at the succeeding term of court, and was reached on December 18, 1903. When the cause was called for trial, the defendant and his counsel were absent from the courtroom, and the court proceeded in their absence. A jury was impaneled, the plaintiff's testimony introduced, the jury instructed, and verdict returned in favor of the plaintiff for the full amount of the principal and interest of the several notes. When the jury were retiring to consider of their verdict, the attorney for defendant appeared in court and requested to have the jury recalled, and trial reopened, and that he be permitted to introduce his testimony. This request was by the court denied, and judgment was afterward rendered upon the verdict. The defendant below brings the case to this court for review.

The first contention is that the trial court erred in refusing him an extension of time within which to make and serve his case. We do not deem this question to be of any importance. The only question the plaintiff in error could have presented for review, had he been enabled to perfect the case-made, was the order of the court granting a new trial. If any prejudicial error was committed by that action of the court, it may be reviewed in this case, and all the rights of plaintiff in error have been preserved. The case-made contains all the proceedings had and evidence introduced on the first trial, and the petition in error specifically alleges, as one of the assignments of error, that the trial court erred in granting the new trial, and with this state of the record the plaintiff in error has lost no rights by the failure of the judge to extend the time for making a case. Counsel has failed to make it apparent to this court that the trial court erred in sustaining the motion for new trial. The motion was upon two grounds, one of which was "because said verdict is contrary to the evidence," which is equivalent to the statutory ground for new trial, "that the verdict is not sustained by sufficient evidence." The alleged alterations of the notes was a controverted question of fact, and the evidence was conflicting. The verdict of the jury was for the defendant.

Unless this met the approval and concurrence of the trial judge, it was his duty to set it aside and order a new trial. Appellate courts will, in the absence of an affirmative showing that the trial court was wrong, presume that it acted correctly. Where the evidence is conflicting upon a material question, and the trial court sets aside the verdict of the jury, this court will not interfere. The rule in such cases is the reverse in the trial court to what it is in the appellate court. The trial court should set aside the verdict of a jury unless it is satisfied that substantial justice has been done. The appellate court should not set aside a verdict of a jury unless it is manifest that injustice has been done. Nothing appearing to show that the trial court committed any error in setting aside the first verdict, the plaintiff in error has lost no rights by his failure to appeal from that order. Mr. Justice Valentine, of the Kansas Supreme Court, in the case of the City of Sedan v. Church, 29 Kan. 190, in discussing the rights of parties under the statutes which we afterwards adopted and which permits an appeal from an order granting a new trial, very appropriately said: "Trial courts are invested with a very large and extended discretion in the granting of new trials, and new trials ought to be granted whenever in the opinion of the trial court the party asking for the new trial has not in all probability obtained or received substantial justice, although it might be difficult for the trial court or the parties to state the grounds for such new trial upon paper so plainly that the Supreme Court could understand them as well as the trial court, and the parties themselves understood them. And generally where the trial court grants a new trial to one party it would be best for the other party, if he supposes he has a reasonably good case, to rely upon the new trial and the verdict or finding to be obtained at the new trial, in preference to immediately taking the case to the Supreme Court; for unless the Supreme Court can see beyond all reasonable doubt that the trial court has manifestly and materially erred with reference to some pure, simple, and unmingled question of law, and that, except for such error, the ruling of the trial court would not have been made as it was made, and that it ought not to have been so made, the Supreme Court will not reverse the order of the trial court granting the new trial. * * * The Supreme Court will very seldom and very reluctantly reverse a decision or order of the trial court which grants a new trial. A much stronger case for reversal must be made where the new trial is granted than where it is refused."

The next contention is that the trial court erred in taking the case up and proceeding to trial in the absence of the defendant and his counsel. The plaintiff in error supported his motion for new trial by the affidavit of his counsel, from which it appears that two or three other cases were on the calendar for

trial on the day this case was tried, and were ahead of this case in their order, and that the court, without notice to him, skipped two of these cases and called the case at bar; and his contention is that it was an irregularity in the proceedings and abuse of discretion by which he was prevented from having a fair trial. In support of his position, he cites section 4204, St. 1893: "The trial of an issue of fact and the assessment of damages in any case shall be in the order in which they are placed on the trial docket, unless by the consent of the parties or the order of the court they are continued or placed at the heel of the docket, unless the court in its discretion shall otherwise direct. The court may in its discretion, hear at any time a motion, and may by rule prescribe the time for hearing motions." This statute simply prescribes an order of business, and leaves the whole matter subject to the discretion of the court. Its provisions are not intended to be mandatory, and the trial court is vested with full power within its discretion to try causes in such order as it shall direct, having in view the best interests of the public and the economical and speedy dispatch of the business before the court.

The defendant in the case at bar knew his case was upon the calendar for trial that day. He knew it was liable to be called at any time one of the other cases were not on trial. The ones preceding his might be continued, judgment rendered pro forma by agreement, dismissed or passed by consent of parties, all of which might be done in a moment's time. It was his duty to be in court and remain there until his case was called, unless excused by the court. It is the usual and customary practice for counsel in causes on call to either remain in court or to get leave of absence from the court either for a definite time or until called. The defendant in this case offers no reasonable excuse for his absence. His counsel had been in court and left without asking to be excused or procuring permission. He was a business man, engaged in commercial business within three blocks of the courthouse. His business at the store was more important to him than his case in court, and he remained at his store. His counsel left the courtroom without calling the attention of the court to his purpose and went to notify his client to be prepared to leave his store when called, all of which shows that it was their purpose to let the public business await their convenience, and give them time to get ready after the case was reached in its order. While courts do frequently, and we may say do ordinarily, have counsel notified or called when a case is reached for trial, this is done as a courtesy, and not as a duty, and it is no abuse of discretion for a trial court to call a case which stands on the day's calendar for trial and proceed with the trial, even though the defendant or his counsel is absent, where no request is made to postpone the

cause and no permission to be absent has been given by the court.

We find no prejudicial error in the record. The judgment of the district court is affirmed, at the costs of the plaintiff in error. All the Justices concur, except HAINER, J., who tried the cause below, not sitting.

WHITE et al. v. MADISON.

(Supreme Court of Oklahoma. Sept. 7, 1905.)

1. NEW TRIAL—MOTION FOR—WHAT ERRORS NOT RAISED BY.

Where an action upon an official bond has been once tried to a jury, and the verdict of the jury has been set aside by the court, and thereafter the pleadings in the cause have been amended and the cause retried, resulting in judgment against the officer and his bondsmen, a motion for a new trial, which does not refer to errors arising upon the first trial, or error of the court in setting aside the first verdict, does not, when overruled, reserve for the determination of this court any question of error not arising upon the last trial.

2. TRIAL—INSTRUCTIONS—TECHNICAL WORDS—DEFINING TO JURY.

Technical words used in an instruction need not be defined in such instructions, if the same as used are in the instructions as a whole made definite and intelligible to the jury.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 489.]

3. SAME—SPECIAL FINDINGS—WHEN WILL NOT CONTROL GENERAL VERDICT.

Where, in the trial of a cause, a general verdict is returned by the jury, together with special findings of fact in answer to interrogatories, such general verdict must stand, unless the special facts found are sufficient to negative the jury's right to return such general verdict.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 857-860.]

(Syllabus by the Court.)

Error from District Court, Garfield County; before Justice James K. Beauchamp.

Action by John C. Madison against W. E. White and others. Judgment for plaintiff. Defendants bring error. Affirmed.

This is an action to recover damages for an unlawful arrest and imprisonment, brought against the city marshal of the city of Enid and his sureties on his official bond. Verdict and judgment for the plaintiff. Defendant appeals. It appears that on the 7th day of August, 1901, the defendant W. E. White was the duly elected, qualified, and acting marshal of the city of Enid, Garfield county, O. T., and that C. B. Utsler and P. J. Goulding were the sureties on his official bond. It also appears that said bond provided for the discharge of the duties of his office by said marshal "without fear or favor, fraud or oppression." The petition charged defendant White with having on the 7th day of August, 1901, "unfaithfully to the duties of his office, oppressively, wrongfully, and illegally arrested and imprisoned plaintiff in the city prison of the city of Enid." The answer admits the arrest and imprisonment, but denies that it was wrongful or oppressive. Upon this issue the cause

was tried to a jury at the December, 1902, term, and a verdict returned in the following form, omitting the entitling of the cause: "We, the jury impaneled and sworn to try the issues in the above-entitled cause, do, upon our oaths, find for the plaintiff and against the defendant W. E. White in the sum of \$500." Motion by defendants to vacate and set aside the verdict returned by the jury, and to render judgment in favor of defendants, because, under the issues in said cause, the failure of the jury to return a verdict against all of the defendants is a release of all under the law. Later the defendant White filed his separate motion to set aside the verdict upon the ground that it was void; the allegation sued upon being joint, and the verdict not being a verdict against all the defendants. The first of said motions was overruled, to which defendants excepted, but the latter was sustained by the court, and the verdict set aside; and the plaintiff, having asked leave to file an amended petition, was given 30 days in which to file the same. Plaintiff having filed his amended petition, defendants demurred thereto, and, the demurrer being overruled, answered in substance and effect as in the former petition. At the April term, 1903, the case again came on for trial before a jury, and at the conclusion of the evidence the court instructed the jury, and thereafter the jury returned their verdict into court in the words and figures following: "We, the jury impaneled and sworn to try the issues in the above-entitled cause, do, upon our oaths, find for the plaintiff in the sum of \$500." Special questions were also submitted to and answered by the jury. The evidence was somewhat conflicting as to the circumstances of the arrest, and the occasion or excuse therefor, but it is not claimed that defendant in error was in fact guilty of any offense, or that any charge or complaint was ever filed against him, either before or after his arrest. After being kept in a filthy prison overnight, he was told by the plaintiff in error White to go. At the conclusion of the second trial, judgment was entered upon the verdict in that case rendered, and thereupon plaintiffs in error move the court for a new trial, which motion is as follows (omitting the title): "Come now the defendants and move the court to grant a new trial in the above cause for the following reasons, to wit: First. Misconduct of the jury. Second. That the verdict is not sustained by sufficient evidence. Third. That the verdict is contrary to law. Fourth. For errors of law occurring during the trial, and excepted to at the time by defendants." Which motion, having been heard and considered by the court, was overruled, and exceptions allowed.

Robberts & Curran, for plaintiffs in error. Moore & Moore, for defendant in error.

GILLETTE, J. (after stating the facts). No questions of error are presented by the record in this case, except such as arise upon the overruling of a motion for a new trial, and the motion for a new trial relates exclusively to errors arising upon the final trial, resulting in a judgment against the defendants jointly.

The first four assignments of error presented in the brief for the plaintiffs in error relate exclusively to questions of error arising upon the first trial of the case. The action as originally brought against the three defendants was upon a joint obligation. At the conclusion of the first trial, the jury returned a verdict against one of the defendants, making no reference whatever to the other two. The defendants, upon the return of such verdict, moved the court for judgment in their favor, for the reason, the obligation sued on being joint, the release of one was the release of all, and that the two not found against were released by the verdict, and their release operated to nullify the verdict against the other. This motion was overruled by the court. We are of the opinion that there was no error in the ruling of the court in this respect as to the two defendants not found against in the verdict. The fact that there was no verdict as to them, either for or against, made the proceeding a mistrial, so far as they were concerned, and they were not, because of this fact, entitled to a judgment in their favor.

Upon the overruling of the motion for judgment in favor of defendants, the defendant White, against whom the verdict was rendered, moved the court for an order vacating the judgment against him. This motion the court sustained, and set the verdict aside. As the case then stood, there was no verdict upon which judgment could be rendered, either for or against either of the defendants. The verdict against defendant White was erroneous under the issue framed, and was rightfully set aside upon his motion. The want of verdict against the other two defendants, either for or against them, left the case standing without conclusion by the jury, upon which the court could enter judgment, making final disposition of the case. A new trial was therefore necessary in the cause, in order that the rights of the parties might be finally and lawfully disposed of by judgment. The order of the court, therefore, overruling the motion of defendants for judgment in their favor, and the order of the court setting aside the verdict against defendant White, and the further order of the court thereafter allowing the plaintiff to amend his petition and setting the case for retrial, when the issues upon such amended petition were joined, were not erroneous, and must be upheld.

Complaint is made of the instructions to the jury, especially the second, wherein the court charged the jury: "And if you should

find from the evidence that defendant White unlawfully and oppressively arrested the plaintiff in the nighttime, and confined him in the city jail, then you should find for the plaintiff, and against all the defendants, in the sum of actual damages which the plaintiff suffered." The objection made to this instruction is that it does not define what constitutes an unlawful and oppressive arrest.

In the third instruction the jury are informed by the court under what circumstances an arrest without a warrant may be made, and in the fourth instruction, at the request of the defendant, an arrest in an oppressive manner is defined. The instruction complained of, when considered in connection with the third and fourth instructions given, presents no reversible error in this case.

The fifth contention is that the court should have rendered judgment for the plaintiffs in error upon the answers of the jury to the special questions submitted to them, and particularly the answers to questions Nos. 2, 3, 4, and 5, which are as follows: "Q. 2. Is the witness Walter Billings a credible person? A. Yes; but not a credible witness in this case. Q. 3. Did the witness Walter Billings inform the defendant that an attempt had been made to pick his pocket? A. Yes. Q. 4. Did the witness Billings point out the plaintiff to the defendant as the person who attempted to pick his pocket? A. We don't know. Q. 5. Did defendant White have reasonable ground to suppose that the plaintiff had committed the offense? A. The informant never identified the plaintiff as the person." The jury returned a general verdict in favor of plaintiff for \$500 damages, accompanied by the special findings of fact in answer to interrogatories, among them those above stated. By the general verdict all of the issues were determined against the defendants, and such verdict must stand, unless the special facts found are sufficient to negative the jury's right to return such general verdict. The verdict of the jury authorized judgment against defendants for the false imprisonment of the plaintiff. By the special questions of fact it was sought to be shown that the arrest and imprisonment were justified, which fact, if established, would overthrow the general verdict. An examination of the special questions, and the answers of the jury thereto above set forth, shows that no fact is established by them, except that the witness Billings informed the marshal, White, that an attempt had been made to pick his pocket. There is nothing shown by such questions and answers which establish the fact that the arrest and imprisonment was justified upon information of the witness Billings, and as this was the only attempt at justification which is now relied upon by plaintiffs in error, it must be held to have failed, for it is certainly insufficient

to justify the court in disturbing the general verdict.

The sixth ground of error presented complaints of the judgment of the court in overruling the motion for a new trial because of misconduct of the jury, and is in substance that before the case was submitted to the jury some of the jurors talked about the merits of the case to each other, and expressed their opinion prejudicial to the rights of the defendant. This question was tried to the court and testimony taken, at the conclusion of which the court overruled the motion for a new trial on that ground. The testimony passed upon by the court in this ruling is preserved in the record. We have examined such testimony, and find that the conclusions of the court below are fully justified by it. Nothing is shown to have been stated with reference to the merits of the case. It appears that one of the jurors made the remark: "We are tied up again for the night." Another replied: "If they are all of my opinion, it will be quickly settled." It appears, further, that the bailiff permitted a man by the name of Swigart to inquire of one of the jurors with reference to the residence of some person not on the jury, and another juror was permitted to say to his daughter that he could not go home with them that night. From this no prejudicial error could have arisen justifying a reversal of this case.

Finding no error in the record, the judgment of the court below must be affirmed, with costs. All of the Justices concurring, except BEAUCHAMP, J., who presided in the trial court.

ELLIS et al. v. WITMER et al.

(L. A. 1,487, 1,488.)

(Supreme Court of California. Jan. 24, 1906.)

1. APPEAL — REMANDING CASE FOR NEW TRIAL — ALLOWANCE OF AMENDMENTS TO PLEADINGS—AUTHORITY OF LOWER COURT.

Where the Supreme Court, on remanding a cause, merely directs the superior court to allow designated amendments to the complaint, the superior court has authority to allow other amendments as justice demands.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4677-4683.]

2. SAME—SUBSEQUENT TRIAL—FORMER DECISION AS LAW OF THE CASE.

The decision of the Supreme Court on appeal, in a suit to quiet title, that the certificate of sale on default in the payment of a bond issued on a street assessment is void, is the law of the case on a subsequent trial of the suit.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4661-4665.]

3. SAME—CONCLUSIVENESS.

The decision of the Supreme Court on appeal, in a suit to quiet title, that a bond issued on a street assessment is valid, is the law of the case on a subsequent trial, so far as the objections set up at the former trial are concerned, but not with respect to objections made for the first time on the subsequent trial.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4661-4665.]

4. MUNICIPAL CORPORATIONS—ENFORCEMENT OF ASSESSMENTS — RIGHT OF HOLDER OF CERTIFICATE OF SALE—EQUITABLE RIGHT TO ASSESSMENT BOND.

A street assessment bond was a lien on a tract of 17½ acres, of which five-eighths was owned by a corporation and three-eighths by a third person. The corporation subsequently obtained 11 acres and the third person 6½ acres. Thereafter a purchaser of the 6½ acres deposited a specified sum in a bank, pursuant to an agreement with the corporation and the third person to the effect that on the bond being adjudged valid the deposit should pay three-eighths thereof, and on it being held invalid the same should be paid to the third person. The entire tract was sold to pay the bond, and the certificate of sale was purchased by the managing officer of the corporation out of his own funds and with knowledge of the facts. *Held* that, as the certificate of sale was void, the managing officer became in equity the holder of the bond, entitled to insist on full payment, and not bound to accept three-eighths thereof in discharge of the lien on the 6½ acres.

5. SAME—PERSONAL LIABILITY.

The remedy of an owner of a part of a tract of land subject to a street assessment bond is to pay the full amount of the bond and compel contribution from the owner of the other part.

6. SAME — ENFORCEMENT OF ASSESSMENT — AGREEMENT OF PARTIES—EFFECT.

A street assessment bond was a lien on a tract of land of which five-eighths was owned by a corporation and three-eighths by a third person. The corporation subsequently obtained 11 acres and the third person 6½. Thereafter a purchaser of the 6½ acres, who conveyed his rights to plaintiff, deposited a specified sum in a bank under an agreement with the third person and the corporation that if the bond was void the same should be paid to the third person, and if the bond was valid the sum should pay three-eighths thereof. The whole tract was sold, and defendant purchased the certificate of sale, and procured an assignment from the third person of his right to the deposit. The deposit was paid to defendant. *Held*, that plaintiff, claiming the 6½ acres, was entitled to have his title thereto quieted against the claim of defendant by reason of holding the certificate of sale.

Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Frank Ellis and others against H. C. Witmer and another. From a conditional judgment for plaintiffs, both parties appeal. Modified.

A. B. McCutchen, for appellants. Lynn Helm, for respondents.

SHAW, J. The complaint in this action, in legal effect, states a cause of action against the defendants to quiet title to a tract of land. The defendant, Donegan, was made a party to answer as to a possible interest, which it appears he did not have, and no further reference need be made to him in his character as a party. The action was tried by the court upon an agreed statement of facts, which stands in lieu of findings, judgment was given declaring that the plaintiffs were the owners in fee of the land, and that, upon the payment by plaintiffs to the defendant, Witmer, or into court for him, of the sum of \$251, there should be a final judgment in favor of plaintiffs against the defendants quieting the plaintiffs' title against all

claims of the defendants. From this judgment both parties appeal.

The claim of the defendants to the land was based solely on a bond issued upon a street assessment levied for an improvement of the street under the Vrooman act and its amendments, and a sale made in pursuance of such assessment and bond. The case was before this court heretofore on an appeal by the then defendants, H. C. Witmer and W. A. Hartwell, city treasurer of the city of Los Angeles. Upon that appeal certain alleged defects in the proceedings on which the street assessment was based were declared by this court to be insufficient to invalidate the assessment, the sale in pursuance of the provisions of the bond act was declared invalid because the notice of sale was defective, the complaint was held insufficient for want of an averment of an offer to pay such sum as should be found justly due on the bond from the plaintiffs to Witmer, the judgment was reversed and "the cause remanded for further proceedings in accordance with this opinion." *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301. In the opinion the court says, respecting the defect in the complaint: "On this account the judgment must be reversed. But, on the case being remanded, the plaintiffs may, if so advised, amend their complaint by offering to pay into the court such portion of the tax as may be determined by the court to be due upon their land, which, as the case is now presented to us, would seem to be three-eighths of the whole, though we are not to be understood as definitely determining this point. * * * If the complaint be not amended, judgment should be entered for the defendants." When the case was remanded the plaintiff filed in the superior court an amended complaint, to which the city treasurer, Hartwell, was not made a party. The amendments consisted of certain allegations relating to a possible interest in the defendant, Donegan, the making Donegan a party defendant, and the addition of allegations relating to a defect in the proceedings for the street improvement, occurring prior to the assessment but not previously alleged, and which, it is claimed, render the assessment void, and the averment of facts upon which, it is claimed, the defendant Witmer is estopped from asserting any lien upon the land. (It should be remarked that in the former opinion it was expressly stated that Donegan should be made a party, and there is no objection to the amendment making him a party.)

The defendant Witmer contends that the effect of the judgment and opinion of this court, upon the former appeal, is such that the superior court in the subsequent proceedings had no power to allow any amendment to the complaint, other than those expressly allowed as aforesaid in the opinion of the Supreme Court. Upon this theory he moved the court below to strike out the other

amendments, the denial of which motion he assigns as error. This would be carrying the doctrine of the law of the case entirely beyond its proper limits, and further than is warranted by any decision of this court. When on appeal the Supreme Court remands a case for a new trial, or for further proceedings, the law, as laid down in its opinion, becomes the law of the case and cannot afterwards be disputed by either of the parties, nor disregarded, even by this court, although it may subsequently appear that it was erroneous. But this rule applies to the case in its subsequent course, only so far as the case then presents the same facts and involves the same principles of law. The former judgment and opinion of this court do not constitute an adjudication of the rights of the parties, controlling the subsequent proceedings in the case, to the same extent as a final judgment in another action would be an adjudication, so that parties are thereby estopped as to their rights to the things determined, although they may discover, or be able to present to the court below, new facts or evidence, which may affect their rights, or make a case different from that which was presented on the former appeal. They do not in the least limit the power of the superior court, in its discretion, to permit further amendments of the pleadings, by either party, presenting additional facts which may entitle such party to relief which the facts originally alleged did not warrant. No express leave to permit such further amendments need be given by the Supreme Court, in order that the superior court shall have power to allow them. It would require, at least, an express decision in the case by the Supreme Court to the effect that an amendment, which would otherwise be proper, should not be made in the court below, to take from that court its ordinary powers to allow such amendments as appear to be in furtherance of justice, and necessary or proper, to enable the parties to present their whole case on the merits. The opinion in question contains no such declaration. It merely directs the superior court to allow certain designated amendments. This made it obligatory on that court, in the absence of any showing of any new facts which might have justified a refusal to do so, to give leave to the plaintiff to make the amendments mentioned, but did not in any respect affect its power, which exists after the granting of a new trial as well as before issue joined, to allow such amendments as justice demands. The motion to strike out the additional amendments to the complaint was properly denied.

To give a clear understanding of the points arising on the merits of the case it is necessary to make a statement of facts. The street assessment was made in 1892, and the bond was issued thereon in January, 1893. The proceedings were taken under the street assessment act of 1885, and amendments there-

to and the street bond act of 1891. St. 1891, p. 116. At that time the $6\frac{1}{2}$ acres of land here involved was part of a larger tract of $17\frac{1}{2}$ acres, which was owned in common by the predecessors of plaintiff and of Witmer Bros. Company, a corporation, respectively, those of the plaintiffs owning three-eighths and those of Witmer Bros. Company owning five-eighths thereof. In March, 1893, the land was divided, and the $6\frac{1}{2}$ acres set off in severalty to plaintiffs' predecessors, and the remaining 11 acres to the other tenants in common. In June, 1893, Witmer Bros. Company, having become the owner of the 11 acres, began a suit in the superior court against the city treasurer and Donegan, the contractor, who held the street improvement bond, to test the validity of the assessment and bond. One Labory acquired title to the $6\frac{1}{2}$ acres, and on November 19, 1894, was about to sell the same to one Nelson, who demanded some protection or security against the lien of the assessment and bond. For this purpose Nelson deposited \$1,390, as part of the price he was to pay to Labory, in the California Bank, and Nelson, Labory, Witmer Bros. Company, and the bank executed the following written agreement concerning the deposit.

"California Bank—Gentlemen: We herewith hand you \$1,390.00 to be held by you in escrow to abide the result of the contest now going on as to the validity of bond for \$3,168.10 issued in payment for street assessment affecting division B of lot 1 of block 26 of Canal and Reservoir lands of the city of Los Angeles, for grading, graveling and curbing First street under Los Angeles City Ordinance No. 1,063. It being the intention of this deposit that it shall pay three-eighths of such bond, if the same is determined to be valid and a lien upon said division B of lot 1, block 26, aforesaid, the other five-eighths of such bond to be paid by Witmer Bros. Company. In the event that it is finally determined by the courts that such bond creates no lien upon such property, then the money deposited is to be paid to Leonard Labory, less three-eighths of costs and attorney's fees in contesting the validity of such bond, which amount of costs and attorney's fees are to be retained by the California Bank to satisfy such portion of costs and attorney's fees."

Labory thereupon conveyed the $6\frac{1}{2}$ -acre tract to Nelson. The "contest now going on as to the validity of the bond," referred to in this agreement, was the aforesaid suit of Witmer Bros. Company against the city treasurer and Donegan. On December 31, 1897, default having been made in the payment of the bond, the city treasurer, in manner as prescribed by law, and to enforce payment of the bond, sold the entire tract of $17\frac{1}{2}$ acres to D. F. Donegan for \$4,435.34, that being the full sum then due on the bond, and issued to Donegan a certificate of said sale, purporting to entitle Donegan, or his as-

signs, to a deed at the expiration of one year if no redemption was made from the sale. On June 28, 1898, the defendant H. C. Witmer obtained from Labory an assignment of all the interest of Labory in the said deposit of \$1,390 in the California Bank, and on July 11, 1898, he purchased from Donegan for the sum of \$4,000 the certificate of sale issued to Donegan under the street assessment bond. These purchases were made by Witmer with full knowledge of all the facts affecting the rights of Nelson and of the plaintiffs, who on July 2, 1898, purchased of Nelson the $6\frac{1}{2}$ acres, and succeeded to his interest in the deposit of \$1,390, and to his rights under the agreement concerning the same. On August 1, 1898, the plaintiffs offered to pay Witmer, in satisfaction of his claim on their land by virtue of the certificate, three-eighths of the sum paid for the same, with interest, which payment he refused to accept. They then offered him three-eighths of the full amount of the bond and interest, and met with a like refusal. A few days thereafter, he began an action against the plaintiffs to enjoin them from committing waste on the land, grounding his action on the proposition that the bond and the sale thereunder were valid. While that action, and also the action of Witmer Bros. Company to test the validity of the bond and sale were pending and undetermined, the plaintiffs began the present action to declare the sale and bond invalid as against their land. The original complaint was filed herein on December 23, 1898. Thereafter, on May 2, 1899, Witmer, as manager of the Witmer Bros. Company, a corporation, dismissed the suit of that company against Donegan and the city treasurer to test the validity of the bond and assessment, and on August 2, 1899, as an individual, and as assignee of Labory, he demanded and received from the California Bank the deposit of \$1,390 made by Nelson, subject to the agreement of November 19, 1894. The decision of this court on the former appeal, that the certificate of sale to Donegan upon default in the payment of the bond was void and the sale invalid, is now the law of the case. The sale must therefore be considered as void. The decision also declares that the bond and assessment is valid, and this also is the law of the case so far as the objections there set up to their validity are concerned, although it does not conclude us with respect to objections thereto, made for the first time in the subsequent amendment to the complaint.

Assuming the validity of the bond, the rights of the parties at the time the action was begun are obvious enough. Witmer was the holder of the certificate and, as the sale was void, he became, in equity, the holder of the bond. The bond was subject to payment by any party interested. In the absence of any facts which would make it inequitable, however, he had the legal right to insist on

full payment, and was not bound to accept a payment of three-eighths of the amount he had paid, nor even three-eighths of the face of the bond, in discharge of the lien on three-eighths of the land. The remedy of the owner of a part of the land would be to pay the full amount of the bond and compel contribution from the owners of the other parts with, perhaps, a lien in equity on the other land as security. Nor would the fact that Witmer Bros. Company was a party to the agreement of November 19, 1894, and thereby agreed that the deposit should pay three-eighths of the bond and that it would pay the other five-eighths thereof, operate to bind Witmer, individually, as holder of the bond, to accept part payment from plaintiffs and look to Witmer Bros. Company for the balance. And we do not perceive that the facts, shown in the agreed statement, that he was a large stockholder in, and the managing officer of, Witmer Bros. Company, and had control of its funds, change his position or rights in this respect. As purchaser of the bond with his own funds, he had the same right as any other purchaser would have to the benefit of any discount he obtained, and to insist on payment of the whole sum due thereon, certainly, as against the plaintiffs, and possibly, as against Witmer Bros. Company.

It is contended, however, that Witmer Bros. Company, by the agreement of November 19, 1894, was in duty bound to prosecute to final judgment the action to test the validity of the bond, for the benefit of Nelson and his successors in interest, and that Witmer, in his capacity as manager of that corporation, was charged, personally, with this duty of the corporation towards plaintiffs, and that under these circumstances, as he could not separate his personality as manager of the corporation from his personality in other respects, and thus become a dual person, he was, in effect, a trustee of plaintiffs as well as of Witmer Bros. Company as to the subject-matter of the suit, and cannot be allowed to gain any advantage by any personal bargain in buying the bond or certificate, and would not be entitled to demand the full face of the bond, but only the sum he actually paid for it, with interest. This presents an interesting question, but, in view of the matters occurring after the beginning of the action, and the manner in which the case was presented to the court below on the last trial, presently to be noticed, we find it unnecessary to decide it. In the agreed statement of facts, on which the case was submitted to the court below for decision, it was stipulated that no objection should be made to any of the facts stated, on the ground of variance between the proof and the pleadings, but that the lower court, and this court on appeal, should hear and determine the cause the same as if the pleadings had been, by leave, properly amended so as to make the facts come within the issues made by the pleadings. This must be understood

to include any facts which could properly have been stated in a supplemental complaint, and, in effect, it presents the case upon all the stipulated facts including those occurring after the beginning of the action.

By his subsequent conduct Witmer has put himself in a position substantially different from that occupied by him when the action was begun. The \$1,390, deposited in the California Bank, was a trust fund which, by the terms of the trust, could only be devoted to certain specified purposes. According to the agreement, if the bond was valid, the fund was to be used to pay three-eighths of the amount due thereby, and Witmer Bros. Company was to pay five-eighths thereof. Labory was not to have any interest in this fund, except in the contingency that the bond should be declared invalid, in which event it was to be paid to him, less three-eighths of the cost of the litigation pending. If Labory had purchased the bond and had then obtained possession of the \$1,390, deposited by his grantee, Nelson, to pay three-eighths of the bond and protect the land against the lien, it seems clear that Labory could not enforce payment of the bond against the land of Nelson, while at the same time retaining the money, which had been set apart out of the purchase price Nelson was to pay, in trust to pay three-eighths of such lien. It is apparent that by the terms of the sale from Labory to Nelson the land was to go to Nelson free from this lien. If valid, the money was to be used to discharge it; if invalid, the money was to be paid to Labory, as for the remainder of the purchase price, which, in that case, would be due to him. Donegan was not a party to the agreement concerning the money, and, as holder of the bond, he had no right to this specific fund. Hence, if Labory had purchased the bond he would not, as holder thereof, have acquired any right to the money. He could have no right to the money except under the agreement, which gave him the right to it only upon the condition that the bond proved invalid. Consequently, if, after buying the bond, he had also demanded and received the money, he would be bound to stand by the condition upon which alone he could become entitled to it, and would be forced to admit, for the benefit of Nelson and his successors, that the bond was invalid. If Labory could not do otherwise than this, it is equally clear that it could not be done by his assignee. He could not, by selling his contingent right to the money, enable his assignee to do what he could not do himself—to buy the bond, receive and keep the money, and hold the bond as a valid lien. It should be stated, in this connection, that Witmer demanded and received the money from the bank, upon the statement that he was the assignee of Labory, that the superior court had held that the bond was not a lien on the land and that, in consequence thereof, he, as assignee of

Laboratory, was entitled to receive the money. He has, therefore, by this purchase of the right of Laboratory, and by the receipt of the money in that right and insisting on his right to keep it, put himself in the place of Laboratory, and is consequently estopped from holding the bond as lien on this land. Having no right to the specific money as bondholder and no right to it as assignee of Laboratory, except on the condition that the bond has proved to be invalid, he cannot keep it on any other condition, and having elected to keep it, he must admit the invalidity of the bond. If he chooses to found his right to the money on the fact of his holding of the bond, he can keep it in that capacity only on the condition named in the agreement whereby it was deposited, that is, in effect, that it was to pay three-eighths of the bond and discharge the lien thereof upon this land. In either case he has no claim or lien upon the land of plaintiffs. It follows that the plaintiffs have the right to a judgment against the defendants quieting their title to the land against all claims of the defendants, and that the judgment should not have required them, as a condition precedent, to pay to or for Witmer the sum of \$251, or any other sum. The theory on which this condition was inserted in the judgment seems to have been that Witmer was entitled, as bondholder, to demand this fund as part payment on the three-eighths of the bond, and that he stood in a fiduciary relation to the plaintiffs and for that reason could not demand from them more than three-eighths of the \$4,000 which he paid for the transfer of the bond to himself. The first branch of this proposition, is, as we have stated, incorrect, and as he received the money as successor of Laboratory and is thereby estopped, we think the latter part of the proposition is immaterial. We do not think that the complaint states two causes of action, nor that Witmer Bros. Company was a necessary party.

It is unnecessary to consider the effect of the newly alleged defect in the street improvement proceedings upon the validity thereof. The \$1,390 deposited under the agreement of November 19, 1894, was the money of Laboratory, part of the price of the land sold by him to Nelson, deposited to await the determination of the validity of the proceedings and to discharge the lien if the bond was valid. In no event was it to be returned to Nelson. If the bond was declared invalid the money was to be paid to Laboratory, less expenses. Witmer is therefore now entitled to the money, either as the successor of Laboratory, on the theory that the bond is invalid, or as successor of Donegan and holder of the bond, on the theory that it is valid. Under the conclusion we have reached, that the plaintiffs are entitled to the land free from any lien of the street assessment and bond, it is a matter of indifference to the plaintiffs, who are not entitled to the fund in either case, whether

the bond and assessment are declared valid or invalid.

It is ordered that the judgment of the superior court be modified by striking therefrom all that part of the first clause or paragraph beginning with the words, "And upon paying into court the sum of \$110," and ending with the words, "Two hundred and fifty-one dollars (\$251)," at the close of said paragraph, and also by striking therefrom the following part of the last clause or paragraph thereof, to wit: "Upon paying into court the sum of two hundred and fifty-one dollars (\$251), with interest thereon from the date hereof at the rate of 7 per cent. per annum for said H. C. Witmer, or upon payment of such sum, with interest, to said H. C. Witmer," and that, as so modified, the judgment be affirmed.

We concur: ANGELLOTTI, J.; McFARLAND, J.

148 Cal. 470

LYON v. UNITED MODERNS.
(L. A. 1,500.)

(Supreme Court of California. Jan. 17, 1906.)

1. TRIAL—DENIAL OF MOTION OF NONSUIT—
WAIVER OF ERROR.

Where, after the denial of a motion for a nonsuit made at the close of plaintiff's case, defendant introduced evidence which supplied defects in plaintiff's proof, the error in denying the motion was waived.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 982.]

2. INSURANCE — MUTUAL BENEFIT ASSOCIATION—PROOFS OF DEATH AND CLAIMANT'S RIGHT—SUFFICIENCY.

A mutual benefit certificate, which bound the association to pay a specified sum to the beneficiary after satisfactory proof of the death of the member, and of the identity and right of claimant, and of the validity of the claim, only required proof of death and proof of claimant's right and identity; and the fact that the proof showed facts of which the association might avail itself as a defense to an action on the certificate did not derogate from the sufficiency of the proofs or bar the bringing of an action.

3. SAME — ACTION FOR BENEFIT—EVIDENCE—
FINDINGS.

In an action on a mutual benefit certificate, the evidence considered, and held to justify a finding that the member did not have pleurisy, within the meaning of the question in the application as to whether he had had pleurisy, and to which the answer was, "No."

4. SAME—FALSE ANSWERS IN APPLICATION—
ASSERTION OF FALSITY—ESTOPPEL.

Where an insured in good faith made truthful answers to the questions in the application, but the answers, owing to the fraud or mistake of the medical examiner, were not correctly transcribed, the insurer was estopped from asserting the falsity of the answers as a defense to the policy.

5. SAME—ACTION ON CERTIFICATE—EVIDENCE—
ASSERTION OF FALSITY OF ANSWERS IN
APPLICATION.

In an action on a mutual benefit certificate, plaintiff was permitted to testify that all the medical examiner asked the member at the time of his examination for membership as to disease was whether he had ever been sick, that the member answered that he had had smallpox, typhoid

fever, the "grippe," and a slight attack of pleurisy. The application showed that the member had answered "No" to the question as to whether he had had pleurisy. *Held*, that the evidence was admissible, as showing that the association was estopped from asserting the falsity of the answer written by the medical examiner.

6. SAME—ASSERTION OF FALSE ANSWERS IN APPLICATION — ESTOPPEL RULE — APPLICABILITY TO BENEFIT ASSOCIATIONS.

The rule that where the insured in good faith makes truthful answers to the questions in the application, and the answers, owing to the fraud or mistake of the agent filling out the application, are not correctly transcribed, the insurer is estopped from asserting their falsity as a defense, is applicable to mutual fraternal societies, where the applicant is not a member until after the making of his application.

7. SAME — APPLICATION FOR CERTIFICATE — QUESTIONS—CONSTRUCTION.

The word "company," in an application for a mutual benefit certificate containing the question, "Has any * * * application to insure your life ever been made to any company * * * upon which a policy has not been issued," refers only to regular insurance companies, and excludes fraternal associations; Civ. Code, § 451, declaring that benefit associations are not insurance companies within the insurance laws, recognizing a distinction between regular insurance companies and benefit associations.

8. TRIAL—INSTRUCTIONS—ASSUMPTION AS TO FACTS.

Where, in an action on a mutual benefit certificate, the evidence warranted a conclusion that the deceased member had not had a certain disease mentioned in the application, an instruction that plaintiff had the burden of proving that the fact that the member had had such disease had been communicated to the association was properly refused, because assuming a fact which was for the jury.

Department 1. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Laura C. Lyon against the United Moderns. From a judgment for plaintiff, defendant appeals. Affirmed.

Rehearing denied February 15, 1906.

J. W. McKinley, for appellant. Frank James and Bernard Potter, for respondent.

ANGELLOTTI, J. This is an appeal from an order denying defendant's motion for a new trial, in an action brought by plaintiff to recover on a benefit certificate of membership of her deceased husband, issued by defendant corporation. Defendant is one of the many fraternal mutual beneficial associations existing in this country which pay benefits to the beneficiaries named in the certificate of membership, upon the death of a member, in such amount as may be set forth in the certificate. Deceased became a member of one of the subordinate lodges of defendant in September, 1901, when a certificate of membership was issued, under the terms of which it was agreed that \$3,000 should be paid plaintiff within 90 days after "satisfactory proof of the death of said member, and of the identity and right of claimant and of the validity of the claim," provided, of course, that such certificate remained in force at the time of his

death. Deceased died December 29, 1901. It was in effect admitted on the trial that the certificate was in full force at the date of his death, if it was not void in its inception by reason of alleged misrepresentations made by the deceased in his application for membership.

1. The first point made by defendant for a reversal of the order is that the court erred in denying its motion for a nonsuit, made at the close of plaintiff's evidence, upon the ground that plaintiff had not shown that satisfactory proof had been made to defendant of her right, or the validity of her claim. Without considering the question as to whether the admissions made by defendant in its answer, and its stipulation at the commencement of the trial, sufficiently showed such compliance with this requirement as was necessary to make a prima facie case for plaintiff, we think there is nothing in the point made. Defendant did not rest its case upon the denial of the motion for nonsuit, but introduced evidence in its own behalf. So far as the evidence introduced by defendant supplied any defects in plaintiff's proof, any error in denying the motion for nonsuit was waived. *Scrivani v. Dondero*, 128 Cal. 31, 32, 60 Pac. 463; *Russell v. Pac. Can. Co.*, 116 Cal. 527, 530, 48 Pac. 616; *Schlessinger v. Mallard*, 70 Cal. 326, 334, 11 Pac. 728.

Defendant introduced in evidence the proofs of death which were in fact made. These proofs were made on blanks furnished by the defendant, and, in accordance with the laws of defendant, by officers of the subordinate lodge of which deceased was a member, and, concededly, prima facie fully established the right of plaintiff to payment, except for one reason. The proofs were written on forms prepared by the defendant for that purpose, and in answer to certain questions propounded thereon the claimant and physician stated that deceased had, nearly one year before making his application for membership, been treated by a physician "for cold and a slight touch of pleurisy," while in the medical examiner's report, which was made a part of his application for membership, in answer to a question as to whether he had ever had any of 45 enumerated "diseases," including "pleurisy," the answer, "No," had been written after each named disease. Concededly, by virtue of certain provisions of the contract, the certificate was void, if the deceased had, on his application, made material misrepresentations in his answers to the questions propounded on the application blank. It is now claimed that the blank showed such a misrepresentation, and that hence the proofs furnished as to the validity of the claim were not "satisfactory." The real point thus appears to be that under the terms of the certificate no action could be maintained by plaintiff on this certificate until she made to the company such a showing as ought

reasonably to satisfy defendant's officers that the defendant had no good defense against the claim on the ground of misrepresentation made in the application for membership. We are satisfied that the contract required no such proof on the part of the claimant as a prerequisite to the maintenance of an action. The words "and of the identity and right of claimant and of the validity of the claim" all have reference solely to her claim that she is the beneficiary named in the certificate, and entitled to recover thereon if the certificate was in force at the death of the insured, and cannot reasonably be construed as requiring a showing as to the validity of the certificate issued to the deceased. Proof of death and proof of the claimant's right and identity to such benefit as was stipulated by the certificate were the only requisites. If the proof showed facts of which defendant might avail itself as a defense to an action on the certificate, this would not derogate from the sufficiency of the proofs in either respect, or bar the bringing of an action. *Ins. Co. v. Rodel*, 95 U. S. 232-237, 24 L. Ed. 433.

2. The medical examiner's report showed, as already indicated, the answer, "No," to the question: "(3) Have you ever had any of the following diseases? Answer yes or no in each space, and give particulars under the head of remarks: * * * Pleurisy." Some 45 so-called diseases were here enumerated. It further showed the following question and answer, viz.: "(6) Have you consulted or been advised by any physician regarding your health within the last five years? If so, whom, when, and for what ailment? A. Grippe, 1900. Dr. La Doux." It appeared from the evidence that all the answers in this very lengthy report were written by the medical examiner of defendant in the presence of the applicant, and as the result of his inquiry of the applicant, and that the applicant was then called upon to sign, and did sign, a statement at the end, to the effect that he warranted the "answers as written to the above questions put by the medical examiner are full, complete, and true, and the same shall be made a part of the herein referred to application for membership." In the application proper was a similar warranty followed by this statement: "And I do hereby acknowledge and consent and agree that any untrue statement made herein by me or on my behalf, or to any medical examiner, whether written by my own hand or not, or any concealments of facts by me or any one else, shall forfeit and cancel all rights to any benefit under the above-named application." The certificate recited that it was issued "in consideration of the statement made in the application for beneficiary certificate, and in answer to questions asked in the medical blank (the truth of which said member guarantees)." There was evidence tending to show that during, or while convalescing from, the attack of "grippe" refer-

red to in the medical report, the deceased had a pleural pain "not so very, very severe." The attending physician testified, "but a little touch of pleurisy." The physician further testified that there was not much inflammation, hardly any fever, that it was not "regular pleurisy," just "the very first symptoms of pleurisy," and "it terminated there" at once. The evidence in regard to the matter is such that a jury might well have been warranted in concluding that the applicant had never had the "disease" of "pleurisy," within the meaning of the question relative thereto, and that the written answer was therefore not false. But, in view of evidence admitted and instructions of the trial court, we are not able to determine that they so concluded. The plaintiff was allowed, over defendant's objection, to show what took place between the medical examiner and the applicant at the time the medical report was written. Under this ruling plaintiff testified that all the medical examiner asked the applicant as to diseases was whether "he had ever been sick any," and that the applicant answered that he had never had anything but smallpox and typhoid fever, "until January, 1901, he had the grippe and a slight attack of pleurisy," and that the examiner did not say anything, but simply apparently wrote down the answers. The only other testimony regarding this interview was that of the examiner, who admitted that plaintiff was present during at least a portion of the interview, and who said he had no recollection of the applicant saying anything about pleurisy, and that he could not say as to whether he asked the applicant as to each of the diseases enumerated on the blank; that it was his custom so to do, and always to write down the full reply.

Upon this matter the court instructed the jury in effect that if the applicant had, prior to the application, been afflicted with the disease of "pleurisy," and that, when asked whether he had ever had such disease, answered, "No," his statement would be a misrepresentation of a material fact, which would avoid the policy, and that if, on the other hand, he told the examiner that he had "an attack, slight or otherwise, of pleurisy, and the medical examiner either neglected or omitted to write the answer in his report," the insured was not responsible for such omission or neglect, unless he had actual knowledge of the fact that the answer had been imperfectly or incorrectly written. There was no pretense that he had any actual knowledge of the contents of said report, or that he had been asked to read the same, or to do anything but sign his name to the statement at the end thereof. There was no error in the action of the court in admitting this evidence, or in giving this instruction. In volume 3, *Cooley's Briefs on the Law of Insurance*, p. 2594, it is said: "From an examination of the cases the following propositions may be regarded as es-

tablished by the weight of authority: Where the insured, in good faith, makes truthful answers to the questions contained in the application, but his answers, owing to the fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy. The acts of the agent, whether he is a general agent with power to issue policies, a soliciting agent, or merely medical examiner for the company, are in this respect the acts of the company, and he cannot be regarded as the agent of the insured, though it is so stipulated in the application or policy."

An examination of many of the authorities satisfies us that, while there is some conflict in the cases on some of the matters included in this statement, the great weight of authority is with the statement, as a whole, where the insured acts in good faith, and is himself without fault. This court has already indicated its support of the rule enunciated. In *Menk v. Home Ins. Co.*, 76 Cal. 50, 53, 14 Pac. 837, 18 Pac. 117, 9 Am. St. Rep. 158, a fire insurance case, it said: "The only point in the offered testimony was that if the agent, knowing all the essential facts, made out the application for plaintiff, the company cannot take advantage of defective statements contained in it as not complying with the requirements of the company, nor would misstatements be fatal to the claim of plaintiff which the agent well knew to be false when he made out the application, received the money of the applicant, and issued the policy. The tendency of the decisions is plainly to hold all those conditions waived which, to the knowledge of the agent, would make the policy void as soon as delivered. Otherwise the company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable fraud." See, also, *Wheaton v. North British, etc., Co.*, 76 Cal. 415, 419-421, 18 Pac. 758, 9 Am. St. Rep. 216; *Maxson v. Llewelyn*, 122 Cal. 195, 199, 54 Pac. 732; *Bayley v. Employers', etc., Corp.*, 125 Cal. 345, 349, 58 Pac. 7; *Parrish v. Rosebud M. & M. Co.*, 140 Cal. 635, 645, 74 Pac. 312. In *Maxson v. Llewelyn*, *supra*, it is pointed out, quoting approvingly from *Union, etc., Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617, that this principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing was procured under such circumstances by the other side as estops that side from using it, or relying on its contents—not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it. The rule is as applicable to life and accident insurance as it is to fire insurance, and, where the applicant is not a member until after the making of his application, to

mutual fraternal societies as it is to what is known as "regular insurance."

3. On the application proper the answers to the printed questions were written by an officer of defendant, and the paper, when so completed, was handed to the applicant for signature and signed by him. The following question was contained thereon, viz.: "(7) Has any proposal or application to insure your life ever been made to any company, or agent, or medical examiner, upon which a policy has not been issued? If so, state full particulars." The written answer was, "No." The defendant sought to show that in December, 1900, deceased had applied for membership in, and a death benefit certificate from, the "Woodmen of the World," a well-known fraternal association, which, as a part of its plan, issued death benefit certificates similar, in all particulars material to the question here presented, to those of this defendant, and that his application had been disapproved by the "head physician" of the order, and no certificate had ever been issued thereon. The trial court sustained the objection made to all such testimony, and this ruling is assigned as error. We are of the opinion that the "Woodmen of the World" was not a "company," within the meaning of the question on the application blank, and that therefore the offered evidence was not material. There is some conflict in the cases as to whether a question of the general character of the one under consideration should be held to refer to any organization other than regular insurance companies, or whether it also includes fraternal associations organized for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money on the death of the members; but, where the question stated on the application blank is as uncertain in its terms as the one under consideration, the better reasoning appears to be in favor of excluding all except regular insurance companies.

It must be recognized that the rule applicable in the construction of insurance contracts of construing the contract in favor of the assured and against the insurer, where it is reasonably susceptible of such construction, is applicable in such cases, and therefore, as said in one of the cases, "where an insurance company or association seeks to avoid a policy or certificate of membership on the ground of falsity in an answer to a question which is, by the terms of the contract made material, the court will construe the question and answer strictly as against the company, and liberally with reference to the insured," and, "if any construction can reasonably be put on the question and the answer such as will avoid a forfeiture of the policy on the ground of falsity of the answer, that construction will be given, and the policy will be sustained." *Newton v. S. W. M. L. Ass'n*, 116 Iowa, 311, 90 N. W. 73. The law of this state recognizes a dis-

inction between regular insurance companies and such associations, which are not conducted for profit, by declaring the associations "not to be insurance companies in the sense and meaning of the insurance laws of this state," and exempting them from the provisions of such insurance laws (Civ. Code, § 451; *Marshall v. Grand Lodge*, 133 Cal. 686, 691, 66 Pac. 25); and there is such a difference between the two classes as to reasonably justify one in concluding that an association or order of the class mentioned is not an "insurance company" within the general acceptance of that term. If this be so, the applicant here was justified in concluding that only regular insurance companies were meant by the question, and we must construe the question as calling for nothing more. If the association wanted anything more, it would have been a simple matter for it to have framed the question, on its carefully prepared blank, in terms so precise and definite as to have left no room for doubt. Again, quoting from *Newton v. S. W. Mutual Life Ass'n*, supra: "When an applicant for insurance answers categorically the questions asked, and his answers are correct in any view of the question which can be reasonably taken, then the insurance company or association, as the case may be, ought not to be allowed to escape its liability on the ground that the answer is false." See, also, *Mutual Life Ass'n v. Miller*, 92 Fed. 63, 34 C. C. A. 211; *Penn. Mutual L. etc. Co. v. Trust Co.*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 70; 3 *Cooley's Briefs on the law of Insurance*, p. 2079.

A contrary view of this matter has been taken by the New York Court of Appeals in *Alden v. Supreme Tent*, 178 N. Y. 535, 71 N. E. 104, where the question was: "Have you ever been rejected by any life insurance company or association?" and also by the supreme court of that state. *McCollum v. Mutual, etc., Co.*, 55 Hun, 103, 8 N. Y. Supp. 249. It will be observed that the question in the New York Court of Appeals case included the word "association," as well as "company," which might reasonably be held to indicate more to the applicant. In *Bruce v. Conn. Mut. Life Ins. Co.*, 74 Minn. 310, 77 N. W. 210, the question was: "Has any company or association ever declined or postponed granting or receiving insurance on your life, either for any particular amount, or in any particular form" and it was held that the question included fraternal associations issuing death benefit certificates. Here, again, the question was so unlike the one involved in this case as to present an entirely different question. We are of the opinion that, where the question asked is materially the same as the one we are considering, the other line of authorities is supported by the better reasoning.

4. Complaint is made that the trial court refused to give to the jury the following instruction, viz.: "The burden rests upon

each party to establish by preponderance of evidence affirmative allegations of its pleading. In this case the plaintiff claims that the fact that James B. Lyon had had pleurisy was communicated to defendant, and the burden rests upon plaintiff to show that such fact was communicated to defendant." Regardless of the question as to where the burden lay to show the facts constituting an estoppel, we are of the opinion that the court was justified in refusing the requested instruction, for the reason that it assumed a fact that, under the evidence, was in issue and for the jury to decide, viz., that the applicant had suffered from the disease of "pleurisy." As we have already shown, the evidence was such as to warrant a conclusion that he had not had such disease, within the meaning of the printed question, but had had only the first symptoms thereof—had only been threatened with the same. The question as to whether he had the disease was one of the questions submitted to the jury for decision by the charge of the court. The requested instruction in effect declared it to be a fact that the deceased had the disease, and that the answer, as written on the medical examiner's report, was false. We are also satisfied that, under the circumstances shown by the record, the defendant could not have been prejudicially affected by the absence of any specific instruction as to where the burden of proof rested to show an estoppel in the respect designated.

5. Various other rulings of the trial court in the matter of instructions are complained of, but we find none that require special mention. As to defendant's other requested instructions, so far as proper, they appear to have been fully covered by other instructions given, and those portions of the charge of the court that are complained of were in accord with the views we have already expressed in discussing the question as to the right of the plaintiff to show that the answers given by the applicant to the medical examiner were correct, and the question as to whether the "Woodmen of the World" was an insurance company, within the meaning of the phrase used in the printed application.

The order appealed from is affirmed.

We concur: SHAW, J.; McFARLAND, J.

143 Cal. 516

STONER v. ZUCKER et al. (L. A. 1,436.)

(Supreme Court of California. Jan. 22, 1906.)

LICENSES—REVOCATION.

Where plaintiff granted defendant a parcel license to construct an irrigation ditch over plaintiff's land, and defendant entered under such license and expended over \$7,000 in the construction of the ditch, the license became irrevocable, and defendant was entitled to a right of way over plaintiff's lands for the purpose of maintaining the ditch.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, §§ 120, 121.]

Department 2. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by Jacob Stoner against Fred Zucker and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Rehearing denied February 20, 1906.

Collier & Carnahan, for appellant. E. W. Freeman and Henry J. Stevens, for respondents.

HENSHAW, J. Plaintiff pleaded that defendants had entered upon his land in 1890, under license, and had constructed thereon and thereover a ditch for the carrying of water; that he never conveyed or agreed to convey to the defendants any right of way, easement, or interest in the land for the purpose, and their right to construct and maintain the ditch rested wholly upon this license; that in 1900 he served notice upon them that the license to construct and operate the ditch had been revoked and abrogated by him. Notwithstanding this notice of revocation and abrogation, the defendants, disregarding it, have continuously entered upon plaintiff's land, making repairs upon the ditch and restoring the same where it was broken and washed away, and defendants threaten to continue this trespass upon the lands of the plaintiff. Plaintiff therefore prayed that the defendants be adjudged trespassers and be enjoined from the use of the ditch or from in any manner entering upon the lands of the plaintiff to repair or otherwise maintain it. The evidence established, without controversy, that defendants constructed the ditch for the purpose of carrying water for irrigation to their own and other lands, and had expended upon the ditch the sum of seven thousand and more dollars. The court found that "a right of way for the construction and maintenance of the ditch for the purpose of taking water from Santa Ana river for use in connection with and upon defendants' lands was given and granted by the plaintiff to the defendants, and that the defendants are the owners of a right of way for said ditch for the purpose aforesaid." The court further found that there was a consideration for the "granting of said right of way, in that defendants contracted and agreed with the plaintiff to deliver to and for the use of the plaintiff on his land lying under said canal sufficient water to irrigate the land, and the defendants have at all times delivered said water so agreed to be delivered. This last finding derives no support from the evidence, and the first finding, to the effect that the plaintiff "granted" a right of way, can be supported only upon the understanding that the court by "grant" meant that "permission" was given to defendants for the construction and maintenance of the ditch. So construing the findings, the question is squarely presented as to the revocability or nonrevocability of an executed parol license, whose execution has involved the ex-

penditure of money, and where, from the very nature of the license given, it was to be continuous in use.

Appellant contends that a parol license to do an act upon the land of the licensor, while it justifies anything done by the licensee before revocation, is revocable at the option of the licensor, so that no further acts may be justified under it, and this, although the intention was to confer a continuing right, and money has been expended by the licensor upon the faith of the license, and that such a license cannot be changed into an equitable right on the ground of equitable estoppel. To the support of this proposition is offered authority of great weight and of the highest respectability. The argument in brief is that a license in its very nature is a revocable permission, that whoever accepts that permission does it with knowledge that the permission may be revoked at any time; that the rule cannot be changed, therefore, because the licensee has foolishly or improvidently expended money in the hope of a continuance of a license, upon the permanent continuance of which he has no right in law or in equity to rely; that to convert such a parol license into a grant or easement under the doctrine of estoppel is destructive of the statute of frauds, which was meant to lay down an inflexible rule; and, finally, that there is no room or play for the operation of the doctrine of estoppel, since the licensor has in no way deceived the licensee by revocation, has put no fraud upon him, and has merely asserted a right which had been absolutely reserved to him by the very terms of his permission. No one has stated this argument more clearly and cogently than Judge Cooley, who, holding to this construction of the law, has expressed it in his work on Torts. Cooley, Torts (2d Ed.) 364. But that the same eminent jurist recognized the injustice and the hardship which followed such a conclusion is plainly to be seen from his opinion in *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453, 2 N. W. 639, where, discussing this subject, he says: "But the injustice of a revocation after the licensee, in reliance upon the license, has made large and expensive improvements, is so serious that it seems a reproach to the law that it should fail to provide some adequate protection against it. Some of the courts have been disposed to enforce the license as a parol contract which has been performed on one side." Indeed, the learned jurist, with equal accuracy, might have stated that the majority of courts have so decided, in accordance with the leading case of *Rerick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497. That case was carefully considered, and it was held that it would be to countenance a fraud upon the part of the licensor if he were allowed, after expenditure of money by the licensee upon the faith of the license, to cut short by revocation the natural term of its continuance and existence, and that under the doctrine of

estoppel, the licensor would not be allowed to do this. The decision was that the licensor would be held to have conveyed an easement commensurate in its extent and duration with the right to be enjoyed. In that case there was a parol license without consideration to use the waters of a stream for a sawmill, and it was held it could not be revoked at the grantor's pleasure, where the grantee, in consequence of the license, had erected a mill. The court in that case says, after discussion: "It is to be considered as if there had been a formal conveyance of the right, and nothing remains but to determine its duration and extent. A right under a license, when not specifically restricted, is commensurate with the thing of which the license is an accessory." And the court said further: "Having in view an unlimited enjoyment of the privilege, the grantee has purchased by the expenditure of money, a right indefinite in point of duration, which cannot be forfeited by a nonuser unless for a period sufficient to raise the presumption of a release. The right to rebuild in case of destruction or dilapidation and to continue the business on its original footing may have been in fact as necessary to his safety, and may have been an inducement of the particular investment in the first instance."

It will not be necessary to multiply citations of authority upon this point. It is sufficient to refer to the very instructive comment of Prof. Freeman to the case of *Rerick v. Kern*, reported in 16 Am. Dec., at page 497. The learned author of the note concludes his review by saying, as he shows, that "It will be seen that the doctrine of the principal case, though not recognized in some of our state courts, is, nevertheless, expressive of the law as administered by the majority of them, and that the preponderance of recent judicial opinions is in harmony with the views of Judge Gibson." This court in the case of *Flickinger v. Shaw*, 87 Cal. 126, 25 Pac. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234, discussed and approved the case of *Rerick v. Kern*, supra. It was not called upon there to pass upon the precise question here presented, because in that case defendant had entered and expended money upon a parol agreement to convey a right of way, and the court was called upon merely to decide in consonance with undisputed equitable principles that that parol agreement was enforceable, but in *Smith v. Green*, 109 Cal. 234, 41 Pac. 1024, the exact principle here announced is distinctly recognized, and it is said: "The general rule, no doubt, is that one who rests his claim to an easement on a verbal contract alone, unexecuted and unaccompanied by any other facts, has no rights thereto which he can enforce. But there are many cases where a mere parol license which has been executed, and where investments have been made upon the faith of it, has been held irrevocable. *Gould on Waters*, §§ 232, 324." The recognized principle, therefore, is

that where a licensee has entered under a parol license and has expended money, or its equivalent in labor, in the execution of the license, the license becomes irrevocable, the licensee will have a right of entry upon the lands of the licensor for the purpose of maintaining his structures or, in general, his rights under his license, and the license will continue for so long a time as the nature of it calls for. Thus, for example, where the license was to erect a lumber mill, the license came to an end when the timber available for use at that mill had been worked up into lumber. The same has been held as to a milldam, the right to maintain the dam continuing so long as there was use for the mill, and the right being lost by abandonment and disuse only when the non-user had continued for a period sufficient to raise the presumption of release. In the case of irrigating ditches, drains, and the like, the license becomes, in all essentials, an easement, continuing for such length of time, under the indicated conditions, as the use itself may continue.

For these reasons the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

148 Cal. 431

PREFUMO v. RUSSELL et al. (L. A. 1,444.)
(Supreme Court of California. Jan. 16, 1906.)

1. EXCEPTIONS, BILL OF—TIME FOR SETTLEMENT.

Code Civ. Proc. § 650, requires a party proposing a bill of exceptions to either present them to the judge for settlement or deliver them to a clerk for the judge within 10 days after service on him of proposed amendments. Section 1012 authorizes the service of papers by mail. Section 1013 provides that in such cases, if the person on whom service is made is given a certain number of days after the service to perform an act, the time is extended one day for every 25 miles distance between the place of deposit and the place of address, the extension, however, not to exceed 90 days. Held that, where an attorney who proposed a bill of exceptions acknowledged by letter the receipt of the proposed amendments served by mail, this did not make the service personal, so as to deprive him of the extension of time provided by section 1013.

2. MORTGAGES — ABSOLUTE DEED AS MORTGAGE.

Where defendants gave plaintiff's husband a deed of land to secure the payment of a certain sum to him, and he conveyed the land to his wife while the defendants were in possession of the land so far as it was occupied at all, the conveyance was a mortgage, and the defendants have all the beneficial interest in the land subject to the lien for the sum secured due plaintiff's husband.

Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Ada S. Prefumo against C. J. Russell and another. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Marcel E. Cerf, for appellants. W. H. Spencer, for respondent.

SHAW, J. The defendants appeal from a judgment in favor of the plaintiff, and from an order denying the defendants' motion for a new trial.

The respondent makes a preliminary objection to the consideration of any of the points arising upon the motion for a new trial, upon the ground that the bill of exceptions was not properly settled, and is not a part of the record. The judgment was rendered on January 24, 1903. The defendants served on the plaintiff's attorney their proposed bill of exceptions, and thereafter, on March 18, 1903, the plaintiff's attorney served on the attorney for the defendants his proposed amendments thereto. The bill and amendments thereto, thus proposed, were not, within 10 days thereafter, presented to the judge for settlement, nor filed with the clerk for the judge. They were filed with the clerk for the judge on March 31, 1903, which was 13 days after the service. Section 650 of the Code of Civil Procedure requires the party proposing the bill to either present them to the judge for settlement or deliver them to the clerk for the judge within 10 days after the service on him of the proposed amendments. The objection made to the settlement of the bill was that the bill and amendments were delivered to the clerk for the judge too late, and that the proceeding for the settlement of the bill consequently lapsed. The facts were that the attorney for the plaintiff, who served the proposed amendments, at that time resided and had his office in San Luis Obispo; that the attorney for the defendants, on whom the service was made, at that time resided and had his office in San Francisco, and the service of the proposed amendments was made by mail, under the provisions of sections 1012 and 1013, Code Civ. Proc.; the distance between the two places, according to the stipulation of the parties, being 250 miles. Section 1013 provides that in such cases the service is complete at the time the paper is deposited in the postoffice at the place of residence of the person making the service, "but if within a given number of days after such service a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done is extended one day for every 25 miles distance between the place of deposit and the place of address, such extension, however, not to exceed 90 days in all." The effect of this provision of section 1013 is to extend this time, in the present case, 10 days, so that the defendant had 20 days in all, after such deposit in the postoffice, within which to make the delivery to the clerk, and consequently the delivery on March 31st was within the time allowed, and was sufficient.

The plaintiff sought to avoid the effect of

section 1013 by showing that on March 21, 1903, after he had received the proposed amendments through the mail, the attorney for the defendants wrote a letter to the plaintiff's attorney, inclosing a copy of his notice of appeal from the judgment in the action, and further stating, "I wish to acknowledge due service of your proposed amendments to my proposed bill by receipt thereof yesterday, March 20, 1903." This, counsel claim, was equivalent to personal service of the amendments on March 20th, and had the effect of setting the time running on that date for the delivery of the bill and amendments to the clerk for the judge and of waiving the additional time given by section 1013 in case of service by mail. The claim is that this admission of service had the same effect as if there had been no attempt to serve the paper by mail, and that the time began to run as if there had been personal service on the day the amendments were, according to the admission, actually received by the defendants' attorney in San Francisco. We think the court below correctly held that this claim was untenable. In case of any dispute in regard to the fact or time of service, the admission would, of course, be very satisfactory evidence thereof, but we do not think that, with respect to the question of the time within which the next successive step in the proceeding was to be taken by the adverse party, it should be held to be a waiver of any part of the time given by the statute in case of service by mail. Express words, or the equivalent thereof, should be required to constitute such a waiver. If the plaintiff's position were correct, all that would be necessary, in case of service by mail, would be to show that there had been actual receipt of the paper in the usual course of mail delivery, and thereupon to invoke the rule that actual receipt is equivalent to personal service, and by that means change the character of the service from a mail service to personal service, and, practically, in every case materially shorten the time allowed by law for the doing of an act after such service. An admission by counsel is only a species of evidence of such actual receipt, and conclusive proof thereof could often be made by other means, with the result that the time allowed would be rendered altogether uncertain and dependent on matters not of record.

The plaintiff relies on the cases of *Heinlen v. Heilbron*, 94 Cal. 636, 30 Pac. 8, and *Shearman v. Jorgensen*, 106 Cal. 483, 39 Pac. 863, as establishing the contrary. We do not think they have that effect. Neither of those cases presented any such question. In the first case there was a dispute concerning the fact of the service of a notice of appeal. An attempt had been made to serve it by mail, but the attempt was abortive, so far as such service was authorized by the statute, because the statutory method had not been followed, in that the notice had not

been addressed to the place of residence, or location of the office, of the party on whom it was to be served. As a statutory service by mail the mere deposit in the post-office, without the proper address, was void. But it appeared that the notice was forwarded from the place to which it was addressed to his place of residence, and was actually received by him within the proper time. It was held that under the circumstances, and for the purposes of opposing a motion to dismiss the appeal for want of service of the notice of appeal, the actual receipt of the notice by the party to whom it was addressed and upon whom it was to be served, within the time allowed, was a personal service thereof, regardless of the question of there having been a sufficient substituted service by mail, and that this was sufficient to give the court jurisdiction of the appeal. The question of the effect of such actual delivery upon the time allowed, in case of a good service by mail, or in any case, did not arise, and was not discussed. In the *Shearman Case*, the question arose with respect to the service by mail of a notice of the overruling of a demurrer to the complaint. The notice was actually received by the attorney for the defendants, and the service was also good as a substituted service by mail under sections 1012 and 1013, Code Civ. Proc. The defendants failed to file any answer to the complaint, and long after his time for so doing had expired under either method of service, his default was taken and judgment entered against him. Following *Heinlen v. Hellbron*, supra, the court said that the actual receipt of the notice was equivalent to personal service. Owing to the short distance between the counties of San Francisco and Alameda, the time for answering was the same under either method. There was no question concerning the time. The only dispute was in regard to the question whether or not the negligence of the party was sufficiently excusable to justify the vacation of the default and judgment, and it was held that there was no sufficient excuse. Neither case is authority on the question arising in this case. The bill was properly settled.

Upon the merits of the case it is clear that the findings and judgment in favor of the plaintiff are erroneous and that the judgment and order must be reversed. The complaint states a cause of action to quiet the plaintiff's alleged title to certain tracts of land. The defense stated in the answer is, in substance, that both plaintiff and defendants claim under D. W. Grover, and Hannah F. Grover, that the defendants had, by assignment from Kramer, a contract to purchase the lands from the Grovers upon which there was due about \$600; that by an agreement then made between the defendants, the Grovers and P. B. Prefumo (plaintiff's husband), said Prefumo advanced for and on behalf of the defendants the said sum of \$600, and therewith paid the balance due

under the contract, upon the promise of defendants that they would repay him the said sum; that it was also agreed at the time that the Grovers should convey the lands to said Prefumo, and that Prefumo should hold title thereto for the benefit of defendants and as security for the repayment of said sum of \$600, and also the sum of about \$985 due him from them on account of another lien on or claim against said land; that in accordance with this agreement, the Grovers conveyed the lands to said P. B. Prefumo, who thereupon held the same under the agreement as trustee for the defendants; that said Prefumo thereafter, and without consideration, conveyed said lands to the plaintiff, Ada S. Prefumo, and that a part of the indebtedness due said P. B. Prefumo, for which he held the land as security, has been paid and the balance remains unpaid. The court found that each and every of these allegations of the answer were untrue, except that P. B. Prefumo had conveyed the lands to the plaintiff without a valuable consideration. By proper assignments of the insufficiency of the evidence the defendants challenge these findings. Although there are some particular details in which the evidence varies slightly from the facts alleged in the answer, yet in all substantial respects the averments are supported by uncontradicted evidence. Under the facts alleged and the evidence given, it is clear that the defendants had all the beneficial interest in the lands subject to the claim and lien thereon in favor of P. B. Prefumo for the payment of the sums advanced by him and due under the agreement made by him with the defendants. The defendants were in possession of the lands, so far as they can be said to have been occupied at all, and the plaintiff's right thereto is, in effect, no more than a mortgage to secure the money due under the agreement. *Walton v. Karnes*, 67 Cal. 255, 7 Pac. 676; *Millard v. Hathaway*, 27 Cal. 119, 140; *Hellman v. Messmer*, 75 Cal. 170, 16 Pac. 766; *Thomas v. Jameson*, 77 Cal. 93, 19 Pac. 177. The only legal method of enforcing such a claim is by foreclosure suit. The plaintiff being a voluntary purchaser, is in no better position than was her grantor at the time she purchased. The findings are unsupported by the evidence. The judgment and order are reversed.

We concur: ANGELLOTTI, J., McFARLAND, J.

2 Cal. App. 335

FLINN v. CROOKS.

(Court of Appeal, First District, California.
Dec. 5, 1905.)

1. APPEAL—HARMLESS ERROR—NONSUIT—DENIAL—ABANDONMENT OF ISSUES.

There was no prejudicial error in denying a nonsuit on a count of the complaint, where it was eliminated by statements of plaintiff's counsel and the instructions.

2. SAME — PRESUMPTIONS—FACTS TO SUSTAIN INSTRUCTIONS.

When error is claimed as to an instruction given, and the evidence might have justified it, appellant must show affirmatively that it did not.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3690.]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by William D. Flinn against Samuel R. Crooks. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Sullivan & Sullivan, for appellant. William J. Gleason, for respondent.

COOPER, J. Action to recover \$1,500 attorney's fees alleged to have become due from defendant to plaintiff's assignor. The case was tried with a jury, and a verdict rendered for plaintiff for \$1,100. This appeal is from the judgment and order denying defendant's motion for a new trial.

The appellant relies upon two points for a reversal of the judgment and order. The first is that the court erred in denying the defendant's motion for a nonsuit as to the second count of the complaint. The complaint contains two counts; the first being for the reasonable value of the attorney's services, the second being upon an express contract. At the close of plaintiff's testimony the defendant made the motion for a nonsuit as to the second count, whereupon counsel for plaintiff stated in open court that he did not rely upon the second count, and intended to ask the court to instruct the jury that plaintiff could only recover for the reasonable value of the services rendered. The court, upon said statement, denied the motion. The instructions of the court to the jury were all given upon the theory that the second count was abandoned, as no reference is made to such count in the instructions. The court instructed the jury as follows: "The sole question to be determined by you from the evidence is the reasonable value of the services rendered by the said M. C. Hassett, as attorney at law for the said defendant in the estate of Susan Crooks, deceased," and, further: "If you find in this case that M. C. Hassett, at the request of the defendant, rendered legal services which he knew of, though the compensation was not agreed upon, and which he accepted of, then and in that event I instruct you that there was an implied contract that the defendant should pay the reasonable value of the legal services rendered by said M. C. Hassett as his attorney, the amount of the services and the full value thereof to be determined by you as a question of fact." We think it plain from the above that the ruling of the court in denying the nonsuit as to the second count was, if erroneous, not prejudicial. If the nonsuit had

been granted, the second count would have been eliminated from the case. It was in fact eliminated by the statement of counsel for plaintiff and the instructions of the court. The jury certainly understood that they were to pass upon the question as to the reasonable value of the legal services. The verdict shows that they intended to find the reasonable value of the services, because there is not a word in the evidence as to any conversation or agreement in which \$1,100 was mentioned. We will presume, for the sake of upholding the verdict and the judgment, that they were based upon the first count, which is supported by the evidence, and to which the instructions were directed.

The second objection urged is that the court erred in giving to the jury the following instruction: "I further instruct you that if you find from the evidence that plaintiff's assignor, M. C. Hassett, on or about the 9th day of February, 1896, received from the defendant in this action the sum of \$300, and at that time the defendant made no specific request nor gave said Hassett any directions how to apply said payment, then I instruct you that the said Hassett had the right to apply said payment upon any obligation due said Hassett from the defendant, and, if said Hassett applied the said \$300 to the payment of a fee charged by him against said defendant for the procurement of a loan of \$5,000 for the said defendant from Christina Strobel, then I charge you that the said Hassett had the right so to do." The defendant's objection to the above instruction is that it took from the jury the question as to whether or not the charge of \$300 made by Hassett against defendant for negotiating the loan referred to was a reasonable charge for such services. The defendant has not seen fit to object to the instruction, as not based upon and applicable to the evidence given on the trial, nor has he brought up the evidence on which the instruction was predicated. We must therefore presume that the evidence showed that the fee of \$300 was agreed upon, and that it was a reasonable charge. It is a settled rule in this court that when error is claimed as to an instruction given to a jury, and the evidence might have justified the instruction, the party alleging such error must show affirmatively that the evidence did not justify the instruction. In this case we must presume that there was no issue as to the reasonableness of the charge of \$300. If appellant had brought up the evidence, and it had shown a conflict as to the reasonable value of the services for which \$300 was charged, and that there was no agreement as to the payment of this sum as a fee, then there would be much force in defendant's contention.

This disposes of the only errors urged on this appeal. The judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

7 Cal. Unrep. 243

In re TUCKER.

(Court of Appeal, Third District, California.
Oct. 23, 1905.)**APPEAL—SUBMISSION OF CAUSE—SUBSEQUENT SETTLEMENT—DISMISSAL.**

Where, after the submission of an appeal, the subject-matter of the action was settled by the parties, the appeal will be dismissed on respondent's motion suggesting such settlement.

Application by W. E. Tucker for mandamus against F. L. Caughey, as county auditor of Mendocino county. On motion to dismiss appeal. Granted.

McNabb & Hirsch, for appellant. W. E. Tucker, in pro per.

CHIPMAN, P. J. This cause was submitted when reached upon the calendar upon the written statement of attorneys for appellant that they understood that respondent was willing to submit the case upon the authority of *Humiston v. Shaffer*, 145 Cal. 195, 78 Pac. 651, and asked that it be so submitted.

The court ordered the case submitted upon that statement. Subsequently the respondent served and filed a motion for dismissal of the appeal, supported by an affidavit in which it appears that the subject-matter of the action has been settled by the parties and that the respondent has been paid by the county auditor the amount involved in the controversy and the judgment therein satisfied. The order heretofore submitting the cause is vacated and the motion of respondent is granted.

The appeal is dismissed, each party to pay his own costs.

We concur: McLAUGHLIN, J.; BUCKLES, J.

2 Cal. App. 338

BELL et al. v. BELL et al.

(Court of Appeal, First District, California.
Dec. 5, 1905.)**EXECUTORS AND ADMINISTRATORS — FAMILY ALLOWANCE—RIGHTS OF WIDOW AND CHILDREN.**

Code Civ. Proc. § 1468, provides that, when property is "set apart" to the use of the family of a decedent, one-half shall belong to the widow and the remainder to the children. The statute also provides for an allowance for the family, which by section 1467 is made a charge against the estate. *Held*, that a widow to whom a family allowance has been paid is not accountable to the children after their majority for shares not expended for their support; section 1468 applying to tangible property, such as exempt property or a homestead, and not to a family allowance.

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Action by Muriel Bell and others against Teresa Bell and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Charles J. Pence and Bart Burke, for appellants. T. Z. Blakeman, for respondents.

HARRISON, P. J. Letters testamentary upon the estate of Thomas Bell, deceased, were granted by the superior court for San Francisco November 7, 1892, and on November 22, 1892, Teresa Bell, one of the defendants herein, presented to the court her petition setting forth that the decedent had left her as his surviving widow with six minor children, and praying that the court would make an allowance out of said estate for the support of said family. January 12, 1893, the court made an order awarding to her "as and for a family allowance out of said estate" the sum of \$2,000 per month, and directing the executors to pay the same to her each month until the further order of the court. October 14, 1895, the court made an order reducing the said monthly allowance to \$1,500 per month, and in May, 1898, made another order reducing it to \$100 per month. The plaintiffs herein, are four of the children of the decedent who have reached their majority, and by the present action they seek judgment for an accounting by their mother (the said Teresa Bell) of the moneys received by her under the aforesaid order and disbursed for their support, and for judgment in their favor for the several amounts found due them upon such accounting, claiming that the said moneys were received and held by her in trust for the several members of the family, and that they are entitled to the respective shares which have not been expended for their support. The court sustained a demurrer to the complaint, and from the judgment entered thereon the plaintiffs have appealed.

It is manifest that the plaintiffs cannot maintain their action unless they have some interest in the moneys paid to the defendant, for the said family allowance; and for the purpose of showing such interest they rely upon section 1468, Code Civ. Proc. which provides that when property is set apart to the use of the family the one-half of such property shall belong to the widow, and the remainder in equal shares to the children, if there be more than one. By the very terms of this section, however, its provisions are applicable only when some specific or tangible property has been "set apart" for the use of the family; e. g., property that is exempt from execution, or a homestead when one has not been selected in the lifetime of the decedent (section 1465), or the entire estate when its value is less than \$1,500 (section 1469). In these cases the property set apart is withdrawn from the administration of the estate and is no longer under the control or supervision of the court. The provision for a family allowance does not direct the court to "set apart" any particular property, but requires it to "make a reasonable allowance" out of the estate, which, by section 1467, is made a "charge" against the estate, which must be "paid" in preference to all others except funeral charges and expenses of administration, and for which,

by section 1536, other property of the estate may be sold for the purpose of raising the money with which to pay the charge. The limitation of title declared in section 1468 for the property which is "set apart," and the omission to prescribe such limitation for the money directed to be paid for the family allowance, clearly indicates that the Legislature did not intend that the latter should be subject to such restriction.

Neither is this allowance made "for the use of the family," but, by the terms of the statute is for its "maintenance" while the estate is in progress of settlement, and its property is in the custody of the administrator or executor; and this includes the duty of keeping its members under the same roof with the common interests of a home as well as the expense incurred for food and raiment or for education and health. Upon the death of the father the maintenance of the family devolves upon the mother, and it is for the purpose of enabling her to discharge this duty that the court is authorized to appropriate a portion of the property of the estate. The allowance is not made merely for the purpose of enabling her to defray the several expenses incurred for each member of the family, but that she may also provide a means whereby she and the minor children may be kept together, and the family may be maintained as a whole. See *Keyes v. Cyrus*, 100 Cal. 322, 34 Pac. 722, 38 Am. St. Rep. 296. The provision in section 1466 that the court "must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances" implies that before making the order, the court will ascertain the circumstances of the family and of the estate out of which the allowance is to be made. This will involve an inquiry, among other matters, into their habits and mode of life during the lifetime of the decedent; the requirements of the several members of the family—depending upon their age and condition—whether for education, physical support, or health, and also the condition and extent of the property belonging to the estate. The amount which, upon such consideration, the court determines will be reasonable is properly directed to be paid to the widow as the person charged with the maintenance of the family, and it then becomes a judgment in her favor for that amount. *Estate of Bell*, 131 Cal. 1, 63 Pac. 81, 668.

The minor children have no claim to any portion of the allowance thus made to her, nor is it held by her in trust for them. Certainly the Legislature did not intend that one-half of the allowance should belong to her out of which should be paid the cost of her maintenance, and that an equal part of the other half should belong to each child, out of which should be paid only the cost of supporting that child. The amount of the allowance is fixed, with the view that

it will be entirely consumed in maintaining the family; and if in this respect the court errs, whether by making the allowance too large or too small, it is an error in its judgment, which can be corrected only upon a further application, setting forth the grounds upon which the amount of the allowance should be modified. Until such change, if there be any portion which is not expended, it is the property of the widow, and if the expenses are greater than the allowance the loss must be borne by her. In determining the amount to be paid, the court does not attempt to fix the amounts which will be consumed for each member of the family, but aggregates the needs of the family as a whole, and makes an allowance which it considers to be reasonable for those needs. It is of universal experience that the same expense is not incurred for each child, and that there are many expenses which do not appertain to either child, but which are incurred for the family as a whole; and there are also many duties of the mother which are not susceptible of pecuniary measurement. The expenses incurred for the infant which requires the mother's care, the child at school, or the youth preparing for the duties of manhood or womanhood in the years before majority, are not the same; and the rent of the home, its furniture, the expense of reparation, wages of servants, cost of equipage, and numerous other items are a charge upon the family as a whole, and are not to be apportioned against the individual members thereof. Upon these considerations it must be held that the widow, to whom the court directs a family allowance to be paid, is not required to account to her children for the manner in which such allowance has been expended, and that the demurrer to the complaint herein was properly sustained.

The judgment is affirmed.

We concur: HALL, J.; COOPER, J.

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CROSS v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

(Court of Appeal, First District, California. Dec. 5, 1905.)

PROHIBITION — ADEQUATE REMEDY IN ORDINARY COURSE OF LAW—RIGHT OF APPEAL.

Under Code Civ. Proc. §§ 1102, 1103, authorizing the issuance of a writ of prohibition to arrest the proceedings of any tribunal when such proceedings are without or in excess of the jurisdiction of such tribunal, and there is no plain, speedy, and adequate remedy in the ordinary course of law, a writ will not be issued on petition of an heir at law to prohibit a superior court from making an order directing the payment of an inheritance tax from the estate of the decedent, on the ground that the statute under which the court is proceeding has been repealed, since such an order, if made, is reviewable by appeal under Code Civ. Proc. § 963, subd. 3, as well as on appeal from a decree of final distribution, and an appeal is a plain, speedy, and adequate remedy within the meaning of the statute.

Petition by Alexander Cross against the superior court of the city and county of San Francisco, department No. 10, Hon. James M. Troutt, presiding, for a writ of prohibition. On demurrer to petition. Demurrer sustained.

Rehearing denied by Supreme Court, February 1, 1906.

Garoutte & Goodwin, for petitioner. A. L. Levinsky, Wilson & Wilson, S. F. Leib, and Oscar A. Trippett, amici curiæ. U. S. Webb, Atty. Gen., Percy V. Long, City Atty., John S. Partridge, Asst. City Atty., and Solinsky & Wehe, for respondent.

COOPER, J. This is an application for a writ of prohibition to be directed to the superior court of the city and county of San Francisco and to the presiding judge of department 10 thereof. The petition alleges: That James T. Cross died in January, 1905, being at the time of his death a resident of the city and county of San Francisco, and leaving a large estate, both real and personal, therein. That one Hynes was appointed administrator of the said estate, qualified, and letters of administration were duly issued to him, and that petitioner is the brother and sole heir at law of deceased. That under the collateral inheritance tax act of the state of California, enacted in 1893, and the amendments thereto, if said act is still in force, the petitioner would be required to pay a collateral inheritance tax to the state of California upon the estate coming to him from the estate of deceased at the rate of 5 per cent. upon the market value of said estate. That by an act of the Legislature enacted at the session of 1905, which took effect July 1, 1905, another and different collateral inheritance tax act was passed, which expressly repealed the inheritance tax act of 1893. That, notwithstanding such repeal, the said superior court is about to and threatens to appoint an appraiser and proceed to have the said estate appraised, and the market value fixed under the method prescribed in the act of 1893, for the purpose of enforcing the collection of the collateral inheritance tax as fixed by the act of 1893, in accordance with the procedure therein laid down. The respondent filed a demurrer to the petition upon the ground that it does not state facts sufficient to authorize the writ of prohibition prayed for, and now claims that petitioner has a plain, speedy, and adequate remedy by appeal in the ordinary course of law. The evident object of the proceeding is to obtain the opinion of this court as to whether or not a collateral inheritance tax can be collected under the act of 1893, after its repeal; but the conclusion which we have reached makes it unnecessary to decide that question.

The writ of prohibition arrests the proceedings of any tribunal when such proceedings are without or in excess of the jurisdiction of such tribunal, and there is no

plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc. §§ 1102, 1103. If there be a plain, speedy, and adequate remedy in the ordinary course of law, the writ will be denied. There are cases on the border line, in which it is a matter of some difficulty, and generally, in this state, a matter of discretion, as to whether or not there is a plain, speedy, and adequate remedy in the ordinary course of law. It is the general rule that, where there exists an opportunity for a review and correction of the wrong complained of in a higher court on appeal, prohibition will not lie. Spelling on Injunctions and Other Extraordinary Remedies, § 1729; High on Extraordinary Legal Remedies, § 780; Huguley Mfg. Co. v. Galetton Cotton Mills, 184 U. S. 301, 22 Sup. Ct. 452, 46 L. Ed. 546; Lindley v. Superior Court, 141 Cal. 220, 74 Pac. 765; Agassiz v. Superior Court, 90 Cal. 103, 27 Pac. 49. In the latter case the court said: "Petitioners had the right to appeal from the order refusing to dissolve the attachment, and would have an appeal from any final judgment in the case; and such appeal being a plain, speedy, and adequate remedy in the ordinary course of law, within the meaning of section 1103, Code Civ. Proc., prohibition does not lie. A remedy does not fail to be speedy and adequate because by pursuing it through the ordinary course of law more time would probably be consumed than in the proceeding here sought to be used. And it makes no difference that in this instance a question of jurisdiction incidentally depends upon the validity of an attachment. If that were so, then in every ordinary civil action, whenever a defendant chose to raise a point of jurisdiction, either of the person or of the subject-matter, he could by prohibition stop the ordinary progress of the action toward a judgment until this court had passed upon the intermediate question; and thus this tribunal would, in innumerable cases, be converted from an appellate to a nisi prius court."

Let us, then, examine the question as to whether or not the petitioner has a remedy by appeal. The main thing sought to be prohibited is the making of an order directing the payment of the tax under the act of 1893. In cases where the court makes an order fixing the amount of tax to which an estate is liable, it becomes the duty of the executor to collect or retain such tax, and pay it to the county treasurer for the use of the state. The order would be in substance an order directing the payment of a claim—the claim of the state to the tax—and, as such, would be appealable, Code Civ. Proc. § 963, subd. 3. In *Stuttmeister v. Superior Court*, 72 Cal. 487, 14 Pac. 35, the word "claim" as used in section 963 was given a broad meaning. It was held to include a demand for attorney's fees, allowed by the court to the administrator for services of his attorney. That case was followed and

approved in *Leach v. Pierce*, 93 Cal. 627, 29 Pac. 239. In *Estate of Stanford*, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788, an appeal was taken, and never questioned, from the order directing the executrix to pay the collateral inheritance tax. Not only would the petitioner have the right to appeal from the order directing the payment of the tax, but he would have the right to appeal from the decree of final distribution, if the decree should direct the deduction of the amount of the tax. That was the course taken in *Estate of Mahoney*, 133 Cal. 180, 65 Pac. 389, 85 Am. St. Rep. 155, and in *Estate of Campbell*, 143 Cal. 623, 77 Pac. 674, both of which involved questions as to the collateral inheritance tax law.

We are aware of no case where an order such as the contemplated order here has been stopped by the extraordinary writ of prohibition. If the attention of the lower court is called to the matter, we must presume that no illegal claim or demand will be allowed or ordered paid. If the ruling should be against petitioner, he has his remedy in the ordinary course of law by appeal, and can thus obtain the judgment of this court upon the question. In *Ophir Silver Mining Co. v. Superior Court of San Francisco* (Cal.) 82 Pac. 70, the superior court was proceeding to try a case involving the issuance of an injunction enjoining a threatened injury to land in another state, and of which the courts of the sister state had jurisdiction. While it was held that the petitioner would have had a remedy by appeal, the writ was issued upon the ground that such remedy "would be wholly inadequate for the reason that much of the greater part of the expenses (of transporting witnesses, etc.) could not be recovered as legal costs."

The demurrer is sustained, and the petition dismissed.

We concur: HARRISON, P. J.; HALL, J.

UNITED STATES EXPRESS CO. v. EVEREST.

(Supreme Court of Kansas. Jan. 6, 1906.)
NEGLIGENCE — INJURY AT UNION DEPOT —
LIABILITY OF EXPRESS COMPANY.

Under the circumstances of this case it is held that an express company engaged in unloading upon a truck express matter from a car standing upon a railroad track in the Union Depot at Kansas City, Mo., was under no obligation to protect from injury, through a collision with the truck, a messenger of the Western Union Telegraph Company riding by permission of the pilot upon the steps of the rear car of an empty passenger train backing into the depot upon an adjacent track which the truck obstructed.

(Syllabus by the Court.)

Error from District Court, Wyandotte County; William G. Holt, Judge.

Action by T. J. Everest against the United States Express Company. Judgment for \$3 P.—52

plaintiff, and defendant brings error. Reversed.

Karnes, New & Krauthoff, A. L. Berger, and Loomis, Blair & Scandrett, for plaintiff in error. Getty, Hutchings & Dean, for defendant in error.

BURCH, J. The plaintiff recovered damages for an injury to his 17 year old son, alleged to have been occasioned by the defendant's negligence. The injured party was a messenger of the Western Union Telegraph Company, whose duties required him to deliver messages in and about the Union Depot in Kansas City, Mo., and upon trains arriving and departing from that station, and to bring mail from the post office, three blocks away. On the morning of the accident he went to the post office and received a bag of depot mail. Instead of returning by the usual route, he went somewhat out of his way to the railroad track used by the Chicago, Rock Island & Pacific Railway Company for access to the depot. There he found an empty train of that company waiting for a semaphore signal authorizing it to back into the depot to receive its load of passengers, baggage, express, and mail, preparatory to its departure westward. As the train commenced to move backward, after receiving its signal, he climbed upon the rear steps of the rear car, and deposited his mail bag upon the platform. The train was upon what is designated as "track 5." As it approached the depot, a Chicago & Alton passenger engine was discovered some 240 or 300 feet ahead, standing upon track 6, and emitting clouds of steam, which obscured all further view in that direction. This engine was attached to a late passenger train which had just arrived from the East. Upon the arrival of trains the defendant's work of removing express matter from the cars begins, and employes are kept in waiting with trucks for that purpose. Tracks 5 and 6 are parallel, and lie next to each other; track 5 being nearest the depot buildings. The space between the tracks, however, is narrow, and a truck of standard size placed lengthwise alongside of an express car on track 6, in the usual manner for unloading, obstructs the operation of trains on track 5. While one of the defendant's employes was engaged in taking express matter from the Chicago & Alton train referred to, the rear of the Rock Island empty train emerged from the bank of steam and bore down upon his truck. The messenger boy standing upon the lower steps of the moving car tried to climb up to the platform, but it was too late. The side of the car passed over the truck, and as it did so the truck carried away the car steps, and crushed the boy's foot so that amputation was necessary.

The plaintiff charges that the defendant was negligent in placing its truck upon track 5 at a time when the Rock Island train was

due, without stationing a sentinel to warn persons upon the train, whose vision might be obstructed by the escaping steam, of the presence of the truck. The defendant answers that it was not negligent, that it owed no duty to the boy at the time and place of the accident, and that his injuries were the result of his own carelessness. The traffic in and out of the Union Station at Kansas City, Mo., is under the management of the Union Depot Company, which owns the building, grounds, and tracks. That company reserves to itself exclusive control over the entrance and exit of trains, and assigns to each railroad company using the depot a certain track for the purpose of loading and unloading its cars. The various express companies operate there under the same authority. There are no special instructions governing the use of tracks 5 and 6, but the servant of the defendant who was in charge of its truck at the time of the accident understands that trains have the right of way. No doubt this is true, since under all ordinary circumstances a truck ought not to block a train, and in any event it must be accepted as true for the purposes of this case. But the fact that the express company is required to remove its carriage in order that the railway company's carriage may pass does not render its occupancy of the track for the purpose of doing its work negligent merely because a train is due.

The two transportation companies are engaged in the business of serving the public in the same way, at the same time, and in the same busy place, and each is under the obligation of using due care toward the other. The operations of the express companies are necessarily limited and guided by the arrival and departure of trains. The Rock Island empty train could not be loaded until it was brought into the depot and set for that purpose. The Chicago & Alton train could not be unloaded until it came in, and it was then the duty of the defendant to remove express matter as soon as trucks could be placed alongside of the express car. This duty relates to trains which are delayed, as well as those which are on time. The express company finds its cars wherever the Union Depot regulations stop them, and in reaching those brought in by the Chicago & Alton it is necessarily compelled to infringe upon track 5. It is impossible to know the precise moment when an empty train will be backed in. It may be delayed by obstructions, or may be kept waiting for signals an indefinite period at the various semaphores along its route, and it would be unreasonable to require the express company to suspend its work altogether and refrain from unloading a waiting Chicago & Alton train until a detained Rock Island "back-over," as it is called, could arrive and pass. All persons using the depot tracks under the orders of the depot company must be held to know when and how the work of the ex-

press company must be carried on, and to know that it must place its trucks in dangerous proximity to track 5 when unloading Chicago & Alton trains. Therefore trucks stationed to receive express matter from those trains are rightfully employed, and the defendant was guilty of no breach of duty on account of the fact that it was in effect using track 5 when the Rock Island train approached. The Rock Island train in question was made up in the company's yards from cars cleaned and prepared for travel, and was sent to the depot, there to be turned over to the conductor and to receive its burden of passengers, mail, and express. Not only was the public forbidden to use it while on the way to the depot, but it was accompanied by an escort who was charged with the special duty of keeping people off of it. The escort carried a key to enable him to go through the coaches, and had no other business except to prevent persons from undertaking to ride. The conductor did not become responsible for the train until after it had backed into the depot and stopped there. The only other person allowed upon the Rock Island coaches was a pilot, who was stationed upon the rear platform of the rear car for the purpose of guiding the train into the depot. He was provided with an air whistle with which to give warnings and an air brake with which to stop the train. This brake worked with a small lever, applied to the entire length of the train the instant the lever was pressed down, and had the same power as the emergency brake. With it the pilot could stop the train as the engineer could stop it. The pilot's position was at the left-hand side of the platform, where the lever of the brake and the lever of the whistle were at his instant command. It was his duty to stop and hold the train for semaphore signals, to obey signals when received, to give signals to the engineer, to look out for pedestrians, vehicles, switch engines, and all kinds of obstructions, see that the train did not run into them, and, as occasion required, to use the whistle and the brake. His attention was entirely taken up with his duties.

When the messenger boy climbed upon the train, he was perfectly familiar with the manner in which traffic in and about the Union Depot is conducted, even to minute details. He knew when and where to catch the train in question, knew it was empty and was backing in to be turned over to the conductor, knew the pilot was not a conductor or brakeman, and knew he was busy attending to duties of the pilot, which no one else could discharge. He testified that he asked if he could ride, and that the pilot said "Yes." By riding on the steps of the car he escaped the attention of the escort, who did not come outside the rear car door. A conflict between the boy's testimony and that of the pilot, who was a witness for the plaintiff, cannot, of course, be

discussed. When the train approached the depot, both the pilot and the boy saw the cloud of steam, and knew that it came from the engine of a Chicago & Alton passenger train standing on track 6. This fact was of itself a warning, at least to the pilot, that the express company might have a truck in proximity to track 5 opposite the door of the express car of the Chicago & Alton train. The pilot testified that he slowed down his train because he feared there might be something on the other side of the steam. The boy testified that he knew they might run into something; that he had seen trains run into express trucks before; that he wanted to get off when he saw the steam; and that he would have done so if the platform had not been icy and he without rubbers.

Under these circumstances it is difficult to understand what function a watchman could have performed had he been present. Not only were the facts sufficient to give notice of the specific peril which was encountered, but an apprehension of danger actually existed in the minds of the very persons who were to be put on guard. Evidently what was needed at the critical moment was such control of his train by the Rock Island pilot that, if the truck and train collided at all, the car steps would not be stripped off by the impact, and the truck would not be carried along some 20 or 25 feet by the momentum of the car, as actually did occur. Conceding, however, that the express company owed some duty in the premises, it is not apparent that it was under any obligation to the messenger boy, except to refrain from the willful infliction of injury upon him. It is elementary law that there can be no liability for negligence unless in consequence of the violation of some duty owed to the aggrieved party at the time and place the injury occurs. "Culpable negligence on the part of one person as toward another always involves a breach of duty on the part of the former as toward the latter. Where there is no breach of duty, there can be no culpable negligence, and it is only for negligence of a culpable character that any person can be held responsible in law." *Rush v. Mo. Pac. Ry. Co.*, 36 Kan. 129, 135, 12 Pac. 582, 585. "The first requisite in establishing negligence is to show the existence of the duty it is supposed has not been performed. A duty may be general, and owing to everybody, or it may be particular, and owing to a single person only, by reason of his peculiar position. An instance of the latter sort is the duty the owner of land owes to furnish by it lateral support to the land of the adjoining owner. But a duty owing to everybody can never become the foundation of an action until some individual is placed in position which gives him particular occasion to insist upon its performance. It then becomes a duty to him personally. The general duty of a railway company to run its trains with

care becomes a particular duty to no one, until he is in position to have a right to complain of the neglect." *Cooley on Torts*, c. 21, p. 791. "Actionable negligence is the failure to discharge a legal duty to the person injured. If there is no duty, there is no negligence. Even if a defendant owes a duty to some one else, but does not owe it to the person injured, no action will lie. The duty must be due to the person injured. These principles are elementary, and are equally applicable whether the duty is imposed by positive statute or is founded on general common-law principles." *Akers v. Chicago, St. P., M. & Ry. Co.*, 58 Minn. 540, 544, 60 N. W. 669, 670. "In order to justify a recovery, it is not sufficient to show that the defendant has neglected some duty or obligation existing at common law or imposed by statute, but that the defendant has neglected a duty or obligation which it owes to him who claims damages for the neglect. (*O'Donnell v. P. & W. R. Co.*, 6 R. I. 211.) It has been said: 'However great the defendant's negligence, if it was committed without violating any duty which he owed either directly to the plaintiff, or to the public in a matter whereof he had the right to avail himself, * * * there is nothing which the law will redress.' (*Bishop on Noncontract Law*, § 446.) In *Shearman & Redfield on Neg.* (4th Ed.) § 8, the doctrine is thus expressed: 'If the defendant owes a duty, but does not owe it to the plaintiff, the action will not lie.' *Williams v. C. & A. R. R. Co.*, 135 Ill. 491, 496, 26 N. E. 661, 662, 11 L. R. A. 352, 25 Am. St. Rep. 397. "Negligence is an omission of care and caution in what we do. But the duty to be actively cautious and vigilant is relative, and where that duty has no existence between particular parties, there can be no such thing as negligence in the legal sense of the term." *Morris v. Brown*, 111 N. Y. 318, 326, 18 N. E. 722, 724, 7 Am. St. Rep. 751.

Besides this, duties are always dictated by the exigencies of some particular state of circumstances. "If there be no negligence, though there be an injury, no action will lie. Negligence is essentially relative. In the abstract it is nullity. It does not, and it cannot in the nature of things, exist. It is metaphysically impossible to evolve a concept of negligence apart from the facts which give rise to it and independently of some imposed or implied correlative duty. The duty must be essentially related to the particular circumstances, and a variance in the circumstances necessarily begets either a modification of the duty or else extinguishes it altogether. Thus the duty which a railroad company owes to a passenger whom it is carrying on its train, is widely different from the duty it owes to a trespasser on its tracks; not only because the rights of the two are different, but because the attendant circumstances and facts creating the reciprocal rights in each instance are dissimilar. This

difference in rights and in duties springs from a divergence in the circumstances out of which they respectively grow. Consequently a condition which would in one case give rise to an inference of negligence would be wholly insufficient to justify its deduction in the other." *City Pass. Ry. Co. v. Nugent*, 86 Md. 349, 356, 38 Atl. 779, 781. And in every instance the duty of taking care presupposes knowledge, or its equivalent, of the particular state of facts out of which it arises. There must be prevision of danger and likelihood of injury, for the law imposes responsibility for that only which reasonable prudence can anticipate. Authorities in support of this proposition would be superfluous.

Conceding that, on account of the conduct of its pilot, the Rock Island Company was bound to recognize the messenger boy as a licensee, he enjoyed no higher rights, so far as the defendant is concerned, than a trespasser upon that portion of the railway track which the defendant was entitled to use. It made no difference that he came on the Rock Island train. His rights were not thereby magnified over what they would have been if he had used a car of his own. The circumstances afforded to the express company no admonition of his presence. The guilty knowledge of the pilot could not be imputed to the defendant. The train was not a train for licensees. Nobody had any right there, and nobody ought to have been there but the trainmen. The defendant had no more reason to believe that a Western Union messenger would be riding upon the lower car steps than it had to expect that a packing house workman would be there, and it cannot be required to expend its resources in employing watchmen to guard the safety of any one whose presence within the range of its activities is not to be anticipated. It does not aid the plaintiff that the defendant knew the pilot would be upon the rear platform, and that the escort would be somewhere upon the train. That fact did not bring the telegraph company's servant within the range of the defendant's foresight. The pilot and the escort were trainmen charged with knowledge of all the Union Depot regulations and of all the circumstances surrounding the use of the depot tracks. They had a full comprehension of all the dangers to be encountered there, of the right of the defendant to encroach upon track 5, and of all the means of averting such dangers and dealing with such encroachments. They were in command of an agency for sounding an alarm at their approach, and of an application for the instantaneous stopping of the train and averting of injury if their warnings were not observed; and to such persons the defendant owes a due measure of care. If the train had been a passenger train, those

properly upon it would have been within the purview of the defendant's obligation to protect. They would have been in charge of a conductor and a number of other servants skilled in the exercise of the highest vigilance to avoid imperiling them. The management of such a train is according to its own appropriate methods; and to all persons entitled to ride upon it the defendant owes a due measure of care. But the defendant, in the discharge of its important public duties respecting the secure and speedy transportation of property, is not bound to adjust its business to meet the sudden perils of intruders who impose themselves upon it without warning, who voluntarily place themselves in exposed positions where they are without the protection of others, and who are destitute of means for protecting themselves.

Cases like *A., T. & S. F. Ry. Co. v. Parry*, 67 Kan. 515, 73 Pac. 105, and *Combs v. Thompson*, 68 Kan. 277, 74 Pac. 1127, holding that anticipation of the specific injury which happens to result from a negligent act is not essential in order to charge a wrongdoer, have no application to the facts of this controversy. In each instance a duty to the injured person was established. In the *Parry* Case the duty of the railway company to protect a sick passenger from the consequences of his delirium was involved, and this duty was violated whether the man wandered away for several miles and was killed upon the defendant's tracks, or whether his illness led him into other danger. In the *Combs* Case the defendant amused himself by recklessly discharging a loaded cannon into a public street of a populous city along which crowds of people were passing. Of course, he was liable to the man he shot, although he did not single out that particular individual as a target. In the *Parry* Case the duty was personal to the passenger. In the *Combs* Case it was general to all who came within reach of the defendant's missiles. In this case the messenger had no personal claim upon the defendant's attention, and he belonged to no class to the individuals of which generally the defendant owed a duty. Therefore the fundamental element of a cause of action in favor of the plaintiff is wanting.

This conclusion follows from a consideration of the admissions of the injured party and the uncontradicted and unconflicting testimony of the plaintiff's own witnesses. However, since the facts are not found or agreed to in the sense of the statute permitting this court to order judgment, the cause must be remanded for a new trial, and to that end the judgment of the district court is reversed.

A preliminary jurisdictional question is decided in favor of the plaintiff. All the Justices concurring.

DULIN v. METROPOLITAN ST. RY. CO.

(Supreme Court of Kansas. Dec. 9, 1905.)

STREET RAILROADS — FRIGHTENING HORSES — NEGLIGENCE—QUESTION FOR JURY.

Where, in an action against a street railway company for injuries to a traveler in consequence of his horse being frightened by a car, the testimony showed that that car when approaching the traveler was running more rapidly than he was driving, that the motorman was sounding his gong loudly, that the horse became frightened, that though the danger to the traveler was apparent the motorman continued to run his car toward the horse and to loudly ring the gong, the question whether the motorman was negligent in failing to do what he could to avert the threatened danger to the traveler so as to render the company liable was for the jury.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 253.]

Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Judge.

Action by John Dulin against the Metropolitan Street Railway Company. There was a judgment for defendant, and plaintiff brings error. Reversed.

T. P. Anderson, for plaintiff in error. Miller, Buchan & Miller, for defendant in error.

PER CURIAM. In driving along a street of Argentine John Dulin's horse was frightened, ran away, throwing him out of his cart, injuring him, and damaging his property. He sued the Metropolitan Street Railway Company, claiming that the injury and loss was caused by the negligent operation of a street car. There was testimony that the street car approached Dulin, running more rapidly than he was driving; that the motorman sounded the gong very loudly and the horse became frightened at the car and pranced and jumped about; that, although the danger to Dulin was apparent, the motorman continued to run his car toward the frightened horse and to loudly ring the gong; and that then the horse became unmanageable, running away, throwing Dulin out, and causing the injury and loss for which recovery is sought. The trial court sustained a demurrer to the plaintiff's evidence.

If the danger to Dulin was apparent, and was or should have been known to the motorman, and he persisted in running the car toward the frightened horse, and in unnecessarily and loudly sounding the gong, it cannot be said that he was free from culpable negligence. Under such circumstances he should have done what he reasonably could do to avert the threatened danger to Dulin. There is testimony fairly tending to show that this was not done, and whether he was guilty of such negligence as would make the company liable for the loss was a question for the jury.

The taking of the case from the jury was therefore an error, for which the judgment will be reversed, and the cause remanded for a new trial.

ST. LOUIS & S. F. R. CO. v. DAUGHERTY.

(Supreme Court of Kansas. Dec. 9, 1905.)

RAILROADS — CLAIM AGENTS — PROOF OF AGENCY—AUTHORITY—EVIDENCE.

The scope of the authority of the claim agent and assistant claim agent of a railway corporation is not defined by law, and, if put in issue in an action, must be proved as matter of fact, even though the conduct of the officials named may appear inexplicable, except on the supposition that they had authority.

Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Judge.

Action by Rose Daugherty against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Pratt, Dana & Black, L. F. Parker, and A. L. Berger, for plaintiff in error. W. E. Flynn, for defendant in error.

PER CURIAM. In this case the testimony of the attorney for the plaintiff was doubtless sufficient, even though it was very slight, to show that W. B. Spaulding was the general claim agent of the defendant, and that J. L. Gaston was the assistant claim agent of the defendant. The scope of the authority of the claim agent and assistant claim agent of a railway corporation is not, however, defined by the law, and, if put in issue, must be proved as a matter of fact. Here the authority of the officials named to make the settlement relied upon as the plaintiff's cause of action was denied under oath, and there is no evidence of such authority in the record. It is true that the conduct of the officials named may appear to be inexplicable, except upon the supposition that they had authority. Agency, however, cannot be proved by the acts or declaration of the agent, except under special contingencies not here involved. The fact of authority must appear before the conduct of the agent can be shown to bind the principal.

This being true, the judgment must be reversed, and the cause remanded for a new trial.

GRAF v. VERMONT SAVINGS INV. CO.
et al.

(Supreme Court of Kansas. Dec. 9, 1905.)

WRIT OF ERROR — ORDER GRANTING NEW TRIAL—GROUNDS—INSUFFICIENCY OF EVIDENCE—REVIEW.

Where the trial court did not state on what ground a motion for a new trial was granted, and one of the grounds was that the verdict was not sustained by the evidence, the Supreme Court will not weigh the conflicting evidence, but will affirm the order.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3871.]

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Action between R. J. Graf and the Vermont Savings Investment Company and an-

other. There was an order granting a new trial, and the former brings error. Affirmed.

W. H. Cowles, for plaintiff in error. W. F. Schoch and Lee Monroe, for defendants in error.

PER CURIAM. The only error complained of in this case is the granting of a new trial. There were several grounds set out in the motion, one of which was that the verdict of the jury was not sustained by sufficient evidence. The court did not declare upon which ground the motion was granted. This court, therefore, cannot say that it was not because the evidence was not sufficient to uphold it. In such cases this court will not undertake to weigh the evidence, but where the evidence is conflicting will confirm the order of the court granting a new trial. *Land Company v. Lewis*, 53 Kan. 750, 37 Pac. 108; *McCreary v. Hart*, 39 Kan. 216, 17 Pac. 889; *Black v. Berry*, 40 Kan. 489, 20 Pac. 194; *McCrum v. Corby*, 15 Kan. 112. These decisions announce the rule that has always been followed in Kansas.

The judgment is affirmed.

McBRIDE et al. v. STEINWEDEN et al.
(Supreme Court of Kansas. Jan. 6, 1906.)

1. STATES—BOUNDARIES—NAVIGABLE STREAM.
Where the Missouri river is designated as a part of the boundary between the states of Kansas and Missouri, the middle of the main channel of the river is the boundary line, and, if the river shifts and its course is changed by the gradual process known as accretion, the boundary line will change with the river, and the center of the main channel as the river runs will continue to be the boundary between the two states.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. States, § 8.]

2. NAVIGABLE WATERS—ACCRETION.

Where the river so changes, the land formed by the gradual and imperceptible accretion from the water belongs to the owner of the shore land to which it is added.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, § 270.]

3. SAME—ISLAND.

In determining whether a formation in a river is an island or a part of the shore land, account should be taken of the size and stability of the formation, its physical features, and the relative size and permanence of the channels around it.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, § 253.]

4. SAME.

In an instruction relating to an island, among other things, it was said: "It may be stated by way of definition that to constitute an island in a river the same must be of a permanent character, not merely surrounded by water when the river is high, but permanently surrounded by a channel of the river, and not a sand bar subject to overflow by a rise in the river and connected with the land when the water is low." *Held* not error, as applied to the facts in the case.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, § 253.]

5. EJECTMENT—DEFENSES—TITLE IN THIRD PARTY.

Where the plaintiff, in an action of ejectment, establishes an interest or title to land paramount to that of the defendant, the latter cannot avail himself of an outstanding title in a third party, although it may be superior to that of the plaintiff.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 100.]

6. SAME—EVIDENCE.

A deed from one not shown to have any interest in or connection with the land proposed to be conveyed is inadmissible as evidence of title in an action for its recovery.

7. DEED—VALIDITY—INDEFINITE DESCRIPTION.

An instrument purporting to convey land, in which the description is so vague and uncertain as to be meaningless, and there is nothing in the deed by which the identity of the premises can be ascertained, is void.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 65.]

8. TRIAL—RECEPTION OF EVIDENCE.

The order in which evidence shall be received must to a great degree be left to the discretion of the court trying the case, and, unless that discretion has been abused, its action furnishes no ground for complaint.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Trial, § 139.]

9. NAVIGABLE WATERS—ACCRETION.

The findings of the jury that the land in controversy accreted to that owned by the plaintiff are *held* to be sustained by the evidence.

(Syllabus by the Court.)

Error from District Court, Atchison County; B. F. Hudson, Judge.

Action by Josephine Steinweden and others against Ella McBride and John McBride. Judgment for plaintiffs, and defendants bring error. Affirmed.

Ryan & Ryan and Jackson & Jackson, for plaintiffs in error. Waggener, Doster & Orr, for defendants in error.

JOHNSTON, C. J. This is a controversy over a tract of land which was formerly the bed of the Missouri river. In 1881 Christoff Steinweden acquired a fractional quarter of section 10, township 5, range 21, on the Kansas shore of the Missouri river, and which is designated as lot 3. In 1855 there was a government survey of the Kansas land which fixed the boundaries of lot 3, and showed that it extended to the Kansas shore of the Missouri river. Southwest of lot 3, and on the opposite side of the river, was land that had been surveyed and designated as section 33, township 56, range 37, in Buchanan county, Mo. It appears that since 1855 the channel of the Missouri river has moved in a southerly direction from lot 3, and the land formed against lot 3 by the shifting of the river is that which is in controversy. Steinweden, who showed a good paper title, at least, to lot 3, claimed the land as an accretion to lot 3, and Ella McBride claimed it as an accretion to a part of section 33 in Missouri, to which she asserted title under certain conveyances. John McBride, the husband of Ella, occupied the land as a

tenant of Steinweden from about 1894 to 1899, when he denied his landlord's title and refused to pay rental. Steinweden brought an action against him to recover the land and obtained a judgment that he was entitled to the land and its possession. Immediately following that judgment, and in October, 1899, McBride entered into a compromise agreement with Steinweden, which, among other things, stipulated that McBride should yield immediate possession of the land and any claim of title or ownership in the buildings or the improvements upon it. Without any change of possession, his wife, Ella McBride, set up a claim of title to the land under a deed from Anna Smith, executed in October, 1899, and purporting to convey a strip of land in section 33 which was formerly on the Missouri shore of the river, and later she claimed under another deed executed to her by John Koch several months after the present proceeding was brought.

Among the points of contention at the trial was the location of the main channel of the Missouri river in 1855, when the Kansas survey was made, the character of the changes in the channel of the river, whether sudden or gradual, and the manner in which accretions were formed as the channel of the river shifted. There was considerable contention also as to whether there was an island in the river near the Kansas shore and opposite the Steinweden land. From the testimony and the findings of the jury it appears that there was no island near lot 3, but that between 1855 and 1866 a sand bar formed in the river opposite and near to the land, and that for a time there was a channel of the river between the sand bar and the Kansas shore called the "Indian Chute," and through which boats and rafts passed in times of high water. The main channel of the river, however, was between the sand bar and the Missouri shore. The sand bar at times was partly covered with an undergrowth, but it did not rise to the level of the shore lands, and it overflowed during ordinary high water. It was shown and found that the alluvial deposits added to lot 3 by the shifting of the river were formed in such a way as to form accretions to that lot. The jury also found that Steinweden had erected fences on the accreted land, and, besides paying taxes levied against it, had exercised authority and control over it since 1884. This action was begun in January, 1900, and the verdict and judgment awarded the land in controversy to Steinweden. Shortly after the rendition of the judgment Steinweden died, and the proceeding and judgment were revived in the names of his widow and children. In their answers the McBrides objected to the jurisdiction of the court and asserted that the land in controversy was in the state of Missouri. This was based on the theory that the "Indian Chute" between lot 3 and the sand bar spoken of was the main channel of the river; that

the sand bar was an island in the state of Missouri; and that title to it was in that state. If Steinweden established a right to the land paramount to that claimed by the McBrides, they could not avail themselves of a title in the state of Missouri, or any other third party, although it might be superior to that of Steinweden. *Duffey v. Rafferty*, 15 Kan. 9; *Thomas v. Rauer*, 62 Kan. 568, 64 Pac. 80; *Christy v. Scott*, 14 How. (U. S.) 282, 14 L. Ed. 422.

The Missouri river is a navigable stream, and at the place in question was the boundary line between the state of Kansas and the state of Missouri. In such a case the middle line of the main channel is the boundary line between the states, and the bed, and also any island between that line and the shore line, belongs to the state in which it is located. If the boundary river changes its course gradually by the accretive process, the boundary line follows the river and is in the center of the channel, but a sudden change of the channel by the process known as avulsion does not change or affect the boundary line. The rule was well expressed by Justice Brewer, in *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. 396, 38 L. Ed. 186, where he said: "It is settled law that, when grants of land border on running water, and the banks are changed by that gradual process known as accretion, the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary. * * * It is equally well settled that, where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the centre of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In *Gould on Waters*, § 159, it is said: 'But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates.' 2 Bl. Com. 262; *Angell on Water Courses*, § 60; *Trustees of Hopkins' Academy v. Dickinson*, 9 Cush. 544; *Buttenuith v. St. Louis Bridge Co.*, 123 Ill. 535, 17 N. E. 439, 5 Am. St. Rep. 545; *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 287; *Murry v. Sermon*, 8 N. C. 56. These propositions, which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between states or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on boundary, but leaves it in the center of the old channel." See, also, *Barney v. Keokuk*, 94 U. S. 824,

24 I. Ed. 224; *Jefferies v. East Omaha Land Co.*, 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 872; *City of St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. 337, 34 L. Ed. 941; *St. Anthony Falls Co. v. St. Paul Water Com'rs*, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497; *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *Peuker v. Canter*, 62 Kan. 363, 63 Pac. 617; *Perkins v. Adams*, 132 Mo. 131, 33 S. W. 778.

Now, there was abundant testimony tending to show that the main channel was southwest of the sand bar, and that the change in the course of the river was gradual and imperceptible. While the river shifted and the Kansas shore line was thereby extended for a distance of about two miles, during a period of 50 years, it was accomplished by the process of accretion, and hence the center of the main channel of the river, as it runs, continues to be the boundary of the state.

It has been questioned whether the accretive theory was applicable to the Missouri river, with its rapid current, crooked course, and unstable banks; but the Supreme Court of the United States has determined that, although the changes in the channel of the river are greater and more rapid than in some others, the differences are not such as to take it out of the general rule of accretion. *Jefferies v. East Omaha Land Co.*, supra; *Nebraska v. Iowa*, supra.

The exclusion of evidence offered by the McBrides is a matter of complaint. A deed purporting to convey a strip of land in section 33, as designated by the Missouri survey, and accretions, executed by Anna Smith to Ella McBride, was offered and rightly refused. Anna Smith was not shown to have had any title to or connection with the land described in the deed. There was no proof, or offer to prove, that her deed was a link in a chain of conveyances from any source of title, nor that she had ever been in possession of the land with or without color of title. A deed from one not shown to have some interest in the land proposed to be conveyed is inadmissible in an action for its recovery. *Bancroft v. Chambers*, 10 Kan. 364; *McKibben v. Newell*, 41 Ill. 461; *Kennedy v. Bogert*, 7 Serg. & R. (Pa.) 97; *Scrack v. Zubler*, 34 Pa. 38. Another deed purporting to have been made by Steinweden to Herman Koch was offered in evidence by the McBrides and excluded. It had no application to the lands in controversy, as the description was so indefinite as to be meaningless, and the deed was therefore ineffectual. The attempt at description was "Beginning at the southwest corner of the northwest quarter of section No. thirty-three (33), in township No. fifty-six (56), in range No. thirty-seven (37); thence north on section line eighty (80) rods to the southwest corner of Allen D. Smith's land; thence east to the Missouri river; thence up the river to the quarter section line between the northwest and the southwest quarters of said section No. thirty-three (33); thence east on said quarter sec-

tion line to place of beginning." This deed was executed September 3, 1903, and, as will be observed, the call "east to the Missouri river," goes away from the land in question. Then "up the river" leads still farther from the land, and "east to the place of beginning" is not in the direction of the starting point, and incloses nothing. There is nothing else in the deed which affords means of identification of the land conveyed, and hence the instrument tendered is void. As the Koch deed followed and depended upon the void one made to him no error was committed in excluding it.

There is complaint that the plaintiff below was permitted to offer testimony in rebuttal, which was in fact evidence in chief. It appears that the evidence objected to, which related to the sand bar, was mainly rebuttal in character, but, in any event, the order of proof is a matter largely in the discretion of the trial court, and there is no reason to say that that discretion has been abused in this instance.

Other objections are made to the rulings on the admission of testimony, but they are not deemed to be material.

There is complaint of the instructions, and especially as to the one which defined an island. Among other things the court said: "It may be stated by way of definition that to constitute an island in a river the same must be of a permanent character, not merely surrounded by water when the river is high, but permanently surrounded by a channel of the river, and not a sand bar subject to overflow by a rise in the river and connected with the land when the water is low." In the same connection the jury were told that in considering whether an island in fact existed, or whether the land in controversy was accreted to plaintiff's land, it might "consider the character and extent of the claimed accretion, the character of the timber growth, the relative size and permanency of channels, if any, around the claimed island, as compared with the size of the stream, the topography of the land in controversy, the character of the soil, the growth, if any, of timber or trees, the testimony of the witnesses, and, in fact, all the circumstances as developed by the testimony." Whether the formation in the river was a sand bar or an island was a question of fact, and was fairly presented to the jury. It did depend upon the stability of the soil and the size and permanence of the channels around it. *Railroad Co. v. Schumeier*, 7 Wall. (U. S.) 286, 19 L. Ed. 74; *Shoemaker v. Hatch*, 13 Nev. 261; *Gould on Waters* (3d Ed.) § 166. As the court told the jury, account should be taken of the conditions named, and also of a variety of circumstances as to the physical features of the formation, the growth upon it, and whether the water supposed to separate it from the shore land was there in times of high water only, or during the ordinary stage of water in the

river. In other instructions the jury were advised as to the doctrine of accretion and the manner in which the formations may be made before the same could be regarded as a part of Steinweden's land. There was also another instruction with reference to the volume of water in the so-called "Indian Chute," which in effect would separate it from Steinweden's land and preclude any claim to the formations on the west of the "chute." A number of instructions relating to accretions to an island were requested, and their refusal is a subject of complaint. But since the jury has found as a fact that no island existed in the river opposite the Steinweden land, they are immaterial.

The findings of the jury, as to whether the land was accretions to that of Steinweden are vigorously attacked on the ground of non-support in the evidence. While there is much conflict in the testimony, we find no difficulty in saying that there is sufficient testimony to uphold the findings. There is no real controversy between the parties as to the doctrine of accretion, or the rule of law applicable in cases like this. The points of difference are mainly on matters of fact, and these, we think, have been fairly and finally determined by the jury.

Judgment affirmed. All the Justices concurring.

RUTHSTROM v. PETERSON.

(Supreme Court of Kansas. Dec. 9, 1905.)

1. INJUNCTION — PROTECTION OF PUBLIC RIGHT.

An injunction will not lie at the suit of a private citizen to protect public interests.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 205-207.]

2. HIGHWAYS — OBSTRUCTION — SUIT BY ABUTTING OWNER.

An abutting owner on a highway has no right to an injunction restraining an obstruction opposite his premises which does not interfere with his right of access.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, § 435.]

3. SAME—PETITION—SUFFICIENCY.

In a suit by the owner of land abutting a 40-foot highway to restrain an obstruction thereof, allegations of the petition showing an obstruction of 20 feet on the side opposite his land did not show an interference with his right of access.

Error from District Court, Riley County; Sam Kimble, Judge.

Suit by G. L. Ruthstrom against Peter J. Peterson. From a decree in favor of defendant, petitioner brings error. Affirmed.

Robert J. Brock, for plaintiff in error. John E. Hessin and John C. Hessin, for defendant in error.

PER CURIAM. The only question involved in this proceeding in error is whether the allegations of the plaintiff's petition show that he has such a peculiar and special interest in a public highway that he may enjoin the obstruction of one side of it.

The petition must be interpreted to mean that Bellman dedicated the west 20 feet of his land to the public for a highway, and that Ruthstrom purchased of Bellman and dedicated to the public for the same use a 20-foot strip of land adjoining the Bellman dedication on the east, so that a public road 40 feet wide was established on the west side of Bellman's land, and along the east side of the plaintiff's land. No legal meaning can be attached to the statement that the plaintiff dedicated his own land to his own special use; and the law does not recognize any such anomaly as a public-private or private-public highway. There is no suggestion in the petition that the action is brought to protect any reversionary interest which the plaintiff might have in the land if the public right to its use were extinguished by the defendant fencing it up. Only the right to use the land as a highway is sought to be vindicated, and the only possible support for the claim on the part of the plaintiff of a special interest in such use must found in the fact that his land adjoins it upon the west. The only special right which an abutting owner has in a public highway is that of access to his premises. When he has passed from his land into the road, his right to travel there is not different from the right enjoyed by other members of the community. *Trosper v. Com'rs of Saline Co.*, 27 Kan. 391. That an injunction will not be granted at the suit of a private citizen to protect public interests is not a subject of debate in this state. *Amusement Co. v. Topeka*, 68 Kan. 802, 74 Pac. 606, and cases there cited.

While there are allegations in the petition to the effect that the plaintiff is denied access to his premises by the special means of the 20-foot strip in controversy, there is nothing to indicate that the west 20 feet of the road upon which his land in fact abuts is in any manner obstructed, or that it is not ample to meet all his requirements as an abutting landowner.

The court cannot judicially declare that a 20-foot strip of ground is too narrow for plaintiff's use as a road to and alongside of his land. He does not allege that it is inadequate in any respect, and if, in fact, it is sufficient, his special demands are satisfied and his interest in the east half of the road is merely that of a member of the body politic.

The judgment of the district court is affirmed.

TRUE et al. v. BRANDT.

(Supreme Court of Kansas. Dec. 9, 1905.)

1. PUBLIC LANDS—SCHOOL LAND CONTRACTS—FORFEITURE.

Where proceedings were had in 1898 to forfeit school land contracts, under Laws 1879, p. 288, c. 161, § 2 (Gen. St. 1901, § 6356), which were void, and the purchasers under the contracts afterward tender to the county treasurer payment of the principal, with interest, and delinquent taxes, before any other proceedings have been begun and before the rights of third parties have intervened, upon a refusal of the treasurer to accept the payments, mandamus will lie to compel him to receive the same and to issue his duplicate receipts therefor.

2. SAME—NOTICE OF FORFEITURE—SERVICE.

A sheriff's return of service of notice of forfeiture of school land contracts, which states that he "found no one in possession" of the land, is not a finding or return that no one was in possession, and a forfeiture cannot be based upon such a return.

(Syllabus by the Court.)

Application by J. T. True and others against E. E. Brandt for writ of mandamus. Allowed.

L. C. True, for plaintiff. H. J. Harwl (P. A. Moyers, of counsel), for defendant.

PORTER, J. Original proceedings in mandamus to compel the treasurer of Graham county to accept the principal, interest, and delinquent taxes upon certain school land contracts, and to issue duplicate receipts therefor. Plaintiffs move for judgment on the pleadings.

In September, 1884, the land in question, 160 acres, was school land, subject to sale, and was sold according to law to one Lyman for \$3 per acre, to be paid for one-tenth cash and the remainder on or before 20 years, with 6 per cent. annual interest. Lyman assigned the certificates of purchase, one for each 40 acres, to plaintiffs. The certificates and assignments were duly recorded, and plaintiffs entered into possession and made the annual interest payments until October, 1895, when they made default in the interest, which default continues to this time, unless it has been avoided by the offer of payment hereinafter mentioned. January 12, 1898, an attempt was made to forfeit the contracts for nonpayment of interest, by proceedings under Laws 1879, p. 288, c. 161, § 2; Gen. St. 1901, § 6356. The county clerk issued four notices, one for each 40 acres, and the sheriff made separate returns upon each notice as follows: "Received this notice this 13th day of January, 1898, and served the same by going to the within-described land, and found no one in possession. The within-named J. A. Kinnaman, J. F. True, and G. H. Pierson cannot be found in this county. D. C. Greenwood, Sheriff." Later, and on January 19, 1898, the second was made as follows: "Received this writ this 13th day of January, 1898. Served the same by posting a true and certified copy on the within-described land, and mailed a true and certified copy to J. F.

True at Newman, Kan., and mailed a true and certified copy to G. H. Pierson at Kansas City, Mo., and posted a true and certified copy in a conspicuous place in the county clerk's office this 19th day of January, 1898. D. C. Greenwood, Sheriff."

On the 21st day of September, 1905, plaintiffs tendered to defendant, as treasurer, the following sums:

Balance of principal.....	\$432 00
Interest in balance due, from date of default in 1895.....	259 20
Delinquent taxes, as reported by the county treasurer.....	36 42
Interest on delinquent taxes to date of tender.....	21 85
Costs claimed by county clerk, but disputed by plaintiffs.....	2 13
Taxes for 1897 to and including 1904, without interest.....	124 18
	<hr/> \$875 78

Plaintiffs at the same time demanded duplicate receipts therefor, as provided in Gen. St. 1901, § 6376, in order that they might obtain a patent for the land. Plaintiffs stand upon the right of a purchaser of school land to deliberately default in his payment of interest and taxes, and in a measure to speculate upon the rise or fall in the market value of such lands, and, in the event of a substantial increase in value thereof, to come in at any time before a valid forfeiture and redeem by paying the principal, interest, and taxes. The petition contains this language: "Eighth. Plaintiffs say that on the 21st day of September, 1905, said land not having been sold to any other party, and they desiring, notwithstanding their default, to redeem the same and secure a patent therefor, tendered and offered to pay to the defendant, as treasurer of Graham county, Kan., the above sum of \$875.78." The answer admits everything pleaded by plaintiffs, unless it is the fact of their continued possession of the land, to which we shall hereafter refer, and sets up the attempted forfeiture proceedings in full, even to the extent of averring the irregularity of the county clerk in issuing separate notices for each 40 acres, instead of including in such notice "all tracts of land sold to the same purchaser," as provided in Gen. St. 1901, § 6356. It is further averred that, relying upon the forfeiture, the board of county commissioners with the county superintendent of schools and county clerk of Graham county leased this land on the 7th day of October, 1902, for a period of three years from January 1, 1903, to one W. W. Coder, who "has ever since paid said rental in advance, and is not now in default therein, and is in the actual and peaceable possession of said land under and by virtue of said lease." This is at least a qualified denial of plaintiff's averment that ever since they purchased the contracts they have been in the possession of the land and improvements thereon, and have never been ejected therefrom. In the answer defendant asks that

leave be given to make the lessee a party, in order that his interests may be determined. To grant this would be unavailing. The lease by its terms will expire on January 6, 1906, less than 30 days after this decision will be announced, and his interests would not warrant him in making any defense to this proceeding, even if he were a proper party here, which we do not decide. In answer to plaintiff's brief defendant has filed one copy of a 15-line brief, in which it is said: "The interests of the state permanent school funds are vitally involved. If it is the law that lapse of time and presumptive acquiescence does not avail, the defendant has no standing in this case." This concedes all the contentions of plaintiffs as to the invalidity of the forfeiture proceedings, and rests the defense entirely upon the delay and presumed acquiescence of plaintiffs. In fact, upon the authority of *Furniture Co. v. Spencer*, 59 Kan. 168, 52 Pac. 425, the service of the notice of forfeiture is void. The first return is insufficient for the reason that it states that the sheriff "found no one in possession," which is not a statement to the effect that no one was in possession. *Knott v. Tade*, 58 Kan. 94, 48 Pac. 561; *Furniture Co. v. Spencer*, supra. And what purports to have been done under the second return, being based upon the previous return as to possession, is void.

Before mandamus will lie to compel defendant to perform, plaintiffs must show a clear legal right in themselves and a substantial compliance with all the requirements of the law upon their part. Their rights are the rights of purchasers under the school land contracts. They gave a bond for the payment of the purchase price, and it is insisted that, inasmuch as the state could maintain an action upon this bond at any time within five years after its maturity in 1904, plaintiffs should be given at least some time after 1904 to bring mandamus, which remedy in this instance amounts to an attempt to compel specific performance. The attempted forfeiture was void and, unless we can say that by reason of their laches and acquiescence plaintiffs are estopped, they are entitled to the writ. The lessee, Coder, went into possession of the land 2 years and 8 months before these proceedings were begun. His possession was, of course, notice to plaintiffs of an adverse claim, and put them upon inquiry, but it can be said that, had they made inquiry, they would have discovered only the void proceedings which in law bound no one. To hold that even actual notice of the void proceedings and failure to assert their claim, or to tender the defaulted payments, estopped plaintiffs, would be to say that their rights as purchasers were forfeited by delay and acquiescence alone. The void proceedings themselves can add nothing to the laches of plaintiffs. Either the delay of plaintiffs to assert their rights must be held to work a forfeiture, or there was none; and forfeitures

are discouraged instead of favored in law. *Hansen v. Wilson*, 40 Kan. 211, 214, 19 Pac. 717. Besides, the only way in which the state could be prejudiced is by the failure to realize the enhanced value of the land, which is a speculative consideration. It appears from the answer that the value of this land is now \$1,600, and it was appraised in 1884 at \$480. The state, however, in addition to the one-tenth payment, received from plaintiffs the annual interest for 10 years (from 1884 to 1895), amounting to \$259.20, and is now offered the balance of the purchase price, with 10 years' interest, which, if accepted, would make the amount, including taxes and interest, which the state receives, \$1,180. To hold in a case like this, where it appears that the land has increased greatly in value, that delay alone works a forfeiture, and in a case where it should appear that the increase in value was slight or only normal, no forfeiture should result, would not be sound in principle.

The policy of the state has been to encourage the settlement and sale of school lands. In 1883 the Legislature provided that a purchaser who was not in default might surrender his certificate and take out a new one running 20 years longer. This applied only to purchases made prior to the act. In 1903 the Legislature extended this privilege to all purchasers who had made partial payments and were not in default, and also to those who, "being in default of such purchase money and interest past due, and taxes past due upon the land, will pay up in full all such delinquent interest and taxes." Laws 1903, p. 723, c. 477, § 1. The act further provides that, if interest has been paid for more than 15 years, the new certificates shall bear interest at 4, instead of 6, per cent. If the state is willing to grant a purchase of school land, who has been in default, a 20-year extension upon his paying up the interest and taxes past due, it manifestly ought not to object to his paying the principal at the same time and taking his patent instead of a new contract. So the right asserted by plaintiffs is seen to be within the policy of the state in reference to the sale of school lands, and, the forfeiture proceedings being void, we are of the opinion that upon the pleadings plaintiffs are entitled to judgment.

The peremptory writ will be allowed. All the Justices concurring.

STOWELL v. KERR et al.

(Supreme Court of Kansas. Dec. 9, 1905.)

1. HOMESTEAD — EXEMPTION — EQUITABLE TITLE.

A homestead exemption may be claimed by a debtor in land to which he has only the equitable title, where he occupies the land with his family as a home.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, § 126.]

2. SAME—WHAT CONSTITUTES.

Where land is purchased with the definite intention of making it a homestead, and immediately afterward the purchaser and his family go into possession of the same and continue to occupy it as their homestead, a judgment subsisting against him at the time of the purchase will not become a lien thereon.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 80, 136-140.]

(Syllabus by the Court.)

Error from District Court, Nemaha County; Wm. I. Stuart, Judge.

Proceeding by John Stowell against Thomas A. Kerr and others. Judgment for defendants, and plaintiff brings error. Affirmed.

John Stowell, in pro. per. J. E. Stillwell, for defendants in error.

JOHNSTON, C. J. In this proceeding John Stowell seeks to subject an 80-acre tract of land, occupied by Thomas A. Kerr and his family, as a home, to the payment of a judgment against Kerr and in favor of Stowell. The judgment was rendered in the justice court, and an abstract of it was filed in the district court on December 6, 1900. It appears that the Kerrs induced S. F. Springer, a relative by marriage, to purchase a home for them, and he did so by buying 40 acres on April 3, 1903, and a contiguous 40-acre tract on February 1, 1904. The purchase money was advanced by Springer, and the title was taken in his name as security for the money advanced. The land was bought by Springer with the intention that Kerr and family should occupy it as a rural homestead. It was immediately occupied by the Kerrs as their home—an occupancy which has continued ever since the purchase. The court held that the judgment lien did not attach to the land. The judgment of Stowell appears to have been valid and subsisting when the land was purchased, and, of course, it became a lien on all property of Kerr which was subject to judgment liens. It can never take precedence, however, of a homestead right, nor in any way affect a homestead. Kerr had an equitable interest in the land in question—an interest sufficient to uphold a homestead right. *Tarrant v. Swain*, 15 Kan. 146; *Moore v. Reeves*, 15 Kan. 150.

Plaintiff argues that, as the judgment was on file and in force when the land was purchased, the lien of the judgment attached instantly, and before the land became invested with the homestead character. As the land was purchased with the definite intention to make it a homestead, it had the homestead character from the beginning. The law does not prohibit a judgment debtor from procuring a homestead which will be exempt from forced sale for debts, nor is there anything in its purpose warranting the view that in the purchase of a homestead a judgment lien will outrun a homestead interest. On the other hand, the homestead law is given a practical and liberal interpretation in keeping with its policy and purpose. While occupancy is an

essential feature of a homestead right, it is well known that complete occupancy at the moment of purchase is frequently impracticable. So it was said in *Edwards v. Fry*, 9 Kan. 417: "We know that the purchase of a homestead, and the removal onto it, cannot be made momentarily contemporaneous. It takes time for a party in possession to move out, and then more time for the purchaser to move in. Repairs may have to be made, or buildings partially or wholly erected. Now, the law does not wait till all this has been done, and the purchaser actually settled in his new home, before attaching to it the inviolability of a homestead. A purchase of a homestead with a view to occupancy, followed by occupancy within a reasonable time, may secure ab initio a homestead inviolability." On the purchase of a homestead there should be such occupancy as the situation warrants, and to preserve the homestead character full occupancy as a residence should be taken within a reasonable time; and, if that is done, the occupancy will relate back to the time when the property was purchased with the bona fide intent to make it a homestead. *Swenson v. Klehl*, 21 Kan. 533; *Gilworth v. Cody*, 21 Kan. 702; *Loan Ass'n v. Watson*, 45 Kan. 132, 25 Pac. 586; *Upton v. Coxen*, 60 Kan. 1, 55 Pac. 284, 72 Am. St. Rep. 341; *Neumaler v. Vincent*, 41 Minn. 481, 43 N. W. 376; *Reske v. Reske*, 51 Mich. 541, 16 N. W. 895, 47 Am. Rep. 594; *Scofield v. Hopkins*, 61 Wis. 370, 21 N. W. 259; 15 A. & E. Encyc. of L. (2d Ed.) 578.

There appears to be no reason for the claim that considerable time intervened between the purchase and the occupancy. Plaintiff bases his claim on the fact that several months intervened between the time of purchase of the two tracts which constituted the homestead. The statement in the answer, upon which the ruling and judgment of the district court rests, is that immediately after the purchase Thomas A. Kerr and his family went into the possession of the land, and have ever since occupied the same as their homestead. This means that possession immediately followed the purchase, whenever made, and not that there was no occupancy until the purchase of the second tract. Under the facts presented the land was acquired for a homestead in good faith. It was occupied and used for that purpose, and the Stowell judgment never became a lien upon it.

Judgment affirmed. All the Justices concurring.

BOARD OF COM'RS OF JOHNSON COUNTY et al. v. MINNEAR.

(Supreme Court of Kansas. Dec. 9, 1905.)

1. HIGHWAYS—ESTABLISHMENT.

Under section 6044, Gen. St. 1901, a road may be legally established by the board of county commissioners, if the proceedings prescribed by law for the establishment of public highways generally are followed, and such road is established as a public highway.

2. SAME—PETITION.

The mere fact that the word "private" is used in the petition and other papers and proceedings relating to the establishment of a road under the above-mentioned statute as a part of the description thereof will not affect the validity of a road so established.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, §§ 52, 53.]

(Syllabus by the Court.)

Error from District Court, Johnson County; W. H. Sheldon, Judge.

Proceedings by the board of county commissioners of Johnson county and others for the laying out of a road. From allowance of damages James G. Minnear brought error to the district court, where the proceedings were reversed, and the commissioners and others bring error. Reversed.

John T. Little and Chas. C. Hoge, for plaintiffs in error. J. P. Hindman, for defendant in error.

GRAVES, J. This case involves the validity of a road. The plaintiff in error Smallwood, having no outlet from his premises, petitioned the board of county commissioners to locate a road 16½ feet wide from his premises over a 40-acre tract of land owned by the defendant in error to a public highway. The petition was signed by 20 other householders, as in ordinary cases. All the steps prescribed by law for the establishment of a public highway were taken under this petition. The petition was the ordinary printed form with the words "private" written before the word "road." This word "private" also appeared in the published notice of the filing of the petition, and in the proceedings of the commissioners, but a full and specific description of the road proposed, stating its width, the point of beginning and termination, and the land upon which it was to be located, was given in the petition, notices, and other proceedings. The landowner met with the viewers and presented a claim for \$300 as damages sustained by him on account of the location of the road. The viewers reported that said route was practical, and of public utility, and recommended the establishment of the road. They awarded the landowner \$56.80 as damages. On December 14, 1903, the board of county commissioners, in regular session, after considering the report of the viewers and other proceedings, found that said road was of public utility, and ordered that it be established as a public highway and opened for public travel when all costs were paid. The landowner was allowed the amount of damages awarded by the viewers. Instead of appealing from the award of damages, the owner filed a petition in error in the district court, with a transcript of the proceedings had before the commissioners, and asked that the action of said board be vacated as without authority and void. The district court granted the prayer of the petition. Smallwood and the commissioners come to this

court by petition in error and ask that the judgment of the district court be reversed.

The landowner claimed in the district court, as he does here, that, the proposed road having been designated in the petition and other papers as a private road, no jurisdiction was conferred upon the board to locate and establish a public road, and therefore all action taken under said petition was illegal and void. This is the controlling question presented. The same proposition was considered by this court in the case of Howard v. Schmidt, 79 Pac. 142, and decided adversely to the contention of the defendant in error. The use of the word "private" in the designation of this kind of a road is a matter of very little importance, and should not mislead any one. There is no such thing in this state as a private road in the sense that the land of one person can be appropriated to the exclusive use and ownership of another. The words "private road," therefore, when used in such sense, is an expression without force or meaning. In a certain sense, however, the road in question is a private one, and the designation "private road" as aptly as any other term describes its character. This road was evidently applied for and established under section 6044, Gen. St. 1901, which reads: "That whenever the premises of any person in this state shall be so completely surrounded by adjoining lands, the property of other persons, as to be without access to any public highway, then such person may petition the board of county commissioners of the county in which such premises lie for a road through some portion of the adjoining lands, and the board shall on the presentation of such petition proceed in accordance with the provisions of the foregoing sections to lay out such road, make returns of plats, and allow damages, if any should be held or allowed, provided said road shall not exceed twenty-five feet in width, and be laid out upon the section or half-section lines when practicable." Under this section a valid road may be established which is only 16½ feet wide. Such a road is not a public highway as ordinarily understood. Its width is different; its object exceptional. Its principal purpose is to accommodate the petitioner. In a large sense it is a private road, but in a more limited view it is also a public road, in that it provides at public expense a free and open highway by which the general public can go to and from the premises of the petitioner, as business or pleasure may require. This limited use by the public is sufficient to give such a road all the legal characteristics of a public highway. Elliott on Roads and Streets (2d Ed.) § 192; Masters v. McHolland, 12 Kan. 17; Bankhead v. Brown, 25 Iowa, 540; Butte, etc., R. R. v. Montana, etc., R. R. (Mont.) 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508. The word "private" in the petition does not, therefore, when construed in connection with the gen-

eral description given therein of the proposed highway, have any controlling significance. *Howard v. Schmidt*, *supra*. The road was legally established.

The defendant has objected to the jurisdiction of this court because the record does not show that the amount in controversy exceeds \$100, but this objection has been met by affidavits filed with the case-made. *Jones v. Kellogg*, 51 Kan. 263, 33 Pac. 997, 37 Am. St. Rep. 278; *Railroad Co. v. Spaulding*, 69 Kan. 431, 77 Pac. 106, 66 L. R. A. 58.

The judgment of the district court is reversed, the cause remanded, and the court directed to carry out the views herein expressed. All the Justices concurring.

WHITE et al. v. DEMING.

(Supreme Court of Kansas. Dec. 9, 1905.)

ERROR—DISMISSAL—DEFECTIVE BRIEF.

When the brief of a plaintiff in error ignores the requirements of rule 10 of this court (79 Pac. ix) and makes no specific allegations of errors as required by heading 2, but objects generally to instructions of the court without setting the same out in full as required by heading 3 of said rule, this court will, in its discretion, dismiss the case.

(Syllabus by the Court.)

Error from District Court, Jackson County; Marshall Gephart, Judge.

Action between William White and others against Henry M. Deming. From the judgment, White and others bring error. Dismissed.

W. W. Harvey, for plaintiffs in error.
Frank Doster, for defendant in error.

SMITH, J. In this case the plaintiff in error makes no specific allegation of error, unless it be in saying that the court erred in giving instruction No. 6, which is not set out in full, nor even a reference to the page of the record where it can be found. It was also said "that the instructions given by the trial court on adverse possession were erroneous as applied to this case," and no further indication is given as to the instructions referred to, either by setting them out in full, giving their number, or referring to the page of the record where they can be found. It is true the record in this case is not large, and this court has carefully considered the errors supposed to be referred to by the plaintiff in error, and should affirm the decision in this case were they passed upon.

However, as there seems to be a growing disregard of the simple requirements of the rules of this court, which often imposes upon the court much unnecessary labor and annoyance in searching records which would be obviated were the rules complied with, we take this occasion, since no injustice is done thereby, to call attention to this matter and for this reason dismiss this case. All the Justices concurring.

STATE v. TINKLER.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. RAPE — "UNLAWFUL" INTERCOURSE — MEANING OF TERMS.

Section 2016, Gen. St. 1901, defines a crime against a female under 18 years of age. The word "unlawfully," as used in said section, is used in the sense of "without authority of law" or "not permitted by law."

2. SAME—EVIDENCE—SUFFICIENCY.

Evidence that the defendant carnally knew the child, that she was under 18 years of age, and that he was not married to her at the time, is sufficient to sustain a charge.

(Syllabus by the Court.)

Appeal from District Court, Saline County; R. R. Rees, Judge.

Jesse Tinkler was convicted of crime, and appeals. Affirmed.

David Ritchie and Corder & Hunt, for appellant. C. C. Coleman, Atty. Gen., and C. W. Burch, for the State.

SMITH, J. The counsel for the defendant in this case have manifested a commendable degree of zeal and industry, as well as considerable erudition, in their effort to convince this court that the word "unlawfully," as used in section 2016, Gen. St. 1901, and in the information in this case means "denounced as a crime," or "made criminal by a statute of this state." It is urged that words used in the definition, and in the charging of crime as well, should be strictly construed; that their meaning should not be stretched to cover a supposititious intent of the Legislature, or to make criminal acts which the court might deem it expedient to punish, but which are not included in the clearly expressed provisions of the criminal statute. It is said that by no other statute than the one under consideration is sexual intercourse between a single man and a single woman or a female child, which is not incestuous and is not procured by promise of marriage nor by force, made criminal. Hence it is not unlawful. To all this, except the conclusion, we assent.

On the other hand, the obvious intent and purpose of the law should not be defeated by any hypercritical construction or meaning of words. Our rule of construction is prescribed by section 7342, Gen. St. 1901: "Words * * * shall be construed according to the context and the approved usage of the language; but technical words * * * and such others as may have acquired a peculiar and appropriate meaning in law shall be construed according to such peculiar and appropriate meaning." Judged by either of these tests, "the approved usage of the language" or "the peculiar and appropriate meaning in law" (if, indeed, the word has acquired any peculiar meaning in law), "unlawful" is not synonymous with "criminal." To speak of an act as unlawful is not equivalent to saying it has been denounced as a crime. "Every criminal act is illegal or unlawful, but il-

legal or unlawful acts may not be criminal. Offenses against public law are criminal. Offenses against private rights are merely illegal or unlawful." In law literature we meet the word constantly in the sense not authorized or permitted by law, thus: Unlawful interest, unlawful entry, referring to a trespass, etc. In the common-law definition of murder, "the unlawful killing of a human being with malice aforethought," and of manslaughter, "the unlawful killing of a human being without malice," the word is used in the same sense it is used in section 2016 in question, viz., without legal justification or excuse, without legal authority, or right." The word "unlawful" is used in this sense in section 5511, Rev. St. U. S., interpreted by the Supreme Court of the United States. *United States v. Watson* (D. C.) 17 Fed. 145, 149. See, also, *Terrell v. State*, 86 Tenn. 523-531, 8 S. W. 212; *State v. Lightfoot* (Iowa) 78 N. W. 41, 42. Authorities could be multiplied, but it is unnecessary. It is conceded that this contention has been adversely decided by this court in *State v. Frazier*, 54 Kan. 719, 39 Pac. 819, which we are asked to reverse. While some expressions in that case might well be modified, we reaffirm the decision. "Unlawfully" in section 2016 might well be interpreted "without lawful wedlock," and hence without authority of law, not permitted by law.

The contention that there can be no assault by consent may be admitted. It is not charged that carnal knowledge was procured or accomplished by the assault. It is not charged as a manner of committing the crime which requires the proof to conform to the allegation, but it is charged that the defendant did assault, and did carnally and unlawfully know, etc. The charge of assault is unnecessary, and may be regarded as mere surplusage, and, if proof of an assault is lacking, it is no variance.

Again, it is contended that the information is bad, in that "unlawfully" is a conclusion at best, and the facts showing that the act was done unlawfully should have been stated, and were not. There is some authority for this objection, but this charge was made in substantially the words of the statute, and this, as a general proposition, is sufficient. The defendant was fairly informed of the offense charged against him, and, had he admitted the charge, the court, by an examination of the record alone, could have determined that a thing forbidden by law had been done, and the penalty which the law attaches thereto. *State v. Gavigan*, 36 Kan. 322, 13 Pac. 554; *State v. Foster*, 30 Kan. 365, 2 Pac. 628; *State v. Beverlin*, 30 Kan. 612, 2 Pac. 630.

Again, it is said the verdict is not supported by sufficient evidence, in that it depends upon the evidence of the prosecutrix alone, and that she contradicted herself in different portions of her testimony, and even admitted that on a former hearing she testified

to facts she knew to be false. At the common law the evidence of the woman, even an infant prosecutrix, was sufficient, without corroboration, to sustain a conviction of rape. 23 Am. & Eng. Ency. of Law, 884. Our statute makes no provision on the subject. Hence the common-law rule is in force in this state. Were corroboration necessary, however, there was an abundance in this case. The credibility of the evidence, if within the bounds of reason, rests with the jury and trial court, and cannot be considered here.

The defendant appears to have had a fair trial, to have been well defended, and to have been righteously convicted; and the judgment is affirmed. All the Justices concurring.

STATE v. KLEINFELD.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. CRIMINAL LAW—VERDICT—SIGNATURE BY FOREMAN.

Where, in a criminal prosecution against several before a justice, a verdict was returned consisting of several paragraphs, in each of which a finding of guilty was announced against one defendant, and the foreman signed the joint verdict, the signature was sufficient as to each defendant.

2. STATUTES — MATTER NOT EMBRACED IN TITLE.

Laws 1901, p. 416, c. 232, entitled "An act relating to the sale of intoxicating liquors," is sufficiently broad to cover the prohibition of unlawful sales.

Appeal from District Court, Cherokee County; W. B. Glasse, Judge.

Mary D. Kleinfeld was convicted of unlawfully selling intoxicating liquor, and she appeals. Affirmed.

Ira Heaton, H. A. Forkner, and W. R. Cowley, for appellant. C. C. Coleman, Atty. Gen., Al. F. Williams, and H. C. Finch, for the State.

PER CURIAM. Mary D. Kleinfeld, with two other defendants, was tried before a justice of the peace upon the charge of unlawfully selling intoxicating liquor. She was found guilty, and appealed to the district court, where she was again convicted. From the latter conviction she now appeals.

She first complains that the verdict in the justice court was invalid, because not signed by the foreman of the jury. A verdict was returned consisting of three paragraphs, in each of which a finding of guilty was announced against one defendant. The foreman signed the joint verdict, and in so doing necessarily affixed his signature to the verdict against this defendant.

A second complaint is that this verdict was void, because it failed to state correctly the defendant's name. The record, however, shows that the verdict gave her full name with entire accuracy.

A third and final complaint is based upon the contention that the title of the act under which the prosecution was instituted

(Chapter 232, p. 416, Laws of 1901), "An act relating to the sale of intoxicating liquors," etc., is not broad enough to cover the prohibition of unlawful sales. The contention is not sound.

The judgment is affirmed.

STATE v. SMITH.

(Supreme Court of Kansas. Nov. 11, 1905.)

CRIMINAL LAW—LIMITATIONS.

Where an indictment is returned by a grand jury, and three days thereafter a warrant is issued, upon which the defendant is arrested, the prosecution is to be deemed begun for the purpose of stopping the running of the statute of limitations from the time of the return of the indictment.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 282.]

(Syllabus by the Court.)

Appeal from District Court, Allen County; Oscar Foust, Judge.

SI Smith was convicted of a violation of the liquor law, and appeals. Affirmed.

Ewing, Gard & Gard, for appellant. C. C. Coleman, Atty. Gen., and B. E. Clifford, for the State.

MASON, J. SI Smith appeals from a conviction upon an indictment for a violation of the prohibitory liquor law. The sole ground upon which a reversal is asked is that the court permitted witnesses to testify to sales of liquor made at any time within two years prior to the return of the indictment. There was an interval of three days between the return of the indictment and the issuance of the warrant. The defendant claims that the action against him was not begun, so as to stop the running of the statute of limitations, until a warrant was issued; that therefore he was protected against prosecution for any offense committed more than two years before that time; and that consequently the evidence should have been confined to a period beginning two years before the warrant was issued, instead of two years before the indictment was found. He relies upon the cases of *In re Griffith*, 35 Kan. 377, 11 Pac. 174, and *In re Clyne*, 52 Kan. 441, 35 Pac. 23, which decide that where a complaint is filed before a magistrate, charging a felony, a prosecution is not deemed to have been begun until a warrant is issued, nor even then, unless reasonable diligence is exercised in its service. In the

Griffith Case it is said: "The complaint is the initiative step to determine whether a prosecution shall be commenced, and the warrant does not necessarily follow the making and filing of the complaint, as is the case where an indictment or information is filed." A proceeding instituted by indictment, as suggested, stands upon a different footing. The statute (section 5568, Gen. St. 1901) provides that, unless a special order is made by the court, the clerk must issue a warrant within 20 days after the close of the term. The mere return of an indictment, therefore, imposes an absolute duty upon the clerk to issue a warrant within a fixed time. It starts the machinery by which, without further attention from the prosecutor, process will be issued, within what must be regarded as a reasonable time, for the arrest of the defendant. Where due diligence is shown, a criminal action instituted by a complaint before a justice of the peace, charging a felony, is regarded as begun when the warrant is issued, no matter how long an interval may elapse before it is served. In *re Clyne*, *supra*. By what seems a fair analogy we hold that in the case of a prosecution by indictment, where a warrant is placed in the hands of the sheriff within the statutory period referred to, it operates by relation as though issued immediately upon the report of the grand jury; and the running of the statute of limitations is suspended from that time. The question of when a criminal action is to be considered begun has often received the attention of the courts. Cases on the subject are collected in 19 A. & E. Encycl. of L. 166, and 12 Cyc. 258. These cases have but little, if any, bearing upon the matter here involved, because they were affected by differences of statutes, and arose under different circumstances—usually where the arrest had preceded the action of the grand jury. However, in *Gardner v. State*, 161 Ind. 202, 68 N. E. 163, the exact question here involved was presented under a statute substantially the same as that of Kansas, and the court, after reviewing the authorities at length, held that the prosecution was begun and the running of the statute of limitations was interrupted when the indictment was returned, irrespective of the time the warrant was issued, expressly disapproving on this point *Flick v. State*, 22 Ind. App. 550, 51 N. E. 951.

The judgment is affirmed. All the Justices concurring.

RUTAN et al. v. HUCK.

(Supreme Court of Utah. Jan. 22, 1906.)

1. TRUSTS — PURCHASE OF STOCK — FRAUD — EVIDENCE.

Evidence, in an action for a decree, that defendant held stock of a mining company in trust for plaintiff under a contract by which plaintiff, a mining expert, was to furnish his skill in the selection of mining properties, and defendant was to furnish the capital, plaintiff to have a third of the profits after the reimbursement of defendant, *held* sufficient to sustain a finding that plaintiff's conduct in the matter of the purchase was not fraudulent as to defendant.

2. SAME—COMPLAINT.

A complaint, alleging that on or about a certain date plaintiff, a mining expert, entered into a contract with defendant to engage in the purchase of mining properties, plaintiff to furnish his skill and to pass on the values of properties, and defendant to furnish the capital, plaintiff to have a third of the profits after reimbursement of defendant, and that in accordance with said contract a certain property was bought and title taken in defendant's name, as to which an accounting is sought, will be *held* to refer to a contract made prior to the date alleged in the complaint, which was to the effect alleged; a contract between the parties of that date being in regard to a different subject-matter.

3. SAME—PURCHASE PURSUANT TO CONTRACT — EVIDENCE.

Evidence, in an action to hold defendant as trustee for plaintiff for a third of certain mining stock standing in his name, *held* sufficient to show that it was purchased pursuant to a contract by which plaintiff, a mining expert, and defendant, a capitalist, should engage in the purchase of mining properties; plaintiff to have a third interest after defendant had been reimbursed for the money he was to advance.

4. COMPROMISE AND SETTLEMENT—EVIDENCE.

Plaintiff, a mining expert, made a contract with defendant, a capitalist, whereby they were to engage in purchasing mining properties, to be taken in defendant's name; he to furnish the money and plaintiff to examine and pass on the value of the properties; plaintiff to have a third interest after defendant was reimbursed. After long and unsuccessful search for a property, which plaintiff would recommend, he in the meantime having personally paid \$3,000 on account of traveling expenses, he found a property, on which, after a thorough examination, he made a most favorable report, to which he adhered, notwithstanding the adverse reports of other experts; and though the property was too large for defendant to handle, he, on the urgent recommendation of plaintiff, took a quarter interest in it, K. taking a half interest, and A. the other quarter interest. After the signing of the contract by which defendant acquired his interest, he handed his check for \$1,000 to plaintiff, accompanied by a letter dictated by A., stating that he was instructed by the gentlemen associated in the deal to hand plaintiff the inclosed check "as a slight recognition of our appreciation of your services in connection with the transactions. I am also requested to say to you that, notwithstanding you have declared that you have no claim against the proposed purchasers, * * * the gentlemen interested intend, in the event that the development justifies your report, to add to the remuneration here made in a substantial manner." Of the \$1,000, defendant and A. each contributed \$250, and B. \$500. *Held*, that the retention of the check by plaintiff was not conclusive either that defendant had not purchased his quarter interest pursuant to the original agreement between him and plaintiff, or of a settlement between them.

5. SAME—PLEADING.

A matter may not be held a settlement of plaintiff's claim under the contract, which is the basis of the action, not having been pleaded as such.

6. ASSIGNMENTS — CONSIDERATION—RIGHT TO QUESTION.

Defendant, in an action against him on his contract with one of the plaintiffs, may not object that the assignment by such plaintiff to the other plaintiff of an interest in the contract was without consideration.

7. EVIDENCE—HEARSAY.

That plaintiff got a commission for selling the mine of S. may not, in an action on a contract by which plaintiff and defendant agreed to engage in mining deals, sharing in the profits, be shown by statements to that effect in the letters of third persons, in no wise representing plaintiff; the statements being hearsay.

8. PARTNERSHIP—FRAUD AS TO PARTNER.

Where plaintiff, a mining expert, entered into an agreement with defendant, whereby plaintiff was to examine and report on the values of mines, and defendant was to buy some that were satisfactory, taking title in his name, plaintiff to have a third interest after the reimbursement of defendant, plaintiff cannot, in an action for an accounting under the contract, be held to have committed a fraud on defendant in receiving a commission from the owner of the S. mine for making a sale of it, but at most defendant could require plaintiff as his partner to account for it; the facts being that plaintiff having examined and reported favorably on the S. and the L. mines, and defendant having asserted that he would not take an interest in the S. mine, and being undecided as to whether he would take an interest in the L. mine, plaintiff got K. to take an option on the two mines, and thereafter defendant was allowed to take an interest in the L. mine under the option of the same terms as K., which were unaffected by plaintiff receiving a commission on the sale of the S. mine.

9. SAME—ACCOUNTING.

Where plaintiff, a mining expert, made a contract with defendant, whereby plaintiff was to examine and report on the value of mines, defendant to make purchases in his name, and plaintiff to have a third of the proceeds after reimbursement of defendant for his expenditures, and defendant being unable to meet assessments on a mining property he had bought, and to retain all his interest in the mine, sold part of his interest, in good faith, at a price not shown to be less than its then value, defendant, on an accounting, may, with respect to the interest sold, be charged only with what he obtained for it.

McCarty, J., dissenting.

Appeal from District Court, Piute County; John F. Chidester, Judge.

Action by Frank C. Rutan and another against Louis C. Huck. Judgment for plaintiffs. Defendant appeals. Modified.

Henderson, Pierce, Critchlow & Barette, Dickson Ellis, and Ellis & Schuider, for appellant. John M. Zane, Wm. A. Vincent, W. I. Snyder, and Bismark Snyder, for respondents.

STRAUP. J. 1. This was an action brought by plaintiffs and respondents against the defendant and appellant to obtain a decree adjudging that the defendant held in trust for them one-third of the capital stock possessed by him of the Annie Laurie Mining Company, and to compel him to account for his receipts and expenditures

in connection therewith. The substance of the complaint, so far as material, is: That on or about August 11, 1898, Rutan, an experienced mining engineer, and Huck, a capitalist, entered into an agreement wherein it was agreed that they would jointly engage in the business of looking for, examining, and purchasing mining properties, bonds on said properties, and options to purchase the same, and other interests therein; that Huck was to advance the necessary purchase moneys, and Rutan to devote his time, labor, skill, and experience in examining, passing, and reporting upon the values of prospective or contemplated purchases, and when such properties or interests were purchased the title thereof was to be taken in the name of Huck, the properties worked, managed, or disposed of, and, out of the proceeds arising therefrom, Huck was to be reimbursed for the moneys advanced by him and the remainder thereof divided between them, two-thirds to Huck and one-third to Rutan; that in pursuance of said contract Rutan devoted time, labor, skill, and experience in looking for and examining properties, and among them examined and reported on the Annie Laurie group of mines situate in Piute county, Utah, and reported to Huck and recommended the acquisition of them or an interest therein, in accordance with said agreement; that such negotiations were had that Huck acquired for himself and Rutan an option upon a quarter interest in said mining properties, advanced moneys in developing them, took up said option, and acquired title to a one-fourth interest in said claims, paying \$52,000 therefor, and thereafter conveyed it to the Annie Laurie company and received therefor 5,000 shares of its capital stock of the par value of \$100 per share, all of which was done in pursuance of said agreement between Huck and Rutan, and that the stock was held by Huck, two-thirds for himself and one-third for Rutan, subject to Huck's being reimbursed for the moneys advanced by him; that Huck, by way of dividends on said stock, and from sales of a portion thereof, received more than sufficient moneys to cover his advancements and disbursements; an assignment, by Rutan of one-half his interest in his contract with Huck, to Snyder; a demand on Huck, and a refusal by him, for an accounting, and a repudiation by Huck of the contract. The answer admitted Rutan was an experienced mining engineer, Huck a capitalist, and that they were interested together in matters connected with mining properties; but denied that their said interest related to or had any connection with the Annie Laurie properties. It admitted that Rutan examined and reported on said properties; but denied such examination or report had any reference to the alleged contract, or any contract which Rutan had with the defendant. It admitted the defendant acquired a

one-fourth interest in said properties for the sum of \$52,000, and that he conveyed it to the Annie Laurie company for one-fourth of its capital stock; that he received dividends on said stock, sold some stock, and still held a large part thereof. It admitted Rutan demanded an accounting, and that the defendant refused to account, and that he repudiated the alleged contract with Rutan. The answer denied all other allegations in the complaint.

The court found all the allegations of the complaint to be true, and made findings accordingly. As conclusions, the court held that plaintiffs became the owners of one-third of the 5,000 shares of the capital stock of said Annie Laurie Mining Company, subject to the payment to said Huck out of said common property of the moneys advanced and paid by him with interest thereon, and that plaintiffs were entitled to an accounting. On the matter of the accounting the court found that the defendant's expenditures, after allowing him interest, exceed his receipts, \$51,630.26; that the receipts were made up from dividends received, and proceeds from the sale of 500 shares of \$100 per share. While the defendant claimed to have sold an additional 1,000 shares to his wife for the sum of \$25 per share, and also debited himself with that amount, the court found that such price was inadequate, and, on plaintiffs' objection thereto, such debit item was not allowed, but the defendant was charged with said 1,000 shares of stock and with the dividends paid thereon. Accordingly the court reached the conclusion that the defendant was chargeable with 4,500 shares, and not 3,500, as contended for by him; and that, subject to the said unpaid expenditure of \$51,630.26, he should be required to deliver to plaintiffs 1,500 shares, the one-third of 4,500. Plaintiffs offered in court to pay to the defendant the said remaining indebtedness, upon his delivering to them 516.3 shares of said capital stock and also delivering to them one-third of the stock remaining. This offer not being accepted, plaintiffs then offered in court to pay \$17,210.09 (one-third of said indebtedness) upon his delivering to them the said 1,500 shares. This offer also was rejected by the defendant. A decree was thereupon entered requiring the defendant to deliver to plaintiffs 1,500 shares of the said capital stock upon their paying to him \$17,210.09.

The defendant appeals attacking the findings for want of evidence, and also claiming that the court in adjudicating the accounting should have charged him with the debit item of \$25,000, the proceeds of sale of the 1,000 shares to his wife, instead of charging him with the said 1,000 shares and with the dividends thereon.

2. The abstract of the record contains about 700 printed pages of evidence, and space will not permit us to detail all the evidence tending to support the findings.

We can only call attention to some of the more prominent features. Both Rutan and Huck admit the making of an oral contract in 1897, substantially as alleged in the complaint. The only material difference between the parties as to the terms of the oral contract is whether Rutan was to have a one-third or a one-fourth interest. On this, Rutan is corroborated by four or five witnesses, who testified that Huck admitted to them that Rutan's interest was one-third. They differ also as to the payment of expenses; Huck claiming he was to and did pay all traveling expenses; Rutan, that he was to pay his own and had paid out about \$3,000 traveling and other expenses. It is, in effect, admitted by both parties, that, in pursuance of the foregoing contract, they visited, between the spring of 1897 and 1898, in four or five western states, many different mining properties, some of which were examined and experted by Rutan, and that they traveled 8,000 or 10,000 miles in search of a property, but so far none had proven to be desirable. In 1898 they acquired an interest in a process, called the Greenewalt-Robinson process, for the treatment of refractory ores. The purchase price of this was \$3,000, of which Huck paid \$2,000, and Rutan \$1,000; and thereupon, according to Rutan's testimony, Huck said: "This is now our first purchase, and I think we ought to define it by contract." And, according to Huck's testimony, Rutan said: "Had we not better have our contract drawn defining our interests in this process?" Consequently, on August 11, 1898, the parties executed the following written contract:

"This agreement, made and entered into this 11th day of August, A. D. 1898, by and between Louis C. Huck, party of the first part, and Frank C. Rutan, party of the second part, both of Chicago, Illinois, witnesseseth:

"That whereas the parties hereto have by an agreement dated the 8th day of August, 1898, between John E. Greenewalt and William Robinson, parties of the first part, both of Denver, Colorado, and themselves, as parties of the second part, purchased a certain process for the treatment of metalliferous ores; and

"Whereas it is contemplated by the parties hereto that a certain mine or mines may be purchased for the purpose of putting such process into effect; and

"Whereas it is desired by the parties hereto to define their respective interests in the process and the property and machinery to be purchased in connection therewith:

"Therefore this agreement witnesseseth: that the parties hereto are the owners of said process and license under the agreement above referred to in the proportion of two-thirds to the party of the first part and one-third to the party of the second part;

"And it is further understood and agreed that in the event any mine or mines shall

be purchased and machinery erected for the purpose of putting said process into effect, the party of the first part hereto shall be paid out of the earnings or proceeds of the property, before any division shall take place, the cost of such mines and machinery and all advances made on account of such joint enterprise, and that thereafter the parties shall be interested in the said mines and said system in the same proportion, to wit: two-thirds shall be owned by Louis C. Huck and one-third by Frank C. Rutan."

After the making of this contract the parties began experimenting with the process, testing its usefulness, continued their search for a desirable property, looked at properties having refractory ores, and at some not connected with the process. Other methods of treating ores and different mining machinery were also investigated by them. A Mr. Welmer called the attention of a Mr. Aldrich, an attorney at Chicago, and also at that time an attorney for Rutan, to the Annie Laurie and Snyder Improvement properties situate in Piute county, Utah. Later Rutan, Huck, and Welmer were brought together. According to Rutan's testimony Welmer gave Huck and Rutan ore from both the Annie Laurie mine and the Snyder Improvement properties. This ore was assayed; some pulverized and panned with good results. Huck testified their attention was then called only to the Snyder Improvement properties. But in this Rutan is corroborated by Welmer. The Greenewalt-Robinson process and plans for a mill were explained to Welmer and the properties discussed in connection therewith. It was then decided that Huck and Rutan should go to Utah for the purpose of examining the properties. About the last of April, 1899, they went to Utah, saw Senator Cannon, who had an option on both the Annie Laurie and the Snyder Improvement properties. Upon their going on the properties an examination was not then made owing to a recent heavy fall of snow. They returned to Salt Lake disappointed. Huck expressed dissatisfaction because their trip had been profitless. Here there is a conflict in the evidence; Huck contending that they went on the property only to look at the Snyder Improvement properties, and that he knew nothing of the Annie Laurie until he returned to Salt Lake; while Rutan testified that the Annie Laurie was talked over and their visit was with respect to that property as well as the Snyder Improvement. In this Rutan is corroborated by both Welmer and Cannon. After their return from the property the talk had with Cannon was mainly with reference to the Annie Laurie mine, and, upon Huck's expressing an opinion that the purchase of that property involved more money than he cared to put in, a scheme was proposed by Cannon whereby a company could be formed and the property handled in that way. At this point the evidence again conflicts; Huck testify-

ing that from here on he and Rutan were and became promoters for the purpose of handling and floating the properties, and that, if they were successful in so doing, they were to share equally in the profits resulting therefrom; while Rutan testified there was no such understanding, but all that they did from then on was in pursuance of their contracts, the same as they had done theretofore; that, the properties being larger than desired by Huck alone, effort was made by them to interest capitalists and friends of Huck in the enterprise and to join with Huck in the purchase of the properties, if they proved to be desirable. On leaving Salt Lake they stopped at Denver on business connected with the Greenewalt-Robinson process, and on their return to Chicago, and after talking with Gates and others, early in May, 1899, Huck prepared and presented to him a written report describing the properties, especially the Annie Laurie. Rutan returned to Utah and made a most thorough and skillful examination of the Annie Laurie mine, and, on the 20th day of June, 1899, made a most complete and exhaustive report thereon. While making this examination Huck was constantly being informed of the situation and condition of things as they progressed. When the report was completed a copy was furnished to Huck, who furnished one to Gates, and Rutan also submitted his report to Farish, a mining expert for Gates. Farish reported adversely on the property, and Gates did not join in the enterprise. Cannon went to Chicago and urged Huck to buy the properties and insisted that he make a payment. Huck did not do so. Cannon went on to New York, there to interest capitalists in the property. Huck sent Rutan to New York to assist Cannon; but nothing came from these negotiations. Finally W. F. Snyder and Welmer went to Chicago, and later P. L. Kimberly was brought into the conferences with Huck and Rutan; the latter explaining fully to Kimberly the properties and the report he had made thereon. On August 26, 1899, Huck, Rutan, Kimberly, Aldrich, Welmer, and Snyder went to Utah, inspected, and examined the properties. At the mines Kimberly told Huck that, if they could purchase the properties at a reasonable price, he would take half, if Huck would take the other half. Huck, being then undecided, said he would consider the matter and would talk it over with Rutan. Kimberly and others left the mine and came to Salt Lake, while Huck and Rutan remained at the mine a day or two longer looking at other properties. In the meantime, and on the 1st day of September, 1899, the Cannon option expired. Kimberly left Salt Lake, giving instructions that, if the Annie Laurie could be purchased for \$210,000, \$5,000 cash and \$20,000 in development work covering a period of six months, when the balance was to be paid, and the Snyder Improvement properties for \$100,000, he would buy them,

providing, according to Rutan's testimony, that Huck would join him in the purchase. This was communicated to Huck, whereupon he replied to Rutan: "I am willing to join Kimberly, if you advise me, in the purchase of the Annie Laurie and take a half interest, but I don't want to buy a half interest in the Snyder Improvement properties." There is also evidence showing that Kimberly was willing and ready to buy the properties on said terms, regardless of Huck's taking any part of it, and wholly independent of him. Huck also left for the east. Here the evidence is again conflicting, and opposite positions are taken by the parties. On the part of Huck it is asserted that, when the Cannon option expired, and when he left Salt Lake, he had abandoned all idea of purchasing any interest in either the Annie Laurie or the Snyder Improvement properties. On the part of Rutan it is contended that Huck had not done so, but was willing to purchase an interest in the Annie Laurie, if Kimberly was, but was not willing to purchase an interest in the Snyder Improvement.

Rutan remained at Salt Lake, and he and Snyder, on the 11th day of September, 1899, in the name of Kimberly, procured an option for the purchase of the Annie Laurie and the Snyder Improvement Company properties upon the terms above stated. These terms were much more favorable to the purchasers than under the Cannon option. Rutan immediately wired Huck that the option had been obtained in the name of Kimberly, and also wrote Huck to see Kimberly and arrange for an interest in the option. In the meantime, Aldrich, who originally was with Welmer representing the sellers in the Cannon option, but at the same time also contended that he was with Huck and Rutan as purchasers, made arrangements to procure a half interest from Kimberly in his option, and, as Rutan may well have then believed, for the benefit of Huck and Rutan, but very likely secretly intending it for his own personal advantage. Here appellant takes inconsistent positions. First, it is claimed by him that, when the Cannon option expired, he had abandoned all idea of acquiring any interest whatever in the Annie Laurie. Second, that Rutan betrayed Huck in taking the option in the name of Kimberly, and not in the name of Kimberly and Huck. Hence much stress is laid by appellant's counsel on the reply Huck made to Rutan's telegram advising him that the option was had in the name of Kimberly, wherein Huck said the news was "a thunderbolt in a bright sky"; that he had "hoped Senator Cannon would be considered first"; and "has Kimberly, in getting the Annie Laurie, corralled the camp?" If this, as counsel claim, is proof of the second proposition, it certainly disproves the first, and contradicts the positive statements made by Huck that he had abandoned all idea of acquiring an interest in the Annie Laurie. It is corroborative of

Rutan's claim that Huck had not abandoned such intention. Huck's reply was, as explained by Rutan, occasioned by a conversation had prior thereto, wherein it was suggested that the new option be in the name of Cannon, but no understanding was had thereon; and, as Cannon had the old option, Huck naturally may have supposed, if a new one was obtained, it, too, would likely be in Cannon's name. There are reasons, however, why the new option could not have been taken in the name of Cannon; primarily, because at the expiration of the option held by him he ceased to have any interest in the properties, was in no manner thereafter connected with any of the transactions, was not even on the scene of action, and no one was authorized to, or in fact did, represent him in the matter, nor was he even a prospective or intending purchaser. Snyder and Rutan in no particular represented him, nor had they the slightest authority from him to do anything for him, and had they taken an option in his name it would have been as though they had taken it in the name of a mere stranger. In addition, Filer, the expert representing Kimberly, insisted that the new option be in the name of Kimberly. This was natural, because Kimberly advanced the \$5,000 cash payment; and, too, Kimberly was the principal purchaser, and, according to some of the testimony, was willing, if need be, to assume alone the whole obligation, while, according to all the testimony (except Huck's) Huck was desirous of only a part, and that of the Annie Laurie. Nowhere is it made to appear that this option was taken in the name of Kimberly to prevent or in any way hinder Huck from acquiring an interest in the Annie Laurie; but, to the contrary, the record shows that Kimberly, although under no legal obligation to do so, was at all times willing to have Huck join him in the option and in the purchase of both or either one of the properties. Furthermore, Huck had all along asserted that he did not want, and would not purchase, an interest in the Snyder Improvement properties, but that he did want an interest in the Annie Laurie. An option for one, up to this time, was not to be had without taking an option for the other. Hence, if the option for both properties had been taken in the name of Huck, or jointly in his name with another, it would have been without Huck's authority, and doubtless he would have declined to be bound by it. If, as is the inference from his letter, Huck would have been satisfied if the new option had been in the name of Cannon, from whom he and Kimberly would have been obliged to purchase, if at all, what difference does it make to Huck that the option was in the name of Kimberly, so long as the privileges, conditions, and terms of purchase on the part of Huck were the same? It must also be remembered that, when

Kimberly and Huck came to Utah and examined the properties, they came as joint prospective and intending purchasers. Looking now at the testimony of the plaintiffs, Rutan and Snyder, both testified that after the Cannon option expired, and before leaving Salt Lake, Huck said to them that they were to stay and see what they could do with reference to procuring a new option, and directed them to make the best deal that they could; and that, if Kimberly got the property, he was willing to take a portion of it with him. Viewing the transaction as a whole, we are satisfied that Rutan acted, in the premises, for the best interest of Huck; that Rutan may well have believed that the arrangements Aldrich made for an interest in the option was, partly at least, for the benefit of Huck, and that he would have no difficulty in acquiring an interest in the option; and that Huck was amply protected, as it proved to be that he was, in the taking of the option in the name of Kimberly. We cannot see wherein Huck would have fared any better had the option been in his name and Kimberly's, or in Cannon's, for Huck got as great an interest in the Annie Laurie as he desired, and, according to his own testimony, all that he was able to handle, and he was permitted to acquire such interest on the same terms as the Kimberly option. The finding of the trial court that Rutan was faithful to the best interests of Huck is amply supported by the evidence.

After the option was procured, Rutan returned to Chicago and explained all the matters connected therewith to Huck. Rutan then saw Kimberly and also Aldrich with reference to Huck's acquiring an interest in the option, and, on Kimberly's request, a meeting was arranged between Kimberly, Huck, and Aldrich in Chicago on the 3d day of October, 1890, when Kimberly, in writing, transferred to Huck a one-fourth, and to Aldrich a one-fourth, interest in and to the option on the Annie Laurie mine upon the same conditions and terms as in Kimberly's option. Huck could have had an interest in the Snyder Improvement properties also, but he did not desire it; consequently he purchased an interest only in the Annie Laurie. There is much conflict in the evidence as to what was said between Huck and Rutan just before the making of this contract wherein Huck acquired his one-fourth interest. According to Huck the following was said by him to Rutan: "I am called here today by Kimberly and Aldrich to decide whether or not I will join them in the bond with Kimberly, and I have got to decide that this morning. I don't want to take an interest in this bond for the reason that it is too large a deal for me; I want to find a small property that we could work together, and I own alone." That Rutan kept on urging him saying: "I feel it my duty to advise you to take a quarter interest in the

bond, because I believe that the Annie Laurie is going to make a great property." And that Huck said: "If I take your advice and take an interest in this bond, you will understand that you will have no interest in my interest, as I have heretofore told you, and our relations will be entirely severed." That Rutan replied: "I am aware and sorry; but it is so." Aldrich, in the main, corroborated Huck. There is no evidence showing that Huck had theretofore said anything whatever to Rutan on the subject that, if Huck took an interest in the bond, or acquired any interest in the Annie Laurie, Rutan was to have no interest in it. Rutan's version of this conversation is that Huck said to him: "We have a meeting here to fix up this contract, and I want to know if it is satisfactory to you, my taking a quarter interest in the Annie Laurie mine, or do you prefer that we drop this entire matter and look for a mine which we will have all to ourselves? Rutan replied: "We have spent a great deal of time and money, and we have found nothing, as you know, that presents as promising a future as the Annie Laurie mine, and I advise you to take a quarter interest in both the Annie Laurie and the Snyder Improvement Company's properties." Huck said: "I think, if I take anything, a quarter interest in the Annie Laurie is sufficient. Now I will not sign that contract unless you are satisfied. You know that your one-third interest in the contract with me will give you only a one-twelfth interest in the mine." Rutan said: "I know that, but I believe that that one-twelfth interest will be worth more than a one-third interest in any property that we have heretofore seen or examined." The witness Charlton, who also was present and heard this conversation, corroborated Rutan.

Later a corporation was organized, called the Annie Laurie Mining Company, of which Huck was made the manager. Work was immediately commenced developing the properties. Rutan and Huck thereafter officed together in the company's office in Chicago, and, according to Rutan's testimony, they had various discussions as to the method of treating the Annie Laurie ore, and, in that connection, talked over the Robinson-Greenewalt process with a view of adopting it as a treatment for said ores; but that Kimberly did not desire to experiment with a process not absolutely determined, and so it was not used. They also investigated other processes and methods of treating said ores. They also discussed the assays of ores, and the reports of the underground workings of the Annie Laurie, sent to Huck. Huck admitted their officing together, but claimed that it had no business significance and was only to accommodate Rutan in giving him desk room for private business of his own. Huck, together with the other option holders, sold and conveyed his interest to the Annie Laurie Company, and he received therefor 5,000 shares

of its capital stock. Later the Annie Laurie Company purchased the properties in accordance with the option.

3. It is urged by appellant that the contract declared on in the complaint was the written contract of August 11, 1898; that the said written contract pertains alone to the Greene-Walt-Robinson process and to mines purchased in connection therewith; and that the interest which Huck purchased in the Annie Laurie properties was wholly separate and apart from that process. As already shown, according to Rutan's testimony, there is evidence tending to show that the said interest of Huck was purchased in view of treating the ores of the Annie Laurie properties with the Greenewalt-Robinson process, and in addition thereto Rutan testified that some of the said ores could be treated by that process. Conceding, however, that such purchase was not made with reference to or because of the said process, the terms of the contract, as stated in the complaint, are sufficiently broad to include the oral contract as testified to by both parties. It is true the date of the contract alleged in the complaint (on or about the 11th day of August, 1898) is the date of the written contract, while the evidence shows the oral contract was made in April, 1897. But the identity of the contract stated in the complaint is not alone determined by the date, but more from the allegations of the terms and conditions of the contract. If the written contract only defined the respective rights of the parties in and to the Greenewalt-Robinson process, and concerned only the subject-matter of the process, and did not define the respective rights of the parties in and to their general business transactions and dealings with respect to the purchasing and acquiring of mining properties, then it was not the contract alleged in the complaint, notwithstanding the similarity in dates. If, therefore, the written contract is not about the subject-matter of the contract alleged in the complaint, the oral contract certainly is; and hence that will be regarded as the one declared on and the one controlling the case. The complaint alleged the dealings and transactions of the parties with respect to the purchasing and acquiring of mining properties, and with respect to defining their interest therein, and, if the written contract was not upon such subject-matter, but was on the subject-matter of the process alone, plaintiffs were not thereby precluded from proving the allegations of the complaint by other competent evidence showing such a contract.

It is further claimed that Huck's purchase was not made in pursuance of either the oral or written contract existing between the parties. It is apparent from the evidence that Huck entered into the oral contract with Rutan because of the latter's ability and experience as a mining engineer in passing judgment on mining properties and in ascer-

taining their values. The record shows that, in their travels for a property, Huck desired to, and would at several different times have, purchased properties at great cost that later proved to be valueless had it not been for Rutan's emphatic advice against it. Rutan, at considerable expense of time, labor, and money made a most thorough examination and inspection of the Annie Laurie properties, and, as well as could be done without further exploration and development, tested its value, demonstrated its worth, and made a most complete and exhaustive report thereon. Huck had the benefit of all this. In addition to this, Huck had the benefit of making a personal inspection of the properties with Rutan and the benefit of Rutan's knowledge and experience in pointing out matters and things about the property, showing its worth. Notwithstanding other experts reported adversely on the property, Rutan held steadfastly to his belief that the Annie Laurie was a good property; and the subsequent development of the mine proved not only that his judgment was correct, but that the property was of greater value than even claimed by him. Upon the judgment and advice of Rutan Huck depended, and he was controlled thereby in determining whether he would purchase an interest in the property. Just before signing the contract whereby he acquired his interest, Huck still sought the advice of Rutan, and was controlled by it. In reviewing this record, the conclusion is irresistible that the thorough examination made by Rutan of the property, and his complete report thereon, the confidence entertained by him as to its great value, and the advice and directions given by him to Huck with respect to it, was the primary and efficient cause inducing Huck in purchasing the interest; and that the purchase was the direct result growing out of the dealings and relations had and existing between them, as in the complaint alleged and as found by the court, and was by virtue and in pursuance of such relations; and that the purchase was not occasioned by reason of any cause independent thereof.

4. After the signing of the contract whereby Huck acquired his one-fourth interest, Huck drew his check for \$1,000, inclosed it with a letter, which was first pencilled by Aldrich and then copied by Huck, in a sealed envelope, and handed it to Rutan later in the day at an hotel. The letter, signed by Huck, was: "I am instructed by the gentlemen associated in the bond of the Annie Laurie to hand you the inclosed check for \$1,000 as a slight recognition of our appreciation of your services in connection with the transaction. I am also requested to say to you that, notwithstanding the fact that you have declared that you have no claim against the proposed purchasers under said bond, the gentlemen interested intend, in the event that the development justifies your report, to add

to the remuneration here made in a substantial manner." Huck testified that, after Rutan read the letter and saw the check, he told him to draw a new check for \$500, and to credit the other \$500 on a note held by Huck against him. Huck admitted that of this \$1,000 Kimberly contributed \$500 and Huck and Aldrich each \$250. Rutan testified that, after he read the letter, he asked Huck what it meant, and if it had anything to do with his contract and relations with him; that Huck replied that it had not; that it was only a gift. From this letter and Rutan's accepting the check, several things are claimed—Rutan's assent to the statements therein contained, a settlement, and a corroboration of Huck's version of the conversation had just before signing the contract acquiring his interest in the option. This letter is double entente. While it bespeaks a token of gift offering, within it is couched a meaning, to which it is sought to have Rutan give assent by accepting the gift, to the effect that he has no interest in Huck's purchase in the option. "Claim against the proposed purchasers under said bond" might be understood to mean commissions, or might mean a variety of things; but it is most difficult to give it a meaning having any connection with the contract between Huck and Rutan, especially when considered with the fact that Huck contributed only \$250 of the \$1,000. Though it may be conceded to be an admission against Rutan, it is, however, only a circumstance to be considered with many others, and against it stand the admissions made by Huck to several witnesses, after all these matters had transpired, that Rutan was interested with him in a one-quarter interest in the Annie Laurie. Nothing can be claimed for this payment by way of settlement. It is apparent that the parties did not bargain, and their minds did not meet on any such matter. Besides, it is not pleaded as settlement, and that is alone sufficient to dispose of this contention. When the extensive travels of Rutan are considered, his expenses of more than \$3,000 paid by himself, his time employed, his examinations made of the Annie Laurie, his aid in procuring the option, his belief in the great value of the properties, and his contract with Huck for an interest, it is not probable that, when Huck was about to purchase the quarter interest in the Annie Laurie, Rutan should, without any consideration, declare, as it is claimed he did, that he was not to have any interest in such purchase, or that he thereafter settled his demand for \$1,000. If Huck intended it as a settlement, there was no occasion to resort to language of equivocal meaning. In this connection it is significant that the letter was first drafted by Aldrich and then copied by Huck and by him sealed in an envelope and personally handed to Rutan. There is evidence in the record showing that Aldrich was not loyal to Rutan, and

at the trial was a hostile witness against his interests. It is quite apparent that Aldrich, in drafting the letter, attempted to carry a meaning in it so obscure as not readily to be discernible, and intended it to be either unnoticed, or apparently collateral to the main thing, the making of the gift.

5. It is also claimed that the assignment made by Rutan to Snyder of the one-half interest in his contract with and claim against Huck was without consideration. So far as Huck is concerned, it matters not whether he discharges his obligation to Rutan alone or to Rutan and Snyder, so long as the discharge when made fully satisfies, as it does, the obligation, and bars all further claim against him with respect to it. It is argued that the \$10,000 paid by Snyder to Rutan was not paid as a consideration for the assignment, but was paid to Rutan by Snyder as commissions for the sale of the Snyder Improvement properties, from which it is also claimed that Rutan was not true to the best interests of Huck. Rutan and Snyder testified that it was paid for the assignment, and denied that it was for commissions. There is no direct evidence that it was paid for commissions. True, in a letter written by Weimer to Aldrich he states that Rutan received \$10,000 by way of commissions for the sale of the Snyder Improvement properties; in a letter written by Filer to Kimberly he stated that Rutan asked commissions. Neither Weimer nor Filer in any manner represented Rutan. Their statements, as to Rutan, were mere hearsay. But it is claimed that, because Rutan and Snyder worked together in procuring the option in the name of Kimberly, Rutan was untrue to Huck, and that the just inference is that the said money was paid for commissions. The facts and circumstances surrounding the procuring of the option have been heretofore alluded to. Before it can be successfully asserted that the said money was paid as commissions there must be some evidence or some circumstance tending to show such fact. Such evidence is wholly wanting. Were it, however, true that Rutan received the money as commissions for the sale of the Snyder Improvement properties, so far as Huck was concerned it was harmless to him, for he did not purchase any interest whatever in these properties, and at all times asserted that he would not do so. The fact that Rutan might have received commissions for the sale of the Snyder Improvement properties in no manner affected Huck's rights in and to the Annie Laurie properties, or placed on him increased burdens, and in no manner prevented him from making terms of purchase in the Annie Laurie better than or different from those he did make. The only complaint that he could make of this is that Rutan, as his partner in the transactions, should be required to account to him for the money thus received; but this claim is not

made, and were it made it would be unavailable, for the evidence is not sufficient to show that any money was paid to or received by Rutan as commissions from any one. It is argued that, notwithstanding the testimony of both Rutan and Snyder that the assignment was made September 8, 1890, for the then agreed price of \$10,000, the facts and circumstances attending the transaction render their testimony improbable. Even if it should be said their testimony in this respect is not probable, it does not necessarily follow that the money was paid to Rutan for commissions, and we have no right to presume that it was so paid, in the absence of evidence showing this fact. Outside of the hearsay testimony there is no such evidence. Upon all the material facts of the case and upon all the contentions made, except the one yet to be reviewed, the evidence is conflicting. Much of appellant's brief is an attempt to demonstrate that the matters and things testified to by Huck are true, and those testified to by Rutan are untrue. This case well falls within the rule so often announced by this court that, where there is a substantial conflict in the evidence, the findings of the court on such conflicting evidence will not be disturbed.

6. We are, however, of the opinion that the court erred in the matter of the accounting. The finding of the court that the 1,000 shares sold by Huck to his wife was for an inadequate price is against the evidence. It is true that transactions between husband and wife, where the rights of third parties may be affected, will be closely scrutinized. Huck testified, and it is not denied, that after he had paid over \$60,000 on the property, and when he was called in April, 1900, to meet an assessment on the stock of over \$62,000, he did not have sufficient funds to meet it, and therefore called on his wife to help him. She was then the owner of oil and gas bonds, which were sold, and from said sales realized something over \$25,000. The character of said bonds, when sold, the amount thereof, the price obtained therefor and from whom, the ownership in Mrs. Huck, the turning of the proceeds of sale over to Huck, and all the circumstances thereof were fully detailed. These facts are not denied. The 1,000 shares were sold to her by Huck at \$25 per share, the price he paid for it. It was at this time that the Annie Laurie company was about to and did purchase the property under the option. There is nothing to show that the stock at that time had any greater value than \$25 per share, or that more than that could have been realized for it. There is no evidence showing what was the market value of the stock in 1900, or that it then had any market value. The evidence shows that its market value in 1902 and 1903 was \$100 per share, but that was after the mine was developed and explored. The other stock sold at \$100 per share was

sold the latter part of 1901 and 1902. So far as Rutan was concerned Huck was under no legal obligation to carry out or complete his purchase under the option, and he had the legal right, even at the time of taking up the option, to abandon the entire transaction, if, for any reason, he thought it was not a desirable purchase, or found himself unable to carry it. Being unable to meet the assessments and to hold the full 5,000 shares, we see no reason why he could not sell a portion of the stock to enable him to carry the remainder, if it became necessary to do so. He was in a position not only to lose all the stock, but also to lose all the money that he had theretofore paid. The selling of the 1,000 shares therefore being necessary to preserve the common property, so long as Huck acted fairly and in good faith with Rutan; and, if he sold the stock for its then market value, and accounted to Rutan for its proceeds, Rutan is not in a position to complain of such transaction. The court did not find that there was bad faith on the part of Huck in selling this stock. It only found that the price was inadequate. But there is no evidence showing that the stock when sold was of greater value than the amount realized, or that more could then have been obtained for it. We therefore conclude, and so hold, that the court erred in charging Huck with 4,500 shares of stock on hand, and with the dividends received on that amount of stock. The finding of the court should have been that Huck ought to be charged with 3,500 shares, and with the dividends received thereon; and, instead of charging him with the said 1,000 shares and dividends thereon, he should have been charged with \$25,000, the proceeds received by him of the sale; and that the report, as made by Huck, showing his receipts and disbursements, should have been allowed; and that it should be decreed that he be required to deliver to plaintiffs one-third of 3,500 shares, or 1,166 $\frac{2}{3}$ shares of the capital stock of the Annie Laurie company, upon plaintiffs' paying to him one-third of the unpaid indebtedness due him, or, at his option, a sufficient number of said 3,500 shares to be sold under the direction of the court to pay off and cancel said indebtedness; and that he be required to deliver to plaintiffs one-third of the stock so remaining.

With such modification the judgment of the court below is affirmed. Neither party is given costs on this appeal.

Our attention having been called to the death of the appellant since the submission of the case to us, the judgment of affirmance is entered as of the 1st day of December, 1905, nunc pro tunc, a time prior to his death.

BARTCH, C. J., concurs.

MCCARTY, J., I dissent; am of the opinion that the judgment should be reversed and a new trial granted.

RED WING GOLD MIN. CO. v. CLAYS.

(Supreme Court of Utah. Jan. 13, 1906.)

1. MINES AND MINERALS—EXTENT AND LOCATION OF VEIN—BURDEN OF PROOF.

Where, in trespass for taking ore from beneath the surface of mining claims owned by plaintiff, defendant alleged that all the mineral removed was removed from a vein the apex of which was wholly within his mining claim, defendant had the burden of establishing the location of the vein and its apex.

2. APPEAL—FINDINGS—CONCLUSIVENESS.

Where the evidence, though conflicting, supports the findings of the trial court, they will not be disturbed.

Appeal from District Court, Third District; S. W. Stewart, Judge.

Action by the Red Wing Gold Mining Company against William D. Clays. From a judgment for defendant, plaintiff appeals. Affirmed.

Henderson, Pierce, Cretchlow & Barrette and Blerer & Orem, for appellant. Frick & Edwards, for respondent.

MCCARTY, J. This is an appeal from a final judgment and decree entered in the district court of Salt Lake county in favor of the defendant against the plaintiff.

The complaint contains three causes of action: The first and second causes of action are for alleged trespasses committed by defendant in taking ore from beneath the surface of the Columbia and Silver Hill mining claims, owned by plaintiff, and are situated in West Mountain mining district, Salt Lake county, Utah; and the third cause of action is for a perpetual injunction to restrain defendant from committing further trespass. The defendant is the owner of the Julia Dean mining claim, and in his answer alleges, in part, "that within the boundaries of the said Julia Dean mining claim of defendant are lodes or veins of mineral extending in a northerly and southerly direction, parallel to the side lines thereof, throughout the full length of the claim, and on their strike extending through and across the end lines thereof and dipping into the earth in a westerly direction at a varying angle between 20 and 30 degrees, having their tops and apexes within the exterior limits of the said Julia Dean lode mining claim and outside of the exterior limits of the mining claims and premises mentioned and described in plaintiff's complaint as the property of the plaintiff; * * * that the defendant, in working, developing, and following the said lodes and veins having their apexes wholly within the exterior limits of the said Julia Dean mining claim, and in extracting waste, rock, and ore from the same on their strike, has worked the same on their course downward, dipping in a westerly direction under and beneath the surface of the mining claims and premises mentioned and described in plaintiff's complaint, to wit, Silver Hill and Columbia lode mining claims; * * * and that all the work done as aforesaid, and all

mineral removed by the defendant, was done and removed from a vein or veins, the tops or apexes of which are wholly within the premises of the defendant, as aforesaid."

The court, among other things, found: "(4) That the discovery of said Julia Dean lode claim is near the south end line of said claim and near the center thereof, and is on what is commonly known as the Julia Dean vein; that said Julia Dean vein is a large fissure vein, entering upon the Julia Dean claim upon its strike near the discovery aforesaid, and continues thence on a northerly course through the entire length of said Julia Dean claim to and through its northerly end line and that said Julia Dean vein has its apex in said Julia Dean claim throughout the entire length of said claim between the end lines thereof, and no part of the apex of said Julia Dean vein is upon the Columbia, Silver Hill, or other claims owned by the plaintiff between the end lines of said Julia Dean claim, but the whole of the apex of said Julia Dean vein is within and upon said Julia Dean claim owned by the defendant. * * * (7) That said Julia Dean vein dips into the earth in a southwesterly direction with a strike in a northwesterly direction and enters into the Silver Hill, Columbia, Brink, and Rustler claims of the plaintiff upon its dip into the earth, and the major portion of said Julia Dean vein upon its dip is within the exterior boundaries of the aforesaid claims of plaintiff, but no part of the apex of said Julia Dean vein is within the exterior surface boundaries of said claims, but the whole of said apex is upon the Julia Dean claim, so far as said vein is covered by said Julia Dean claim between both of its end lines."

As stated by counsel for appellant in their brief: "The principal point in the case hinges upon finding 4." It is admitted that the Julia Dean vein passes upon its strike or course through the southerly end line of the Julia Dean claim, and runs thence northerly, with its apex wholly within the exterior limits or side lines of said claim, for a distance of about 400 feet, to a point near the westerly side line thereof, which point is marked and designated as "station 205." The development work done north and northwesterly from this point on the mining claims mentioned is not very extensive, and the apex of the Julia Dean vein is not so easily traced on its course northerly beyond station 205 as it is from the discovery monument to said station, and there is a sharp conflict in the evidence respecting the strike and location of the apex of the vein after it leaves station 205 on its northerly course. Appellant contends that at or near this station the vein on its course crosses the westerly side line of the Julia Dean claim and wholly departs therefrom, and continues on its strike

into, along, and through the Columbia claim, owned by plaintiff, and with its apex entirely within the exterior limits or side lines of the Columbia, from the point where it is claimed the vein crosses the westerly side line of the Julia Dean at or near station 205. On the other hand, respondent insists that there is ample evidence in the record to support the finding of the court that the Julia Dean vein continues in, through, and along the Julia Dean claim to the northerly end line thereof, and that the apex of the vein is wholly and exclusively within the exterior limits or side lines of said claim.

As hereinbefore stated, there is a conflict in the evidence on this point. The defendant, upon whom was the burden of proof to establish the location of the vein and its apex on its strike northerly beyond station 205, introduced evidence which tends to show that the strike of the vein northerly from said station is parallel with the side lines of the Julia Dean claim from station 205 to the north end line thereof, with the apex of the vein within the exterior limits of said claim for the entire distance. While, on the other hand, plaintiff's evidence tended to show that the Julia Dean vein on its strike wholly departs from the Julia Dean claim at or near station 205, and continues on its true course through and along the Columbia claim, with the apex of the vein wholly within said claim. The record is voluminous and contains about 1,800 pages of evidence, besides numerous exhibits, consisting of photographs of the premises showing the contour of the ground and excavations made on the surface thereof, and maps showing the boundaries of the respective claims, as well as the extensive underground workings therein, which were introduced in evidence and made a part of the record. To reproduce the evidence here, even in an abridged and condensed form, we do not deem important under our view of the case.

After the evidence was all in, and before judgment was entered, the trial judge, at the request of counsel for both sides, visited and made a personal inspection of the premises and property mentioned. The trial court, having had the benefit thus derived from a personal examination of the property, and having had an opportunity to observe the demeanor and appearance of the witnesses who testified in the case, was better able to correctly weigh the conflicting evidence than is this court, who has before it only the exhibits and printed record. We are, therefore, of the opinion that the findings and decree cannot be disturbed, as there is ample evidence in the record to support them.

The judgment is affirmed, with costs.

BARTCH, C. J., and STRAUP, J., concur.

(47 Or. 350)

PRICE v. OREGON R. CO.

(Supreme Court of Oregon. Jan. 23, 1906.)

1. PRINCIPAL AND AGENT—NOTICE TO AGENT—SCOPE OF AUTHORITY.

In an action against a railroad company for negligently constructing a fill over a water course and leaving an alleged insufficient drain, because of which water was thrown back on plaintiff's land, declarations made by plaintiff, before the fill had been constructed, to a person who was taking measurements with surveying instruments of the place where the fill was subsequently made, concerning the quantity of water which flowed in the stream, and similar declarations thereafter made to persons at work on the fill, not shown to have any authority from defendant in the matter of planning or constructing the same or determining the size of the drain, etc., were inadmissible.

2. WATERS AND WATER COURSES—FLOWAGE—RAILROADS—CROSSING WATER COURSES—CARE REQUIRED.

It is the duty of a railroad company in constructing a fill over a water course to make sufficient provisions for the passage of the water of the stream, and to exercise ordinary skill and knowledge to so construct the work as to allow for the passage of such water as is known to flow in the stream in times of usual freshets, and such as might be reasonably expected to flow in floods shown by experience to be liable to occur.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, §§ 216-218.]

3. SAME—ACTIONS—INSTRUCTIONS.

In an action against a railroad company for alleged negligence in constructing a fill over a water course, an instruction that if plaintiff informed defendant's employees, regardless of whom such employees were, that at times the water was hip deep at the place where the fill was constructed, or that the pipe inserted for the passage of the water was not in his opinion sufficient, they might consider such testimony in determining whether defendants used ordinary care in constructing the drain, and whether it should have reasonably anticipated such a flood as caused the damage, was fatally defective.

4. SAME.

Where, in an action against a railroad for negligently constructing a fill over a water course, it was conceded that neither the embankment of a county road, or a culvert therein, in any way affected plaintiff's injury by water thrown back upon his property by the fill, it was error for the court to charge that, in determining whether defendants used ordinary care in determining the size of the fill, they might consider, with other matters, the size of the culvert across the road between the fill and plaintiff's residence.

5. SAME—OBSTRUCTION OF STREAMS—SURFACE WATER.

Where plaintiff's property was injured by water of a stream which was turned back by an insufficient culvert constructed by defendant railroad company as part of the fill erected over the stream, and the water causing the injury was the continuous overflow of the stream, it could not be regarded as surface water in determining the rights of the parties.

6. SAME—EXTRAORDINARY FLOODS—QUESTION FOR JURY.

In an action against a railroad company for injuries to plaintiff's property by water of a stream claimed to have been turned back by an insufficient culvert, constructed as a part of defendant's fill, evidence held to require submission to the jury of the question whether the storm was so extraordinary and unprecedented

that defendant, in the exercise of ordinary care, could not have been required to anticipate and provide for it.

Appeal from Circuit Court, Umatilla County; W. R. Ellis, Judge.

Action by Thomas J. Price against the Oregon Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action to recover damages for an injury to plaintiff's property and premises by backwater, alleged to have been caused by the negligence and unskillfulness of the defendant company in constructing and maintaining a fill on the line of its road from Pendleton to Walla Walla on and over the channel of Hale creek, near the town of Weston. Hale creek is a small stream, about 2 feet deep and from 8 to 10 feet wide where it flows through plaintiff's premises. It has its origin several miles in an easterly direction, from where it crosses defendant's road and flows through a narrow valley or draw between the hills. It is dry in the summer months, but carries more or less water during the remainder of the year. The plaintiff is the owner of a tract of land through which the creek flows a short distance above the defendant's road. His dwelling house, outbuildings, and garden are in the valley, or draw, near the creek and about 280 feet above the road, at which place the valley, or draw, is about 150 feet wide. Between the railroad track and the plaintiff's dwelling is a county road, with a culvert four feet square, for the passage of water. When the defendant's railway was first built, the draw or gorge through which Hale creek flows was spanned by a trestle 135 feet long and 20 feet high, but in 1901 a fill of earth, having an iron pipe three feet in diameter at the bottom for the passage of the water of Hale creek, was substituted for the trestle. On the 6th of July, 1904, a severe and sudden thunder and rain storm occurred up the creek above the plaintiff's house, and a large quantity of rain fell in the drainage area, which, finding its way into the stream, caused it to overflow its banks, and, as the water was unable to pass through the drain pipe in the fill on defendant's road, it flowed back upon and overflowed plaintiff's garden and lawn and ran into his house, injuring and damaging his carpets, furniture, etc. Being unable to obtain a satisfactory settlement of his damages with the railway company, he brought this action. The complaint avers that the defendant carelessly and negligently failed to put in a sufficient drain or passage for the water under the fill, and thereby caused it to flow back and overflow his premises, injuring his dwelling house and the furniture therein, his garden, lawn, and outbuildings, to his damage in the sum of \$2,000, the items of which are specifically set out. The answer admits the existence and location of Hale creek, but alleges that it is

dry the entire year, except during the freshest season, when it usually flows a small quantity of water; that the culvert in the county road and the iron pipe put in by defendant have always been adequate to accommodate the flow of the stream, and are entirely sufficient for that purpose under any and all circumstances which might reasonably have been expected or anticipated; that the storm of July 6, 1904, which caused the damage to plaintiff, was unprecedented and extraordinary in fury and violence, amounting to a cloud-burst, so that for more than two miles up the stream above his house the water became a torrent of great volume and velocity, flowing through the valley or draw in a column two feet in height and down onto the lands of plaintiff without regard to the banks of the stream, carrying great quantities of earth and debris before it, thus causing the greatest and most severe flood ever known in that vicinity; that it thus swept over the lands of plaintiff, and whatever damage occurred to him was caused solely and exclusively by such cloud-burst and unprecedented flood. The reply denies the new matter in the answer, and affirmatively alleges that the culvert in the county road did not affect one way or the other plaintiff's property; that the water would have flowed over the county road regardless of the culvert, and would not have backed up and injured him by reason of such road; that the storm referred to was a severe electrical storm, such as is liable to occur in the section of the country where Hale creek has its source, and was no greater than has occurred there within the memory of persons now living in that vicinity, but was of a kind and character against which the defendant should have provided when it assumed to restrict or interfere with the natural flow of the stream. Upon the issues thus joined the cause was tried before a jury, resulting in a verdict and judgment in favor of the plaintiff, and defendant appeals, assigning error in the admission of testimony and the giving and refusal of certain instructions.

Arthur C. Spencer, for appellant. T. G. Hailey, for respondent.

BEAN, C. J. (after stating the facts). The plaintiff, as a witness in his own behalf, testified, among other things, that he had lived on Hale creek and in the house damaged by the flood about 35 years; that the stream dried up about the 4th of July each year, and remained dry until the winter rains, except during storms in the summer time; that the country it drained for four or five miles up the stream was steep and rugged, and was visible from the railroad track; that during the time he had lived on the stream he had seen a great many storms and high waters; that he had seen the stream in harvest dry, and within two hours after a storm came up the water would be knee

deep from his yard fence to the hills on the north, but did not run around his house; that he had known a great many storms of a similar character; that he had seen more water come down the stream than in July, 1904, but it did not damage him; that in the winter time the water sometimes ran out and into his garden and cut out the soil; that he was at home at the time of the flood in July, 1904; that the water was able to pass down the stream and did not reach his house and outbuildings until it backed up from the railroad fill; that the water can and did pass over the county road below the culvert before becoming high enough to fill the culvert; that he had often seen it do so. He was also permitted to testify, over defendant's objection, that before the fill was made by the defendant company a man, who seemed to be spokesman for a party who had surveying instruments and were making measurements at the place where the fill was subsequently made, inquired of him as to his knowledge concerning the quantity of water that came down the gorge or ravine at the railway crossing, and he told him that he had seen it hip deep over a space 50 or 60 feet wide at that place, and that he thought it would take a "pretty big culvert, not less than 10 feet"; that he did not know whether the party was an official of the road or not; that he afterward had a conversation with parties who were putting in the fill and whom he supposed were working for the railroad company, and told them that he did not think the drain pipe used was sufficient to carry the water. Based upon this testimony, the court instructed the jury that if plaintiff informed the employees of the defendant before the fill was made that the water had at times run hip deep through the gulch, or advised its agents that the pipe or conduit was not large enough, before it was put in place, they might consider such matters in determining whether the defendant used ordinary care in fixing the size of the drain under the fill, and whether it should reasonably have anticipated such a flood as came in July, 1904. The admission of this testimony, emphasized as it was by the instructions based thereon, was, in our opinion, error.

There was no proof that the parties with whom the plaintiff talked were officers or agents of the defendant, or had authority to represent it in the matter of planning or constructing the fill, or even that they were its employees, unless that is to be inferred from the fact that they were at the time apparently at work for it. They may have been, for all the record shows, laborers, having nothing whatever to do with the question of determining the size of the drain or the nature or character of the fill. It was the duty of the defendant company in constructing the fill to make sufficient and proper provision for the passage of the waters of the stream, and to that end it was required

to bring to the planning and execution of the work the skill and knowledge which are ordinarily practiced in such matters, and to construct it so as to allow for the passage of such water as was known to flow in the stream in times of usual freshets and such as might have reasonably been expected to in floods which are not usual, but which experience shows might occur at any time. 2 Farnham, Waters, § 569; 13 Am. & Eng. Enc. Law (2d Ed.) 690; Jones v. Seaboard Air Line R. Co., 67 S. C. 181, 45 S. E. 188. If it failed to use such skill, it is liable to those injured by its negligence, but in determining whether it had used reasonable care and prudence in the construction of the work regard must be had to the size and nature of the stream, the character and features of the country drained by it, its liability to overflows, and their probable extent and effect, and not to a single item of testimony. The true test, considering all the circumstances, is, ought a competent and skillful engineer reasonably to have anticipated such a flood as caused the damage to the plaintiff and to have made provision therefor? The evidence objected to might, perhaps, have been competent if the persons with whom the plaintiff were in fact the agents or employés of the company, acting for and representing it in planning or constructing the fill, as tending to show the knowledge which it had of the character of the stream and the quantity of water carried by it, but the effect of the testimony under the instructions of the court was practically to make it determinative of the question whether the defendant exercised ordinary care and prudence in using the drain or outlet under the embankment. It was singled out from all the rest of the testimony, and the jury advised that if the plaintiff had informed the employés of the defendant (regardless of whom such employés were) that at times the water was hip deep at the place where the fill now is, or that he had told them that the pipe was not, in his opinion, large enough to pass the water, they might consider such testimony in determining whether the defendant used ordinary care in the construction of the drain, and whether it ought to have reasonably anticipated such flood as caused the damage. The practical effect of which was not only to give special importance to the testimony, but that, if plaintiff told an employé or employés of the defendant that the water was hip deep in the stream at times and the conduit as put in was not sufficient to carry or pass that quantity of water, it was insufficient, and the defendant was negligent in using it.

The court also instructed the jury that, in deciding whether the defendant used ordinary care in determining the size of the culvert or drain placed by it under the fill, they might consider, along with other matters, the size of the culvert across the county road between the fill and the residence of

the plaintiff. It is shown by the evidence, alleged in the pleadings, and admitted by all, that neither the embankment of the county road nor the culvert therein in any way affected or contributed to the injury to plaintiff. The road embankment was not high enough to cause the water to flow back and overflow plaintiff's land, and but for the fill made by the defendant it would have passed on down the stream. Under these circumstances we can conceive no purpose for the instruction, unless the court intended the jury to use the size of the culvert in the county road as a standard by which to determine the sufficiency of the one used by the defendant. They were, in effect, told that they might consider as evidence of what would be a sufficient culvert the one in the county road, without any proof whatever that it was of the proper size or was put in by a person familiar with the history of the stream or the amount of water necessary to be accommodated. So far as the record discloses, its size and height may have been regulated by a mere matter of convenience in constructing the road, and not in any way by the quantity of water to be accommodated, and therefore permitting the jury to use it as a standard of comparison was error.

These considerations lead to a reversal of the judgment, but, in view of another trial, it is deemed proper to consider the contention of the defendant that the water which damaged the plaintiff was surface water, and for that reason it is not liable for causing it to flow back and overflow his premises. There is a sharp conflict in the adjudicated cases in this country as to the law of surface water and the rights and liabilities of conterminous proprietors of land in respect to the obstruction and flow thereof. The courts of many of the states have followed the common law, and held that mere surface water, or such as accumulates by rain or the melting of snow, is to be regarded as a common enemy, and the proprietor of the lower tenement or estate may, if he chooses, obstruct and hinder the flow of such water, and in doing so may turn it back upon and over the lands of others without liability for injury ensuing from such obstruction or diversion. Other courts, following the doctrine of the civil law, have held that the owner of the upper or dominant estate has a natural easement or servitude in the lower, or servient, one to have all waters accumulating on his land to flow upon and across that of the lower proprietor as it would naturally do, and that the flow of such water cannot be interfered with or obstructed by the servient owner to the detriment or injury of the upper proprietor. Walker v. Southern Pac. Co., 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837.

The question has never been decided in this state. The court expressly disclaimed doing so in West v. Taylor, 16 Or. 165, 13

Pac. 665. Nor do we deem its consideration necessary at this time. The waters which caused the injury to the plaintiff were not surface waters, but the flood waters of a natural stream. "Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to, and does flow with other waters, whether derived from the surface or springs; and it then becomes the running water of a stream, and ceases to be surface water." *Crawford v. Rambo*, 44 Ohio St. 282, 7 N. E. 429. When such water has found its way into a natural stream or water course, and mingles with the waters thereof, it becomes as much a part of the stream as any other particle of water in it, and ceases to possess any of the qualities of surface water. And the mere fact that for the time being the channel of the stream is not sufficient to carry all the water does not change the rule, so long as the water forms one continuous body and flows in the course of the ordinary channel of the stream. As said in *Crawford v. Rambo*, supra: "It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low the entire volume at any one time constitutes the water of the river at such time; and the land over which its current flows must be regarded as its channel, so that, when swollen by rains and melting snows it extends and flows over the bottoms along its course, that is its flood channel, as when, by droughts, it is reduced to its minimum, it is then in its low-water channel." If in times of flood any part of the waters of a stream become separated or disassociated from the main body and spreads out over the adjoining country without following any definite water course, or channel, it ceases to be a part of the stream and may be regarded as surface water. *N. Y. & St. L. R. Co. v. Speelman*, 12 Ind. App. 372, 40 N. E. 541; *New York, etc., R. Co. v. Hamlet Hay Co.*, 149 Ind. 344, 47 N. E. 1000, 49 N. E. 269. But, so long as the waters form one continuous body, flowing in the ordinary course of the stream and returning to the natural channel as they recede, they are, properly speaking, waters of a water course, although not confined to the banks of the stream.

This question has been ably and exhaustively considered, in his usual clear and masterful manner, by Mr. Justice Lumpkin, in *O'Connell v. East Tenn. Ry. Co.*, 87 Ga. 246, 13 S. E. 489, 13 L. R. A. 394, 27 Am. St. Rep. 246, and his conclusion is that whether the flood waters of a stream are to be deemed as part of the stream or mere surface water de-

pends upon the configuration of the country and the relative position of the water after it has gone beyond the usual channel. "If the flood water," he says, "becomes severed from the main current, or leaves the stream never to return, and spreads out over the lower ground, it has become surface water. But, if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel animo revertendi, presently to return, as by the recession of the waters, it is to be regarded as still a part of the river. The identity of a river does not depend upon the volume of water which may happen to flow down its course at any particular season. The authorities hold that a stream may be wholly dry at times without losing the character of a water course. So, on the other hand, it may have a 'flood channel' to retain the surplus waters until they can be discharged by the natural flow." And this is the doctrine of the authorities generally. 30 Am. & Eng. Enc. Law (2d Ed.) 324; 3 Farnham, Waters, § 879; *Jones v. Seaboard Air Line R. Co.*, 67 S. C. 181, 45 S. E. 188; *Byrne v. Minn. & St. L. Ry. Co.*, 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 608; *Chicago, Burlington & Quincy R. Co. v. Emmert*, 53 Neb. 237, 73 N. W. 540, 68 Am. St. Rep. 602; *New York, etc., R. Co. v. Hamlet Hay Co.*, 149 Ind. 344, 47 N. E. 1000, 49 N. E. 269; *New York, etc., R. Co. v. Speelman*, 12 Ind. App. 372, 40 N. E. 541. There is no contention in this case that the waters which caused the injury to the plaintiff were not flowing in one continuous body, following the course of the ordinary channel of Hale creek, and they were therefore to be regarded as a part of the stream, and not as surface waters.

It is contended on behalf of the defendant that the damage to plaintiff was due to an extraordinary and unprecedented storm which it could not reasonably have been expected to anticipate when constructing its road. Upon that matter there was conflicting evidence, and the question was for the jury, and not the court. In the construction of its road the defendant was required to use reasonable care and skill to avoid unnecessary injury or damage to the plaintiff by reason of freshets in the stream and also from floods which experience teaches may be expected to occur at any time, but it was not required to anticipate and use precautions to prevent injury from floods caused by extraordinary and unexpected storms. Whether the storm in question was of the character indicated was a matter for the jury.

There are some other assignments of error in the record, but, as they need not arise on a new trial, it is not necessary to consider them at this time.

Judgment reversed, and new trial ordered.

HAILEY, J., having been of counsel, took no part in the consideration of this case.

FLEGEL v. CHARLES KOSS & BROS. CO.
et al.

(Supreme Court of Oregon. Jan. 23, 1906.)

1. APPEAL—TRIAL BY COURT—FINDINGS OF FACT—EFFECT.

Under B. & C. Comp. § 159, providing that in a trial by the court without a jury the findings of fact shall be deemed a verdict, such findings cannot be set aside on appeal if there is any evidence to support them.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3979.]

2. ATTACHMENT—CREDITORS—PURCHASER IN GOOD FAITH—PLEADINGS—SUFFICIENCY.

Under B. & C. Comp. § 302, providing that, from the date of the attachment until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property, etc., an attaching creditor, in order to be deemed a purchaser in good faith as against the owner of an outstanding equity, must, in an action on a bond for redelivery of the property, allege and prove all the facts necessary to establish that character of his ownership, as against the equity; and a reply consisting of a general denial only of the claim of ownership made by defendants in their answer was insufficient to bring plaintiff within the statute.

3. SAME—EVIDENCE.

In attachment, on the issue whether the attachment debtor owned the property attached or had bought the same as agent only, not having sufficient means with which to purchase for himself, evidence as to his financial condition, both on the day of purchase and prior thereto, was admissible.

Appeal from Circuit Court, Multnomah County; John B. Cleland, Judge.

Action by Flegel, trustee in bankruptcy, etc., against Chas. Koss & Bros. Company, Baumbach, Reichell & Co., and the American Surety Company. Judgment for defendants, and plaintiff appeals. Affirmed.

N. H. Bloomfield and A. F. Flegel, for appellant. Dolph, Mallory, Simon & Gearin, for respondents.

HAILEY, J. This is an action upon an undertaking given by the respondents for the redelivery of certain hops, attached as the property of one Phil Neis in an action against him brought by one Estelle Mayer, in which action the appellant herein was substituted as plaintiff. The respondents claimed to own the property attached, and from a judgment in their favor this appeal is taken.

On January 30, 1902, Estelle Mayer commenced an action in the circuit court of Multnomah county against Phil Neis to recover upon a promissory note, and filed her affidavit and undertaking for an attachment, and caused a writ of attachment to be issued under which the sheriff of that county attached two warehouse receipts, representing 179 bales of hops, as the property of the defendant Neis. The respondents, Chas. Koss & Bros. Company and Baumbach, Reichell & Co., both eastern corporations dealing in hops, claiming to be the owners of the hops attached, gave to the sheriff an undertaking for redelivery thereof, with the American

Surety Company as surety thereon. The warehouse receipts and hops were then delivered to the respondents. In March following the defendant Phil Neis was declared a bankrupt, and the appellant herein, A. F. Flegel, was elected his trustee in bankruptcy, and by order of the bankruptcy court was substituted as plaintiff in the case of Estelle Mayer against Neis, after which he obtained judgment against Neis for the amount sued for. On this judgment an execution was issued to the sheriff of Multnomah county, who made return thereon that the hops attached had been delivered to the respondents upon their delivery to him of the undertaking for redelivery, which he attached to his return. The American Surety Company being the only resident signer of such undertaking, demand was made upon it for redelivery of the hops. Upon refusal to deliver them plaintiff, as trustee in bankruptcy of Neis and assignee of Estelle Mayer, instituted this action upon the undertaking for redelivery. The respondents filed their answer, denying ownership of the hops by Neis, and alleging ownership in themselves, to which answer a reply was filed containing a general denial only. A jury trial was waived, and the cause tried by the court, whose findings of fact and conclusions of law were filed and judgment entered thereon in favor of the respondents.

The real issue in this case was as to who owned the hops at the time they were attached. The record shows that on January 30, 1902, and for several years prior thereto, Phil Neis, under the trade name of Phil Neis & Co., had been acting as agent for the respondents, Chas. Koss & Bros. Company and Baumbach, Reichell & Co., in buying hops, and also purchased hops on commission for other persons, for which they paid him a commission of $\frac{1}{2}$ cent a pound for all hops bought. On January 30, 1902, Neis bought of Balfour, Guthrie & Co. 179 bales of hops for \$3,973.68, and gave in payment therefor his check, signed "Phil Neis & Co.," for that amount, and the agent of Balfour, Guthrie & Co. indorsed upon the two warehouse receipts representing this amount of hops, the following words: "January 30, 1902. Deliver the within hops to Phil Neis & Co. Balfour, Guthrie & Co." The delivery of this check to Balfour, Guthrie & Co. was made by Neis' clerk in the office of Balfour, Guthrie & Co., and the warehouse receipts were handed out by the agent, but before Neis' clerk could get possession of them they were snatched up by a deputy sheriff and taken into his possession under the writ of attachment in the case of Mayer against Neis, and never were delivered to Neis or his clerk. The check given by Neis in payment for these hops was drawn upon a bank in Portland where he did business under his trade-name, and in which bank he had about \$4,000 to his credit at the time the check was drawn, \$1,062.50 of this amount being proceeds of

a draft drawn by him that day upon the respondents Chas. Koss & Bros. Company, and the remainder moneys obtained by him upon drafts drawn upon eastern buyers, other than respondent, for whom he was also agent.

The appellant claims that the purchase of these hops by Neis and payment therefor by his check, drawn upon his own bank account, together with the indorsement of the warehouse receipts to him, made Neis the owner of the receipts and the hops; and, further, that, if he was not the owner of all the hops, he was the owner of all, except the 70 bales purchased by him with the \$1,662.50 received upon the draft from Chas. Koss & Bros. Company on the day of the purchase of the hops, for the reason that the purchase price for the remaining portion of the hops was paid out of funds standing in the name of Neis received from other sources.

On the other hand, the respondents claim that Neis never owned the hops, but, acting as agent, had bought them for the respondents, Chas. Koss & Bros. Company and Baumbach, Reichell & Co.—136 bales for the former and 43 bales for the latter. There is evidence that during the year 1901 each of these respondents last named sent money to Neis with which to buy hops, and that he erroneously represented to them that he had bought certain amounts of hops for each and had them in storage, while in fact he was short 66 bales to Koss & Bros. Company and 43 bales to Baumbach, Reichell & Co. Shortly prior to buying these 179 bales from Balfour, Guthrie & Co. he notified Koss & Bros. Company that he could buy 70 bales for them and received authority to do so, and thereupon drew upon them for the price of 70 bales, \$1,662.50, and bought the 179 bales from Balfour, Guthrie & Co., intending thereby to cover his shortage with these firms, the moneys for which he had received long before. The lower court found that in purchasing these hops Neis was acting as agent for respondents, and purchased for them, and not for himself, and that he did not own the hops at the time of the attachment.

The errors complained of relate chiefly to the findings of fact made by the court, and attempt to question the sufficiency of the evidence upon which they were based. Under our statute, in a trial by the court without a jury, the findings of the court on the facts shall be deemed a verdict. Section 159, B. & C. Comp. In construing this section, this court has repeatedly held that such findings cannot be set aside on appeal if there is any evidence to support them. *Williams v. Gallick*, 11 Or. 337-341, 3 Pac. 469; *Bartel v. Mathias*, 19 Or. 482, 24 Pac. 918; *Lovejoy v. Chapman*, 23 Or. 571, 32 Pac. 687; *Bruce v. Phoenix Insurance Co.*, 24 Or. 486-492,

34 Pac. 16; *Liebe v. Nicolai*, 30 Or. 364-367, 48 Pac. 172; *Astoria Railroad Co. v. Kern*, 44 Or. 538, 76 Pac. 14. It is therefore sufficient answer to the appellant's contention on this point to say there is evidence in the record tending to support the findings made by the lower court on the point complained of by the appellant, and it is therefore not for this court to inquire into the sufficiency of such evidence.

Appellant further claims that, although Neis might not have been the real owner of the property attached, he was, by reason of the warehouse receipts having been indorsed to him, and having paid for the hops with his personal check, the apparent owner, and under section 302, B. & C. Comp., an attaching creditor, such as the appellant's assignor, as against third persons, should be deemed a purchaser in good faith for a valuable consideration of the property attached; and that the respondents are third persons within the meaning of said section. In *Rhodes v. McGarry*, 19 Or. 229, 23 Pac. 973, Mr. Chief Justice Thayer, speaking of section 302, supra, said: "An attaching creditor, in order to be deemed a purchaser in good faith of the property as against one having an outstanding equity, must allege and prove all the facts necessary to establish that character of ownership in favor of a purchaser of such property as against such an equity." The answer in that case did not contain any such defense, but was confined strictly to a traverse of the allegations of the complaint. So it is in this case. The reply is a general denial only of the claim of ownership made by the respondents in their answer. The construction placed upon this section of our Code in the foregoing case has been upheld in the following cases: *Meier v. Hess*, 23 Or. 590-601, 32 Pac. 755; *Raymond v. Flavel*, 27 Or. 219-248, 40 Pac. 158; and *Dimmick v. Rosenfeld*, 34 Or. 101-105, 55 Pac. 100. The appellant, therefore, not having brought himself within the statute by his pleadings, can claim nothing under it.

The only remaining assignment of error is based upon the admissibility of the following question asked the witness Neis: "From 1893 up to the 30th day of January, 1902, what was your financial condition as to having means?" Appellant contended that the hops attached belonged to Neis, and that he was a dealer in hops, buying and selling the same; while the respondents claimed that he was only an agent, buying hops for others upon commission, and did not personally deal in hops, and had no means with which to purchase for himself. This being one of the issues, we think it was competent to show his financial condition, both on the day of purchase and prior thereto.

The judgment of the lower court is therefore affirmed.

(47 Or. 232)

STATE v. MARTIN.*

(Supreme Court of Oregon. Jan. 2, 1906.)

1. HOMICIDE LAW—EVIDENCE—MOTIVE.

In homicide, testimony that defendant had had intercourse with the daughter of deceased, and that she was with child, was admissible to show motive, where there was evidence that previous to the homicide deceased had called upon defendant and threatened him with prosecution for seduction and consequent imprisonment, under B. & O. Comp. § 1921, unless he married the girl, and that defendant was at the time presumably engaged to another girl, so as to render it improbable that he would willingly marry deceased's daughter.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 830-832; vol. 26, Cent. Dig. Homicide, §§ 320-325.]

2. CRIMINAL LAW—CONDUCT OF TRIAL—OPENING STATEMENT.

In homicide, it was not error for the district attorney to say in his opening statement that the state expected to prove that defendant had had sexual intercourse with the daughter of deceased, where evidence of such intercourse was, under the circumstances of the case, competent to show motive.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1659.]

3. WITNESSES — IMPEACHMENT — CONTRADICTORY STATEMENTS.

Under B. & O. Comp. § 853, authorizing the impeachment of a witness by evidence that he has made previous statements inconsistent with his testimony, a witness in homicide could not be impeached by the production of a transcript of the testimony given by her at the inquest, nor by the reading of the stenographer's notes of such testimony, where the stenographer stated that he could not say that his notes contained all that the witness stated at the inquest.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1253-1257.]

4. CRIMINAL LAW—COMPETENCY OF EXPERTS — WAIVER OF OBJECTIONS.

In homicide, a witness who testified that he was a graduate of a medical school and a licensed physician was properly permitted to state whether a certain injury to deceased could have been caused by the blow of a fist, over an objection that the question was incompetent, where there was no objection to the competency of the witness to express his opinion.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1633.]

Appeal from Circuit Court, Umatilla County; W. R. Ellis, Judge.

Grover Martin was convicted of manslaughter, and appeals. Affirmed.

J. H. Raley and S. D. Peterson, for appellant. A. M. Crawford, Atty. Gen., and G. W. Phelps, Dist. Atty., for the State.

MOORE, J. The defendant, Grover Martin, was indicted for the crime of murder in the first degree, alleged to have been committed in Umatilla county May 18, 1905, by killing one O. N. Preston, and having been tried therefor he was convicted of manslaughter, and sentenced to 10 years' imprisonment in the penitentiary, from which judgment he appeals.

His counsel contend that an error was committed in permitting the district attorney, over objection and exception, to detail to the jury, in his opening statement, circum-

stances pointing to the defendant's participation in the commission of a crime other than that with which he was charged, and in allowing testimony to be introduced tending to prove such statements. In order to illustrate the legal principle insisted upon, a brief statement of the facts involved is deemed essential. The defendant, who is 20 years old, was for several months prior to the homicide studying dentistry with one Dr. Fulton in an office at Milton, where he was visited about May 1, 1905, by the deceased, and informed that he had seduced the latter's daughter. This he denied, and on the 15th of that month he was again visited by the deceased, who reiterated the charge, and exposed the butt of a pistol in his pocket. The defendant, again protesting his innocence, promised to visit this daughter and make some arrangement to avoid the shame incident to her condition. This promise was not kept, and three days thereafter, while the defendant was calling at a neighbor's house, the deceased, who lived across the road, invited him out, whereupon a combat ensued in the highway. The defendant knocked the deceased down and continued to pound him in the face until the neighbor interfered. The deceased then arose and picked up a stone, but the neighbor took it from him, and as he was standing in the road the defendant shot him, claiming that at that time Preston made a demonstration as if to draw a pistol, when, in fact, he had none. The deceased died in a few hours from the effects of the shot he received. The following is a summary of the statement and testimony complained of: The district attorney, detailing to the jury the facts which the state expected to prove, was permitted to say, in effect, that October 19, 1904, the defendant had illicit sexual intercourse with a daughter of the deceased. Minnie Preston, the daughter referred to, who is 16 years old, appearing as a witness for the state, testified that she had kept company with the defendant, and that she visited a dental office at Milton October 19, 1904, and, the proprietor being absent, the defendant did some work on her teeth, when he locked the door, pushed her into the dental chair, and had sexual intercourse with her. Dr. Alice Jent, a practicing physician, as a witness for the state, testified that Minnie Preston called upon her professionally, and, though she made no physical examination of the patient, the latter informed her that she was enceinte. Viola Preston, Minnie's mother, referring to this daughter, said that she was in the family way.

It is argued by defendant's counsel that for the purpose of showing the aggressor in a combat, it is competent for the prosecution, in a criminal action, to prove that on a previous occasion the parties participating in the encounter had had trouble, but that it is improper to enter into an examination of the antecedent difficulty in detail to determine who was in the wrong; that the testimony

*Rehearing denied February 5, 1906.

as to the condition of Minnie Preston related to the defendant's alleged commission of a crime, wholly unconnected with the offense for which he was being tried; and that such testimony and the statement made by the district attorney diverted the minds of the jurors, thereby inducing the consideration of an immaterial matter to the prejudice of the defendant. The rule is quite general that evidence of the commission, by the defendant in a criminal action, of another offense, wholly unconnected with the crime for which he is being tried, is inadmissible on the ground that such evidence tends to mislead the jury, creates in their minds a prejudice against the prisoner, and requires him to answer a charge for which he is not supposed to have made preparation. 1 Greenl. Ev. (15th Ed.) § 52; Underhill, Crim. Ev. § 87; State v. Baker, 23 Or. 441, 32 Pac. 161; State v. O'Donnell, 36 Or. 222, 61 Pac. 892; State v. McDaniel, 39 Or. 161, 65 Pac. 520. To this rule there is, among others, the well-recognized exception that relevant evidence is not inadmissible because it may indirectly tend to establish the prisoner's guilt of another dissimilar crime, if there exists a union of motives in the commission of the separate offenses. Underhill, Crim. Ev. § 90. This text-writer, illustrating the deviation from the rule adverted to, says: "Thus the fact that the evidence introduced to prove the motive of the crime for which the accused is on trial points him out as guilty of an independent and totally dissimilar offense is not enough to bring about its rejection, if it is otherwise competent. Under this exception to the general rule, where facts and circumstances amount to proof of another crime than that charged, and it appears probable that the crime charged grew out of the other crime, or was in any way caused by it, the facts and circumstances may be proved to show the motive of the accused." In State v. Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322, the defendant being tried for murder, testimony was admitted tending to show criminal intimacy between him and the wife of the deceased. It was contended that, as the killing was admitted, the motive could be shown in a general way, but that a detailed inquiry necessarily created a new issue. It was ruled, however, that such evidence was admissible; the court saying: "A detailed inquiry was made, and a large volume of testimony was taken. It may be said, however, that this was due, to a large extent, to the fact that an undue intimacy between these parties was denied by the defendant. The testimony of the illicit relation, however, if it existed, was receivable in evidence as tending to show the motive of the defendant in killing the deceased." In Webb v. State, 73 Miss. 456, 19 South, 238, it was held on the trial of a person charged with murder that evidence tending to show that the accused had seduced a sister of the deceased was admissible from which a motive for the

commission of the crime charged might be inferred. In Commonwealth v. Ferrigan, 44 Pa. 386, the defendant being tried for murder, it was held that evidence of his adulterous intercourse with the wife of the deceased was admissible to prove a motive for the crime involved. In State v. Larkin, 11 Nev. 314, on the trial of an indictment for murder, it was held that evidence of illicit relations between a witness and the deceased and between such witness and the prisoner was admissible as tending to prove a motive for the killing. So, too, in Morrison v. Commonwealth, 74 S. W. 277, 24 Ky. Law Rep. 2493, on the trial of an indictment for murder, it was held that evidence of the prisoner's improper relations with a sister of the deceased was admissible as tending to show a motive for the commission of the crime charged. In support of the exception that evidence of the prisoner's participation in other offenses is admissible to prove a motive for the commission of the crime for which he is being tried, see, also, People v. Pool, 27 Cal. 572; People v. Walters, 98 Cal. 138, 32 Pac. 864; Fraser v. State, 55 Ga. 325; Franklin v. Commonwealth, 92 Ky. 612, 18 S. W. 532; State v. Pancoast (N. D.) 67 N. W. 1052, 35 L. R. A. 518; State v. Williamson, 106 Mo. 162, 17 S. W. 172; Beberstein v. Territory, 8 Okl. 467, 58 Pac. 641.

In the case at bar, the defendant having been indicted for the crime of murder in the first degree, the written accusation involved the elements of malice, premeditation, and deliberation, to determine which necessitated the introduction of testimony on the part of the state tending to prove the charge as laid. The imputation of seduction of an unmarried female of previous chaste character, if established in a criminal action involving that charge, subjects the man found guilty thereof to punishment by imprisonment, unless the parties marry subsequent to the commission of the offense. B. & C. Comp. § 1921. It is stated in the brief of appellant's counsel that at the time of the homicide the defendant was keeping company with another young woman who lived near Milton, to whom, the testimony tended to show, he was presumably engaged to be married. Assuming this to be so, it is improbable that he would willingly marry Miss Preston, and hence, if he was found guilty of seducing her, a sentence of imprisonment confronted him, which was threatened by her father, who, as the testimony shows, when he first called upon the defendant, informed him of his daughter's condition, accused him of being responsible therefor, and told him that he "would have to do something about it * * * or be put behind the bars." The defendant's unwillingness to marry Miss Preston and the consequences that might result to him from his refusal to enter into that relation with her, by being imprisoned, which punishment was threatened, might supply the motive that induced the taking of the

life of the deceased. As the formal charge of murder in the first degree made motive an element to be considered by the jury in determining the state of the defendant's mind towards the deceased prior to and at the time of the homicide, which inducement might be implied from the testimony so objected to, no error was committed in the introduction thereof. Such testimony being admissible, no error was committed in permitting the district attorney, in his opening statement to the jury, briefly to allude to the facts which the state expected to prove at the trial. Whether or not, to determine the existence of a motive for the commission of a crime, the admission of testimony tending to show that a defendant in a criminal action has committed other independent offenses, can be carried to the extent allowed in *State v. Reed*, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322, to which attention has been called, is not necessary to a decision herein, for in the case at bar no "detailed" inquiry was even attempted by the state to prove the defendant guilty of seduction; the testimony on that subject and the statement of the district attorney being general only. The testimony so objected to and the statement based thereon were only such as tended to show the information upon which the deceased acted in demanding that the defendant do something to mitigate the injury it was claimed he had inflicted, and to diminish the resulting disgrace it was insisted he had caused, or, failing in this respect, to suffer the consequence of his wrong. To show that the jury must have understood the purpose for which this testimony was received, the court, in its general charge, said: "Some evidence has been introduced in this case which might tend to show that defendant committed a crime in his relations with the daughter of the deceased, but I instruct you that defendant is not on trial here for any such crime, and in this case you must not in any manner allow that evidence to prejudice you against the defendant, nor can you consider that evidence as going to show defendant to be a bad man or a good man, or a moral or immoral man. The only purpose for which you can consider such evidence is in relation to the question: What, if any, motive deceased had for attacking defendant, or what, if any, motive defendant had for seeking or attacking the deceased?" When we take into account the meager statement by the district attorney of the defendant's possible commission of an independent offense, the slight testimony offered upon that subject, and the careful instruction in relation thereto, it is quite evident that the jury were not misled thereby or prejudiced against the defendant, and that they considered such statement and testimony only to determine the motive of the respective parties to the combat which resulted in Preston's death.

Minnie Preston, appearing for the state,

testified that she witnessed the combat between her father and the defendant, detailing the position occupied by each immediately preceding and at the time the fatal shot was fired, and also stated, on cross-examination, that she was a witness at the coroner's inquest held the morning after the homicide, and had there given no testimony variant from that uttered at the trial herein, denying that she testified at such inquest relating to the positions, respectively, assumed by her father and the defendant, as imputed to her by the defendant's counsel. This witness was then attempted to be impeached by a duly authenticated transcript of what purported to be the testimony given at such inquest, but before tendering such writing to her the stenographer who took the evidence received at the inquest, appearing as defendant's witness, was unable to say that his notes of the testimony contained an accurate statement of what the daughter of the deceased asserted under oath before the coroner. The shorthand reporter, alluding to the condition of such witness and to her manner of testifying, and probably attempting to excuse his inability correctly to report the evidence, for he is an amateur, said: "She was excited and crying, if I remember right, and she talked very rapidly." This stenographer not being permitted to read his notes of the testimony, an exception was allowed, whereupon defendant's counsel said: "Miss Preston, I hand you what has been called in this case the 'transcript of your evidence,' given at the coroner's inquest about the 19th day of May, near Freewater, in this county. I will ask you to examine page 4 of that transcript and say whether or not this is a full and complete transcript and narrative of your testimony given at that time." An objection having been interposed, the court would not permit the witness to examine the writing tendered, on the ground that the stenographer's testimony showed that it was not a complete transcript of the evidence given at the inquest, and an exception was saved.

It is insisted by defendant's counsel that an error was committed in not allowing them to impeach Miss Preston in the manner indicated. Our statute permits the impeachment of a witness by evidence that he has made at other times statements inconsistent with his present testimony, but, if such statements are in writing, they must be shown to the witness before any question is put to him concerning them. B. & C. Comp. § 853. In *State v. Crockett*, 39 Or. 76, 65 Pac. 447, it was held that the testimony of a witness given before a coroner was prima facie evidence of what the deponent swore to, and that, when the proper foundation was laid, was admissible for the purpose of contradicting him. "Prima facie evidence," says Mr. Justice Foster, in *Emons v. Westfield Bank*, 97 Mass. 230, "we understand to be evidence which, standing

alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced." Prima facie evidence is that degree of proof which, if unchallenged, is sufficient in law to establish a relevant fact. *Crane v. Morris*, 6 Pet. 598, 8 L. Ed. 514; *State v. Lawlor*, 28 Minn. 216, 9 N. W. 698. It will be remembered that the statements made under oath by Minnie Preston at the coroner's inquest, the certainty of which as to its entirety might possibly have been established by the mere production of an authenticated transcript, if a proper foundation had been laid, is rendered doubtful as to its completeness, by the declarations of the stenographer who attempted to take her testimony. If it were assumed that the disputable presumption that official duty has been regularly performed makes evidence of an authenticated transcript of testimony taken at the trial of an action, or at the inquiry by a coroner into the cause of the death of a person slain or of a person who dies under such circumstances as to create a suspicion of the commission of a crime, admissible, it appears in the case at bar that such duty was not properly discharged, and, as the basis upon which the presumption should rest never had any existence, it follows that no proper foundation was laid for the deduction which the law expressly directs to be made from particular facts. The stenographer being unable to say that his notes of the testimony taken before the coroner contained all that Miss Preston uttered under oath at the inquest, she could not be contradicted by the reading of such notes or impeached by the production of a translated transcript thereof, and no error was committed as alleged. The defendant was evidently not prejudiced by such ruling, for the court offered to permit his counsel to lay a foundation for the impeachment of Minnie Preston in the manner prescribed by statute, by calling her attention to the time, place, and persons present when she gave her testimony before the coroner, and to ask her on cross-examination whether or not she testified in a given manner, detailing what it was claimed she said under oath at the inquest, and, if she denied giving the testimony imputed to her or could not remember what she said on that occasion, to call witnesses who were present at the inquest and heard her testify to impeach her.

Dr. C. W. Thomas, appearing as a witness for the state, testified that he was a graduate of a medical school and a licensed physician, and that he visited O. N. Preston at the time he was shot and found a lacerated wound over the cheek bone, his nose broken, and the flesh under his eyes discolored, whereupon he was asked whether or not, in his opinion, the injury to the cheek bone could have been caused by a blow from a man's naked fist. An objection to this question on the ground that it was incompetent having been overruled and an exception al-

lowed, the witness answered: "In my opinion it could not have been caused from the blow of a man's naked fist." It is maintained by defendant's counsel that as no testimony had been given tending to show that Dr. Thomas was qualified, either by experience or by study, to express an opinion upon the subject to which the question related, an error was committed in permitting him to answer the interrogatory propounded to him. It will be remembered that the objection interposed was not directed to any inability of the witness to express the opinion, but to the incompetency of the question asked. If defendant's counsel had stated that they objected to any answer that might be given by the witness in response to the inquiry, because no testimony had been offered tending to show that he was qualified to express an opinion upon the subject to which his attention was called, the trial court would have had an opportunity to require the production of further testimony relating to the question of his qualification. The object of every objection interposed at the trial of a cause and of the exception to the court's ruling thereon is to incorporate into the bill of exceptions the particular legal proposition submitted to and decided by the trial court, so that upon an appeal from its ruling an appellate tribunal may be able to review the identical question considered. As the objection which was made related to the alleged incompetency of the question, and not to the incompetency of the witness to express an opinion, the legal principle now insisted upon was evidently not considered by the trial court, and, this being so, no error was committed in permitting Dr. Thomas to answer the question propounded after he had testified that he was a graduate of a medical school and a licensed physician; thus showing a prima facie qualification.

Other exceptions are noted, but, as they are not argued in the brief of defendant's counsel, and an examination thereof shows them to be without merit, the judgment is affirmed.

The firm of which HAILEY, J., was a member having been of counsel at the preliminary examination of this case, he took no part in the consideration hereof.

MARQUAM v. ROSS et al.

(Supreme Court of Oregon. Dec. 4, 1905.)

1. MORTGAGES—FORECLOSURE—PERSONS WHO MAY PURCHASE—RIGHTS OF TRUSTEE.

A trustee of mortgaged property will not be permitted to purchase the same for his own benefit, where such purchase would be in contravention or violation of his duties, and such purchase, if made, is in equity for the benefit of the cestui que trust, regardless of the amount paid, or whether there was actual fraud or not.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1518.]

2. TRUSTS—TERMINATION—CONTRACTS—CONSTRUCTION.

Plaintiff, owning certain property largely incumbered, applied to a trust company to secure him a mortgage loan thereon. The trust company, being unable to obtain the amount required, agreed to itself loan the balance, in consideration of plaintiff executing a deed of the property to it, and a certain "declaration of trust and agreement" which provided that the conveyance was "in consideration of securing the loan in secret trust for the purpose thereafter set out," stipulating for compensation to the trust company for its services in managing the property, collecting rents and profits, and to secure advances. The agreement vested no power of sale in the trust company, nor did it authorize it to convert the property into money. *Held*, that the trust company was a second mortgagee in possession as to the title, and that the trust created was confined to the possession and management of the property, together with the collection and disbursement of the rents and profits, and was therefore terminated on the foreclosure of the mortgage.

3. MORTGAGES—SUBSEQUENT LIEN HOLDERS—RIGHT TO PURCHASE.

The trust company, having made advances under such contract, became a subsequent lien holder, and on foreclosure of the first mortgage was entitled to purchase at the sale to protect its lien.

4. SAME—INSTRUMENTS TO SECURE LOANS.

Where an instrument was intended as security for the payment of money, it will be deemed a mortgage in equity, whatever its form.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 43.]

5. TRUSTS—DUTY OF TRUSTEE—ADVANCES.

The mortgagor, at the time the mortgage was made, deeded the property to a trustee under an agreement that the latter should take possession and collect rents and profits and apply them to interest, taxes, expenses, etc. The deed obligated the trustee to make specified advances, interest on the mortgage not being specifically mentioned, and recited that it might become necessary for the trustee to make other advances, in which case it should be entitled to a lien on the property therefor. *Held*, that the trustee was not bound to make advances to pay interest on the mortgage to prevent a foreclosure.

6. SAME — MISCONDUCT OF TRUSTEE — EVIDENCE.

In a suit to redeem certain property from foreclosure sale, evidence *held* insufficient to show that a trustee of the property in possession was responsible for the foreclosure for failure to apply the net income of the property to the payment of interest on the mortgage as it matured.

7. SAME—CONTRACTS—PRACTICAL CONSTRUCTION.

Where itemized statements of receipts and disbursements of mortgaged property were rendered by a trustee of the rents to the mortgagor quarterly, and in several instances the mortgagor gave notes for balances shown to be due by such statements, and in others retained them without objection until after suit was brought to foreclose the mortgage, such statements constituted a practical construction of the trust agreement, in so far as it related to the trustee's right to make the charges shown by the statements, which the mortgagor could not thereafter question.

8. MORTGAGES — FORECLOSURE — REDEMPTION — EVIDENCE.

In a suit to redeem from a sale of mortgaged property, evidence *held* insufficient to show that foreclosure proceedings were instigated by a certain trust company in possession as a subsequent lien holder, for whose benefit the property was purchased at the sale.

Appeal from Circuit Court, Multnomah County; Alfred F. Sears, Jr., Judge.

Suit by P. A. Marquam against J. Thorburn Ross and others to redeem certain land from mortgage foreclosure sale. From a decree in favor of plaintiff, defendants appeal. Reversed.

See 78 Pac. 698.

This is a suit against the United States Mortgage & Trust Company, a New York corporation, hereinafter called the "Mortgage Company," the Title Guarantee & Trust Company, an Oregon corporation, hereinafter called the "Title Company," the Oregon Company, and J. Thorburn Ross to redeem block 178, known as the "Marquam Block," and lots 1, 2, 3, and 4, in block 120, in the city of Portland, and 80 acres of land in or near that city from a purchase by Ross, as trustee for the Title Company, at a sheriff's sale, under a decree in a suit brought by the Mortgage Company against Marquam, the plaintiff herein, the Title Company, and others, to foreclose a mortgage on such property, and to require the Title Company and the Oregon Company, its successor in interest, to account for the rents and profits accruing after the purchase. The facts are these: In August, 1894, the plaintiff was the owner of the property in question, which was incumbered with mortgages and attachments for more than \$300,000. His creditors were pressing him for payment, and he was obliged to secure a new loan or suffer a forced sale of the property. He made application to the Title Company, the local correspondent of the Mortgage Company, for a loan from the latter of \$400,000, at 5½ per cent. interest, to be secured by mortgage on the Marquam building, offering, if the loan were made, that the rents of the property should be impounded as additional security therefor, and collected and disbursed by the Title Company. The Mortgage Company declined to make the loan as applied for, but after considerable negotiation finally agreed, on October 16th, to lend \$300,000, for five years, at 7 per cent., secured by a mortgage on the Marquam Block and the 80 acres of land; the management and control of the property and the collection of the rents to be in charge of the Title Company during the existence of the loan. The plaintiff was willing to accept this offer. As the \$300,000 was not sufficient to pay his pressing demands, however, or relieve his property from liens, the Title Company agreed, at his request, to advance sufficient money to make up the deficiency, such advances to be secured by a lien on the property and the rents subsequent to that of the Mortgage Company. Plaintiff thereupon entered into a contract with two of his attaching creditors, the Portland National Bank and George B. Ellis, which, after reciting his desire to borrow of the Mortgage Company \$300,000, and secure the same by mortgage on the Marquam Block and the 80 acres of land, and stating in de-

tall his indebtedness and the claims against the property, proceeds as follows:

"Now, therefore, this agreement entered into on this thirtieth day of October, 1894, by the undersigned parties interested in the premises, witnesseth: That the Title, Guarantee & Trust Company, acting for and on behalf of the said P. A. Marquam (and said P. A. Marquam hereby agreeing to the terms hereof) does for certain valuable considerations agree to procure for him the necessary funds to discharge the hereinbefore described two mortgages, the taxes for 1893, costs of repairs of roof, fire insurance premiums and expense in securing loan aggregating three hundred and fifteen thousand dollars (\$315,000), and to procure for the said Marquam funds with which to make a cash payment to said W. W. Cotton, on the indebtedness due the said Ellis of Riverside, California, of thirty-six hundred dollars (\$3,600), provided the said suits be both dismissed and said attachment to be released, and provided that upon the execution of the mortgage on said property and notes in favor of the United States Mortgage Company for three hundred thousand dollars (\$300,000) said property shall be conveyed by the said P. A. Marquam and Emma Marquam, his wife, to said the Title Guarantee & Trust Company in secret trust to hold the said property and to collect the rents thereof for the following purposes, to wit:

"First—To pay the fixed charges for operating the buildings on said premises and to pay for necessary repairs and for services in collecting rents, and to pay the interest on said loan of three hundred thousand dollars (\$300,000), and all taxes and other public charges on said property and on said indebtedness.

"Second—To pay all amounts to be advanced by said the Title Guarantee & Trust Company for the said Marquam in carrying out the requirements expressed herein, with interest thereon at ten per cent.

"Third—To pay pro rata said claims of the Portland National Bank and Mr. Ellis and interest thereon at ten (10) per cent. per annum.

"Fourth—To pay said the Title Guarantee & Trust Company for its services in executing said trust, and,

"Fifth—After said three hundred thousand dollars loan to be made by said the United States Mortgage Company shall be paid off, to reconvey said property to the said P. A. Marquam or to his assigns.

"And the said W. W. Cotton, for and on behalf of his said client, and the said Portland National Bank, in consideration of the premises, do hereby agree to accept a settlement of their said claims in the manner hereinbefore set out. Said action not to be dismissed and said attachment not to be discharged until said trust deed is executed, as above provided, and a certificate of said trust issued to said attaching creditors, re-

citing the same and the terms of this agreement, duly executed and acknowledged.

"P. A. Marquam.

"The Portland National Bank,

"By W. D. Fenton, of Its Attorneys.

"George B. Ellis,

"By W. W. Cotton, His Attorney."

At the time this contract was made, and as part of the same transaction, the plaintiff agreed in writing with the Title Company to pay it \$4,500 for exchange, title insurance, brokerage, etc., for procuring the loan, 3 per cent. commission on all collections, of whatsoever nature, after October 31, 1894, and \$1,000 per annum for its services, together with one-sixth of the rents and profits derived from the mortgaged property in excess of what was then being received. On November 13, 1894, the transaction was finally consummated by the plaintiff and his wife executing and delivering to the Mortgage Company a first mortgage on the Marquam Building and the 80-acre tract of land to secure the payment of their promissory notes for \$300,000, principal, due five years from date, and 20 interest notes, for \$5,250 each, one of which matured every three months, also a deed to the Title Company of the mortgaged property and lots 1, 2, 3, and 4, in block 120, absolute in form and purporting to convey the legal title, subject, however, to the prior mortgage, and entered into a written defeasance or agreement with the Title Company as follows:

"This Declaration of Trust and Agreement, entered into in duplicate, on this, the thirteenth day of November, A. D. 1894, by and between P. A. Marquam and Emma Marquam, his wife, of the city of Portland, Oregon, and the Title Guarantee & Trust Company, a corporation, organized and doing business under the laws of the state of Oregon, witnesseth:

"That whereas, in consideration of the premises and of the agreements on the part of the said P. A. Marquam and Emma Marquam hereinafter contained and heretofore understood between the parties hereto, said the Title Guarantee & Trust Company has rendered certain services, and has advanced and will advance certain sums of money, and has secured for said P. A. Marquam and Emma Marquam a loan in the sum of three hundred thousand dollars (\$300,000) from the United States Mortgage Company of New York, to secure the repayment of which said P. A. Marquam and Emma Marquam have this day made their certain promissory notes for principal and interest and executed their mortgage to said United States Mortgage Company, covering those certain parcels of real property situated in the county of Multnomah and state of Oregon, and particularly described as follows, to wit: First, all of block numbered one hundred and seventy-eight (178), containing eight lots, in the city of Portland, Oregon, according to the duly recorded map or plat thereof, said

block being bounded on the north by Alder street, on the east by Sixth street, on the south by Morrison street, and on the west by Seventh street, in said city of Portland; and, second, all of that portion of the John Quinn donation land claim, particularly bounded and described as follows, to wit: Beginning fifteen (15) chains north of the southeast corner of section twenty-five (25), in township one (1), north of range one (1) east of the Willamette meridian, and from thence running east eleven (11) chains and ninety-four (94) links; thence north twenty-five (25) chains; thence west thirty-two (32) chains; thence south twenty-five (25) chains; thence east twenty chains and six (6) links, to the place of beginning, containing eighty acres of land. And, whereas, in consideration of securing said loan, and of the premises, said P. A. Marquam and Emma Marquam have granted and conveyed by deed to said the Title Guarantee & Trust Company in secret trust for the purposes hereinafter set out, all of lots numbered one (1), two (2), three (3) and four (4), in block numbered one hundred and twenty (120), in said city of Portland, in the county of Multnomah, and state of Oregon, and also all of said property described in said mortgage to said United States Mortgage Company, subject, however, to said mortgage.

"Now, therefore, this is to certify that it is hereby mutually understood and agreed by and between the parties hereto that said P. A. Marquam and Emma Marquam will pay to said the Title Guarantee & Trust Company the sum of four thousand five hundred dollars (\$4,500) for exchange, title insurance, abstract of title and brokerage, in the matter of said loan of \$300,000, and that during the life of the trust estate hereinbefore mentioned, they, said P. A. Marquam and Emma Marquam, will pay said the Title Guarantee & Trust Company for its services in the financial management and financial oversight of said trust property the sum of one thousand dollars (\$1,000) per annum; and the further sum of three per centum (3%) commissions on all collections made in the matter of said trust after October thirty-first, 1894, except on the collection of said \$300,000 indebtedness and interest falling due to said United States Mortgage Company, and in further consideration of the premises and of said services rendered and to be rendered, they, said P. A. Marquam and Emma Marquam, will pay unto said the Title Guarantee & Trust Company monthly during the life of said trust estate a one-sixth part of the net receipts of the income derived from said trust property, covered by said mortgage to the United States Mortgage Company, received monthly in excess of the present net monthly income derived therefrom; this present net monthly income for the purposes of this agreement being now estimated and agreed to be one thousand five hundred dollars (\$1,500), and this said

one-sixth to be computed in the following manner to wit: From the gross monthly income derived from said trust property covered by said mortgage to the United States Mortgage Company, during each successive month of the life of said trust there must first be deducted the amount of said present net monthly income of \$1,500, and, secondly, the operating expenses for each respective month pertaining to said trust property covered by said mortgage to the United States Mortgage Company, to wit: The cost of superintendents, engineers, firemen, janitors, porters, watchmen, laborers and teams, of fuel and light, and of janitor's supplies, and of other incidental supplies and repairs, not including, however, any material alteration, improvement or repair of any portion of said property, and then to divide this amount which remains, if any there be, into six equal parts, one of which shall be the one-sixth ($\frac{1}{6}$) hereinbefore referred to.

"And it is further hereby agreed in further consideration of the premises that during the life of said trust said the Title Guarantee & Trust Company shall have absolute, entire and exclusive control and management of said property held in trust as aforesaid, and covered by said mortgage to the United States Mortgage Company for the uses and purposes hereinafter set out, except that it is agreed that the Marquam Building, situate on part of said property shall only be used as an office and store building and not as a lodging house, and that in said matter it shall be under no obligation to said P. A. Marquam and Emma Marquam to keep the buildings on said property held in trust and covered by said mortgage to the United States Mortgage Company rented and to increase or to keep said monthly income up to said present estimated basis of \$1,500, other than it shall exercise every reasonable effort to do so; but it is understood and agreed that it shall take reasonable care of said property covered by said mortgage to the United States Mortgage Company so held in trust, and that during the life of said trust said P. A. Marquam shall have free of charge and rent, office rooms in the Marquam Building, situate on part of said trust property equal to what are now occupied by him therein, and that when the theater in said building shall be leased, the lease shall specify that the theater shall only be run as a first-class theater and that a box therein shall be reserved, free of charge, for the use of said P. A. Marquam.

"And, whereas, under that certain preliminary agreement entered into between P. A. Marquam and the Title Guarantee & Trust Company and others, on the thirtieth day of October, A. D. 1894, said the Title Guarantee & Trust Company did agree to advance for said P. A. Marquam when said loan of \$300,000 should be consummated, the funds in excess of said loan of \$300,000, necessary to defray and discharge the fol-

lowing expenses and indebtedness of the said P. A. Marquam named in said preliminary agreement, to wit: The mortgage to the estate of James Phelan of two hundred and fifty thousand dollars (\$250,000), with interest and costs accruing thereon, and the mortgage to Dr. A. Sonnenfeld in the sum of twenty thousand dollars (\$20,000), with interest accruing thereon and taxes for the year 1893, on said property covered by said mortgage to the United States Mortgage Company, amounting to four thousand one hundred dollars (\$4,100), and costs and the indebtedness of the said P. A. Marquam and Emma Marquam for repairs made on the roof of said Marquam Building, amounting to eight hundred and twenty-five dollars (\$825), and the fire insurance premiums for policies of fire insurance covering the buildings on said property covered by said mortgage to the United States Mortgage Company coming due and amounting to three thousand one hundred dollars (\$3,100) and the sum of \$4,500, coming due by said P. A. Marquam and Emma Marquam to said the Title Guarantee & Trust Company for exchange, title insurance, abstract of title and brokerage, the expense in the matter of securing said loan of \$300,000, and a cash payment of three thousand six hundred dollars (\$3,600) on the indebtedness of said P. A. Marquam to George B. Ellis of Riverside, California; and, whereas, it may be necessary in the matter of said trust for said the Title Guarantee & Trust Company to from time to time advance moneys for said P. A. Marquam and Emma Marquam, his wife, it is hereby mutually agreed that when any of said advances are made said P. A. Marquam and Emma Marquam shall execute their joint promissory notes, payable to the order of said the Title Guarantee & Trust Company for each sum so advanced, said notes to be payable on or before two years after the respective dates thereof, unless such dates of maturity shall fall on a day subsequent to the maturity of said \$300,000 mortgage to the United States Mortgage Company, in which case said notes shall be drawn so as to fall due at the same time with said mortgage or before the same becomes due.

"It is hereby further understood and agreed by the parties hereto that the uses and purposes for which the said trust estate shall be held are as follows, to wit: That said lots numbered one (1), two (2), three (3) and four (4), in block numbered one hundred and twenty (120), in said city of Portland, shall be held in trust as collateral security in the premises, the rents and profits thereof during the life of said trust being for the benefit of said P. A. Marquam and Emma Marquam, and the care and management thereof being under the control of the said P. A. Marquam; and that the remainder of said trust property, to wit: The part thereof covered by said mortgage to the United States Mortgage Company is to

be held in trust by said the Title Guarantee & Trust Company to carry out the purposes of this agreement, and to collect the rents and profits arising from said property, for the following purposes, that is to say:

"First, to pay the expenses and charges for operating said trust property, as hereinbefore set out, and to pay for necessary repairs on said premises, and for services in collecting rents, and to pay the interest on said loan of \$300,000, to said United States Mortgage Company, and all taxes and other public charges on said property and on the said indebtedness.

"Second, to pay all amounts advanced and to be advanced by said the Title Guarantee & Trust Company for said P. A. Marquam and Emma Marquam as hereinbefore set out, with interest thereon at ten per centum.

"Third, to pay pro rata the indebtedness of said P. A. Marquam to said George B. Ellis hereinbefore mentioned, said indebtedness being evidenced by a note of P. A. Marquam to J. M. Wood, dated February first, 1893, and upon which, after indorsement of the \$3,600, hereinbefore referred to, there is unpaid a balance of four thousand one hundred and twenty-six dollars and seventy-seven cents (\$4,126.77), and interest from this date at the rate of ten per cent. per annum, payable semiannually, and if not so paid to be compounded semiannually, and to bear the same rate of interest as the principal; and the indebtedness of said P. A. Marquam to the Portland National Bank in the sum of fourteen thousand three hundred and ninety-seven dollars and twenty-five cents (\$14,397.25), as evidenced by two promissory notes of date October thirtieth, 1894, the one for \$7,397.25, payable one year after date, with interest at the rate of ten per centum (10%) per annum, and the other for \$7,000, payable eighteen months after date, with interest at the rate of ten per centum (10%) per annum.

"Fourth, to pay said the Title Guarantee & Trust Company for its services in executing said trust, and

"Fifth, after said loan of \$300,000, made by the United States Mortgage Company shall be paid off, and all the requirements of said trust satisfied, and complied with, to reconvey all of said property covered by said deed of trust to said P. A. Marquam, so that he shall be repossessed of the fee thereof, and the said Emma Marquam reinstated as to her dower therein, it being understood that said property when so conveyed back shall be returned in as good order and repair as the nature of this trust will admit, and that if, at any time all moneys to be paid by said P. A. Marquam and Emma Marquam as set out in this agreement exclusive of principal and unmatured interest on said mortgage to the United States Mortgage Company shall be paid, then that portion of the funds arising under said trust not necessary for use in compliance with its

terms, shall be thereafter turned over quarterly to said P. A. Marquam.

"In witness whereof, said P. A. Marquam and Emma Marquam have hereunto set their hands and seals, and said the Title Guarantee & Trust Company has hereunto caused its corporate name to be subscribed and its corporate seal to be affixed for and on its behalf as its act and deed, by its secretary, in accordance with due authority in him vested by its board of directors.

"Executed in presence of P. P. Dabney.

"P. A. Marquam. [Seal.]

"Emma Marquam. [Seal.]

"The Title Guarantee & Trust Company,

"By J. Thorburn Ross,

"[Corporate Seal.] Secretary."

On February 13, 1895, a supplementary agreement was made, defining more clearly the powers of the Title Company in the matter of the renting of the property, but its terms are unimportant here. Upon the execution of the papers referred to the Title Company advanced about \$13,000 from its own funds, being the amount necessary in excess of the \$300,000 borrowed of the Mortgage Company to pay and discharge the Marquam indebtedness, and went immediately into possession. Thereafter it managed and controlled the property, rented the same, made remittances from time to time to the Mortgage Company to apply on the interest notes due it from the plaintiff, and rendered statements of the receipts, disbursements, and advances made by it to the plaintiff at stated intervals, which statements were received and accepted without objection. The income of the property was not sufficient to meet the charges against it, and the Title Company for a time made advances from its own funds to pay the interest notes in favor of the Mortgage Company as they matured, until the indebtedness due it from the plaintiff, and secured by the deed and contract referred to, amounted to from \$35,000 to \$40,000. It declined to make further advances, and default was made in the payment of the interest notes to the Mortgage Company falling due February 13, May 13, and August 13, 1899. On October 30th of that year the Mortgage Company declared the entire debt due, and commenced a suit in the circuit court for Multnomah county to foreclose its mortgage, making plaintiff herein and the Title Company parties defendant to the suit. The plaintiff answered in abatement, denying the Mortgage Company's authority to declare the principal sum due for the non-payment of interest, and setting up that the Title Company was the agent of the Mortgage Company; that, as a part consideration for the loan, the agreement was entered into between plaintiff and the Title Company, as hereinbefore set forth; that the Title Company had collected sufficient funds, over and above the expenses and costs of management of the property, with which to pay the in-

terest notes, but had misapplied and misappropriated them, in violation of its agreement; that by neglecting its duty it had failed to collect as large a sum for rentals as it could and should have collected; and that an accounting was necessary to a proper determination of the matter. For a further defense it was alleged that the Title Company, while acting as agent for the Mortgage Company, at its instance and with its approval, but without the consent of the plaintiff, made sundry leases in violation of its trust. The prayer was for a dismissal of the suit. The material allegations of the plea were denied, and upon a trial it was found, among other things, that the trust agreement was not a part of the contract with the Mortgage Company for the loan, and the Mortgage Company was not a party thereto; that the Title Company was not an agent of the Mortgage Company, so far as it related to the trust agreement, nor had it collected rents and profits sufficient when applied as stipulated in the agreement to pay any part of the interest notes maturing February 13, May 13, August 13, and November 13, 1899, nor had it misapplied or misappropriated any part thereof. The plaintiff thereupon, by permission of the court, answered to the merits, alleging that the trust agreement was entered into as a part consideration for the loan made by the Mortgage Company; that for a long time prior to the date of the mortgage and agreement the Title Company had been and was the agent of the Mortgage Company for making loans and investments of its money and remitting the interest under an agreement that it should charge and collect from the parties to whom the money had been loaned a reasonable compensation for its services; that the loan to the plaintiff was made in pursuance of this agreement, and that the so-called trust agreement was entered into for the benefit of the Mortgage Company, to enable it to collect and receive interest in excess of that allowed yearly; that by reason thereof it had received unlawful and usurious interest on the loan, and it was therefore void, and the principal sum should be forfeited to the school fund. For a second defense he alleged, as in the plea in abatement, that leases had been made by the Title Company extending beyond the date of the maturity of the mortgage, at the instance and by the consent of the mortgagee, and the lien of the mortgage was thereupon waived, and the Mortgage Company estopped to foreclose the same. For a third defense he alleged that the conveyances and agreement operated as a general assignment of his property, and were void because not made for the benefit of all his creditors. This answer was held insufficient on demurrer. On November 6th the Title Company filed a cross-complaint, setting up the trust agreement and its operations and doings thereunder, that it had made large advances to plaintiff and wife

from time to time, and taken their notes therefor, and had made other advances, for which notes had not been given, and had rendered to them from time to time statements of account, which had been approved and settled, and that at the date of filing the cross-complaint there was due and owing from plaintiff to it a large sum of money, amounting to \$40,897.81, with accrued interest, which was a lien on the mortgaged property, and praying for a foreclosure of such lien. The plaintiff answered this cross-complaint, denying the allegations thereof and setting up the trust agreement, averring that the requirements of the trust had not been fully satisfied, and it had not yet terminated; that by the terms thereof the Title Company was obliged to make further advances and render further services, and the trust must yet continue for a further period. For a second defense he averred that the Title Company was in possession of the property, assuming and pretending to be engaged in the performance of its duties under the trust. For a third defense he alleged that the Title Company had been negligent in leasing the property, to his damage in the sum of \$50,000, and for a fourth that he had been damaged a large sum by reason of the failure of the Title Company to pay the taxes on the property, for which reasons it was sought to have the cross-complaint dismissed, an accounting had, and the trust wound up.

After a trial upon the merits the court found that the Title Company had, from time to time, and frequently during its control and management of the property, and as late as June 13, 1899, rendered statements of account to the plaintiff, whereby it fully disclosed and truly stated the matters of account between them arising out of the trust; that no objections were ever made thereto prior to the month of July, 1899; and that on the 13th of May, 1900, there was due the Title Company from the plaintiff \$24,188.33, exclusive of attorney's fees; that the Title Company had been prudent, careful, and diligent in renting the various properties, and in conducting and managing the trust, and had been guilty of none of the negligence, carelessness, or malfeasance specified; that the trust agreement had been fully carried out and completed; that it was in effect a mortgage, and constituted the Title Company a mortgagee in possession. A decree was thereupon rendered against the plaintiff, in favor of the Mortgage Company, for \$345,875.60, principal and interest, exclusive of attorney's fees and costs; the Title Company, for \$21,511.42; W. S. Mason, for \$14,397.25; and George B. Ellis, for \$4,126.77—besides attorney's fees and costs, and ordering that the mortgage be foreclosed, the mortgaged property sold in the manner provided by law, and the proceeds applied in payment of the costs of the suit and accruing costs and the several judgments in the order of their prior-

ity. Execution was subsequently issued on the decree by order of the court, and the mortgaged property was sold by the sheriff of Multnomah county to the defendant Ross, as trustee for the Title Company, on December 10, 1900; he being the highest and best bidder therefor. A short time afterward the Title Company was required by the court to render a final statement of its accounts as trustee, which were approved, and the company was discharged. The sale to Ross was subsequently confirmed, and after due time a sheriff's deed was made to him. Appeals were taken by the plaintiff from the decree in the foreclosure suit and the order confirming the sale, both of which were affirmed. *U. S. Mortgage Co. v. Marquam*, 41 Or. 391, 69 Pac. 37, 41. The Title Company afterward caused the defendant the Oregon Company to be organized by its officers and agents, and at its instigation Ross conveyed the property to the latter company. In November, 1902, this suit was brought for the purpose of having the defendants declared to hold the title to the property in trust for the plaintiff, and for permission to redeem, on the ground that the relations between the plaintiff and the Title Company at the time the purchase was made by Ross were such that it could not purchase for its own benefit, and that the foreclosure sale was procured and instigated by its wrongful act. The plaintiff had decree, and the defendants appeal.

Wm. P. Lord and Wallace McCamant, for appellants. E. B. Watson and Wm. D. Fenton, for respondent.

BEAN, J. (after stating the facts). We are strongly impressed with the view that the decrees in the suit brought by the Mortgage Company to foreclose its mortgage are a bar to this proceeding. The plaintiff and the Title Company were both parties to that suit, and both answered. The Title Company set up the contract between it and the plaintiff, its doings thereunder, the amount of advances made by it, claimed a lien on the property therefor, and prayed a foreclosure thereof. The plaintiff joined issue on the answer, averred that the trust relation had not terminated, but must continue for an indefinite period, and that the Title Company had been unfaithful to its trust. The question of the relationship of the Title Company to the plaintiff and the property, and the manner in which it had discharged its trust were therefore put in issue, and fully tried and determined in that suit. It was adjudged and decreed that the Title Company had been faithful to its trust, and had properly accounted for all moneys received by it on account thereof: that it was in effect a mortgagee in possession, and had a lien on the property for the amount advanced by it, which lien was foreclosed and the property ordered sold to satisfy the same. The questions thus determined are the ones sought to be litigated in this case, and the decree

would seem, therefore, to be a complete determination of the rights of the parties, and a bar to subsequent litigation between them upon the same claim or demand. *Ruckman v. Union Railway Co.*, 45 Or. 578, 78 Pac. 748. On account of the importance of the case, however, the amount involved, and the zeal and learning exhibited by counsel on both sides, we have examined and decided the case on the merits, regardless of the effect of the former adjudication. The argument has taken a wide range, but the consideration of many questions which have been ably and exhaustively discussed is rendered unnecessary by the view we have taken of the matter.

The principal, and, indeed, the controlling, question is whether the Title Company, at the time of the sale under the decree in the foreclosure suit brought by the Mortgage Company, sustained such a relation to the property or to the plaintiff that it was disqualified under the law from purchasing for its own benefit. The contention of the plaintiff upon this point involves substantially two propositions: (1) That under the contracts between him and the Title Company the latter became a trustee of the title to the property in question, and that, such relation not having been terminated at the time of the sale, it was disqualified to bid or to purchase such property on its own account; (2) that, if the trust had terminated and the trust relation ended, the Title Company had been guilty of breaches of duty during its existence, designed to and which did bring about the foreclosure and sale, which made it a trustee *ex maleficio*. The court below held upon the testimony that the Title Company had in every respect been faithful to its duty, and guilty of no breaches of trust, but, as a matter of law, it was disqualified to purchase, because of the relationship existing between it and the plaintiff at the time of the sale. It is a familiar rule of law that a purchase by a trustee or person occupying a fiduciary position, in contravention or violation of his duties, is in equity made for the benefit of the *cestui que trust* at his election, regardless of the amount paid, or whether there was actual fraud or not. In such a case the court will not try the question of the bona fides of the purchaser or the adequacy of the consideration. The fiduciary character of the purchaser, when the circumstances are such that to allow him to purchase for himself would tempt him to act for the protection of his own interest and the consequent injury of those whom, as trustee, he is bound to protect and serve, will be sufficient. It is enough that there is a conflict between duty and self-interest. The law will not allow the matter of self-gain to stand as a temptation to misconduct in the discharge of the duty growing out of the fiduciary relation. A trustee will not be permitted to subject himself to the temptation which arises out of the conflict between the interest of a purchaser and his duty as a trustee. 28 Am. & Eng.

Enc. Law (2d Ed.) 1016; 4 Kent, Comm. *438; 1 Story, Eq. (13th Ed.) § 322; 1 Perry, Trusts (5th Ed.) § 205; *Davoue v. Fanning*, 2 Johns. Ch. 252.

A trustee with a power of sale cannot therefore purchase at his own sale. Neither can a trustee whose duty it is to convert the trust property into money for the benefit of his principal or his creditors purchase at a sale made by himself or by his direction, or, under many authorities, upon a judgment or decree based upon a paramount title or adverse proceeding. *Van Epps v. Van Epps*, 9 Paige, 237; *Jewett v. Miller*, 10 N. Y. 402, 405, 65 Am. Dec. 751; *Davoue v. Fanning*, supra; *Downs v. Rickards*, 4 Del. Ch. 416; *Lewis v. Welch*, 47 Minn. 193, 48 N. W. 608, 49 N. W. 665; *Carson v. Marshall*, 37 N. J. Eq. 213; *Hamilton v. Dooly*, 15 Utah, 280, 49 Pac. 769; *Michoud v. Girod*, 4 How. (U. S.) 503, 11 L. Ed. 1076. Upon this latter point there is a sharp conflict in the decisions (*Earl v. Halsey*, 14 N. J. Eq. 332; *Chorpenning's Appeal*, 82 Pa. 315, 72 Am. Dec. 789; *Anderson v. Butler*, 31 S. C. 183, 9 S. E. 797, 5 L. R. A. 166; *Allen v. Gillette*, 127 U. S. 589, 596, 8 Sup. Ct. 1331, 32 L. Ed. 271; *Fisk v. Sarber*, 6 Watts & S. 18), but it is unnecessary at this time for us to examine the adjudged cases, or attempt to deduce any general rule from them, if, indeed, it is possible to do so. It will probably be found on investigation that the decision in each case depends upon the application of the general rule of disqualification to the particular facts, and that, where there was a conflict between duty and self-interest, the purchase was held voidable, regardless of the manner in which or by whom the sale was made, and, where there was no such conflict, it was upheld.

The decision of the case in hand depends upon the construction of the contract between the plaintiff and the Title Company, and the relation which the parties sustained to each other by reason thereof. When we have arrived at this determination, the way is clear. If it was such that there was a conflict between duty to the plaintiff and self-interest of the Title Company at the time of the sale under the foreclosure decree, the plaintiff must prevail; otherwise, his suit fails on this branch of the case. In construing a contract the object is, of course, to ascertain the intention of the parties, from the language used, in the light of the surrounding circumstances. Recurring, then, briefly, to some of the facts, for the purpose of showing the condition of things prior to and at the time of the execution of the deed from plaintiff to the Title Company and the making of the so-called trust agreement, so as to enable us to understand better their object, it appears that at the inception of the negotiations the parties were dealing with each other at arm's length. There was no relation of trust or confidence between them. The plaintiff was the owner of valuable property, which was heavily incumbered and

about to be sold to satisfy the lien against it. He had made repeated efforts, without success, to procure money with which to meet his obligations. Under these circumstances he applied to Mr. Ross, the manager of the Title Company, whose assistance he invoked in extricating his property from the embarrassment which threatened it; a part of the company's business being to procure loans for other parties. Ross undertook to furnish the desired aid through the Mortgage Company, his correspondent in New York, and after much negotiation finally succeeded in procuring a loan of \$300,000 from it. This sum was not sufficient to satisfy the demands against the plaintiff and his property. Ross accordingly agreed, at the plaintiff's request and on behalf of the Title Company, to make certain advances, amounting to about \$18,000, to meet this deficiency.

To secure the payment of the loan and the advances made and to be made by the Title Company was the primary object and purpose of the several instruments. To accomplish this, plaintiff gave a mortgage to the Mortgage Company direct, and made and delivered a deed, absolute in form, to the Title Company and the so-called trust agreement for the purpose of impounding the rents and revenues from the mortgaged property. These several instruments were entered into contemporaneously, and as a part of the same transaction. Their sole object and purpose was to secure the payment of the money borrowed from the Mortgage Company, and that which was advanced and to be advanced by the Title Company, the payment of the cost of maintaining and operating the property, the agreed compensation for the services of the Title Company in its management and control, the taxes thereon, and certain indebtedness to Ellis and the Portland National Bank. That such was the purpose of the transaction is apparent from the language of the agreement, providing for the reconveyance of the property to the plaintiff upon the payment of the indebtedness, and from the relation of the parties. They were dealing with each other as borrower and lender, not as trustee and cestui que trust. The desire of the plaintiff was to secure funds with which to pay and discharge the incumbrances against his property, in order to prevent a forced sale thereof. The object of the Title Company was to obtain security for the money loaned by the Mortgage Company, and for such as might be advanced by it. The fact that one of the instruments that was given to accomplish this purpose is in form an absolute deed, and the other is denominated a "trust agreement," does not change their legal effect. A deed or agreement of trust, intended as security for a debt, performs the office of a mortgage, and is in effect nothing more than a mortgage. The fact that it is absolute in form does not change its character from a security to an absolute conveyance. When it appears

that the instrument is intended as security for the payment of money, it will be treated and deemed in equity as a mortgage, whatever its form. This rule has been so often announced and enforced by this court that a mere citation of the authorities will suffice. *Hurford v. Harned*, 6 Or. 362; *Stephens v. Allen*, 11 Or. 188, 3 Pac. 168; *Thompson v. Marshall*, 21 Or. 171, 27 Pac. 957; *Adair v. Adair*, 22 Or. 115, 132, 29 Pac. 193; *Marx v. La Rocque*, 27 Or. 45, 39 Pac. 401; *Security Trust Co. v. Loewenberg*, 38 Or. 159, 62 Pac. 647. The agreement and deed were executed contemporaneously, as a part of the same transaction, and are in legal effect but one instrument. The declaration that the conveyance was made "in secret trust," to collect the rents and profits for the purpose of paying the cost of operating and maintaining the property and certain specified indebtedness of the plaintiff, and the provision for a reconveyance upon the performance of the conditions imposed, show that the deed was not intended as an absolute and indefeasible conveyance. By an absolute deed of trust the grantor parts with the title, which vests in the grantee unconditionally for the purposes of the trust, with no right of reconveyance to the grantor (*Ladd v. Johnson*, 32 Or. 195, 49 Pac. 756); but a deed of trust, designed as security for money, creates a mere lien, and is in legal effect a mortgage. *Thompson v. Marshall*, *supra*.

It seems to us, therefore, that the Title Company's relation to the property, under the law and the facts, was that of a mortgagee in possession, with certain added duties and obligations, arising out of a special contract, rather than as a trustee of the title; and such was in effect the holding of this court in the former case. *United States Mortgage Co. v. Marquam*, 41 Or. 391, 69 Pac. 37, 41. And a mortgagee in possession is not such a trustee as will prevent him from purchasing the mortgaged property at a public sale. *Ten Eyck v. Craig*, 62 N. Y. 406. If, however, it be deemed, as held in *Title Guarantee & Trust Co. v. Northern Counties Ins. Trust (C. C.)* 73 Fed. 931, that the title passed by the deed from the plaintiff to the Title Company, as against strangers, the rights of the Title Company in the property and of the parties as between themselves were fixed and defined by the so-called trust agreement. The case stands exactly as if such trust agreement had been embodied in and made a part of the deed of conveyance. Unless, therefore, it imposed duties upon the Title Company which were in conflict with its right to protect its own lien for advances made and to be made by purchasing at the foreclosure sale, its title must be upheld.

Now, when we turn to this agreement, we find that it did not vest the Title Company with power of sale of the mortgaged property, nor did it require it to convert the property into money, or authorize or empower it to do so. It did not purport to affect

the title in any way, but only the possession and the right to the income. After reciting the mortgage to secure the payment of \$300,000 to the Mortgage Company, the conveyance of the mortgaged property to the Title Company, "in consideration of securing the loan * * * in secret trust for the purposes hereinafter set out," stipulating the compensation to be paid the Title Company for its services in the matter of the control and management of the property and the collection and disbursement of the rents and profits, the agreement of the Title Company to advance sufficient funds which, with the \$300,000 borrowed from the Mortgage Company, would pay and discharge certain specified indebtednesses of the plaintiff, for which plaintiff and wife agreed to "execute their joint promissory notes, payable to the order of said the Title Guarantee & Trust Company for each sum so advanced, said notes to be payable on or before two years after the respective dates thereof, unless such dates of maturity shall fall on a day subsequent to the maturity of said \$300,000 mortgage to the United States Mortgage Company, in which case said notes shall be so drawn so as to fall due at the same time with said mortgage or before the same becomes due," the agreement provides that "it is hereby further understood and agreed by the parties hereto that the uses and purposes for which said trust estate shall be held are as follows": The four lots in block 120, "as collateral security," the control and management thereof to be in the plaintiff, and the rents and profits to go to him. The remainder of the property "to carry out the purposes of this agreement, and to collect the rents and profits arising from said property, for the following purposes: * * * First, to pay the expenses and charges for operating said trust property, * * * pay for necessary repairs on said premises, and for services in collecting rents, and to pay the interest on said loan of \$300,000 to said United States Mortgage Company, and all taxes and other public charges on said property and on the said indebtedness. Second, to pay all amounts advanced and to be advanced by" the Title Company, "with interest. * * * Third, to pay pro rata the indebtedness of" the plaintiff "to said George B. Ellis," and the "Portland National Bank. * * * Fourth, to pay" the Title Company for its services in executing the said trust; and, "Fifth, after said loan of \$300,000 * * * shall be paid off, and all the requirements of said trust satisfied and complied with, to reconvey all of said property," etc., to the plaintiff.

It will thus be seen that the trust created by the agreement was confined to the mere possession of the property, and was limited to its management for the purpose of collecting and disposing of the rents and profits for certain specified objects. It was simply a part of the scheme for securing the pay-

ment of the loan from the Mortgage Company, the advances made and to be made by the Title Company, and other specified indebtedness of the plaintiff, by impounding the rents and profits of the property as additional security therefor. It and the deed were intended to serve a double purpose—to furnish security by a lien upon the property for the money advanced by the Title Company and the indebtedness to Ellis and the bank, and to provide a means of paying interest, taxes, repairs, etc., out of the rents, issues, and profits, and, if not sufficient, then out of the proceeds of the property itself. The first purpose was provided for by the deed, and the latter by the agreement. There being no power or authority vested in the Title Company to sell, convey, or dispose of the corpus, there was no means provided by which it could make the amount of its lien for advances, if the rents, issues, and profits were not sufficient for that purpose, except to fall back upon the agreement itself, or the security afforded by the deed for the payment of such advances and indebtedness, and this could only be worked out by foreclosure in equity, as would be the case if the transaction were a mortgage proper. The trust being thus confined to the control and management of the property and the collection of the rents and profits thereof, for the purpose of paying and discharging certain liens and incumbrances, it is manifest that the trust relation was terminated and ended by the decree in the foreclosure suit brought by the Mortgage Company to foreclose its mortgage; and such is the construction given to the contract by this court in *United States Mortgage Co. v. Marquam*, 41 Or. 391, 403, 69 Pac. 37, 41. The court at that time had the contract before it, and its construction was a material question for consideration and decision, because it involved the right of the Title Company to appear and answer in such suit—a point stoutly contested by the present plaintiff. In discussing this question Mr. Justice Wolverton, speaking for the court, says: "The trust agreement, as shown by its terms and conditions, was entered into to enable the Title Company to manage the property, and from the rents and profits arising therefrom to discharge the expenses of management and interest charges on the mortgage, so far as they were sufficient, and, if there was a surplus, to apply it pro rata to certain specified indebtedness of Marquam and wife, and after these to apply it on the principal sum for which the mortgage was given. The life of the trust was made dependent upon the existence of the mortgage, and the Title Company was given a lien for advances made in pursuance of the stipulations contained in the trust agreement, so that a foreclosure of the mortgage would necessarily put an end to the trust relations. Regardless of any stipulations of the parties, such foreclosure would deprive the trustee of the

subject of the trust to operate upon, and the agreement would henceforth become inoperative. It was therefore incumbent upon the Title Company, when made a party to answer, setting up its duties and obligations in the premises, as well as its rights and interest in the property; and, having a lien, whether it comes by a trust agreement, technically speaking, or an instrument more properly denominated a mortgage, it has as good a right to have it foreclosed as if it were plaintiff in the suit."

This is a clear and succinct statement of the effect of the so-called trust agreement and the relation of the parties arising therefrom. It created a trust, conditioned on the life of the mortgage. The purpose was to provide a fund for the payment of operating expenses, repairs, interest charges, etc., in order that a foreclosure might be averted. When default occurred and the mortgage was foreclosed, the trust agreement no longer served the purpose of its creation, and the trust was necessarily at an end. The agreement was dependent for its vitality upon the existence of the liens on the property, and necessarily terminated, and the powers and duties of the trustees ceased, when the liens were merged in the decree in the foreclosure suit. The rights of all the parties, including that of the Title Company, were litigated in such suit and merged in the decree, and thereafter had to be worked out through it. As a party to the foreclosure suit, the Title Company had a right to and did set up its lien, and obtained a decree ordering the sale of the property pledged as security therefor. Such foreclosure necessarily put an end to its custody and control of the property for the purposes stated in the so-called trust agreement, and thereby extinguished the trust relation as such. It could no longer collect and disburse the rents and profits, or manage and control the property for the purpose specified. It was therefore deprived of its duties as trustee, and of the control and custody of the subject-matter of the trust, at the time of the sale, and had a right to bid in the property to protect its lien the same as any other lien creditor. *O'Relley v. Bevington*, 155 Mass. 72, 29 N. E. 54; *Preston v. Loughran*, 58 Hun, 210, 12 N. Y. Supp. 313; *Felton v. La Breton*, 92 Cal. 457, 461, 28 Pac. 490; *Anderson v. Butler*, 31 S. C. 183, 9 S. E. 797, 5 L. R. A. 166; *Boyer v. East*, 161 N. Y. 580, 56 N. E. 114, 76 Am. St. Rep. 290.

The rule invoked by plaintiff, which disqualifies a trustee from purchasing the trust property because inconsistent with his duties, can have no application to the Title Company, under the facts and the law of this case. "Jealous as courts of equity are in watching over the conduct of a trustee in connection with the object of his trust," says the Supreme Court of Illinois, "he is only forbidden by them from dealing with the trust property for his own benefit so long as the trust con-

tinues. The moment it ceases he occupies precisely the same relation towards it that strangers to the trust do, and, acting in good faith, he may then become its owner, by purchase or otherwise." *Munn v. Burges*, 70 Ill. 604, 611. And, as said by the Supreme Court of Kentucky, in *Waring's Executor v. Waring*, 10 B. Mon. 331: "When, therefore, the powers of the trustee ceased by the limitation contained in the trust itself, he had no longer any right to retain the trust estate in his hands; and having died without having transferred it to the beneficiary, or made any disposition of it for her use and benefit, the court below very properly decreed its payment by the executors out of the estate in their hands." The duties of the Title Company were brought to an end by the decree in the foreclosure suit. It was thereby relieved of any disability it may previously have been under because of the trust agreement, and enabled to purchase the property on its own account and for its own benefit. *Ball v. Carew*, 13 Pick. 28; *Shakeley v. Taylor*, 1 Bond, 142, Fed. Cas. No. 12,698; *Robertson v. Chapman*, 152 U. S. 673, 14 Sup. Ct. 741, 38 L. Ed. 592. It had a right to and did foreclose its lien in such suit, and this carried with it the right to protect itself by bidding at the sale under such decree, unless the suit was due to its wrongful acts. *New Memphis Gaslight Co. Cases*, 105 Tenn. 268, 60 S. W. 206, 80 Am. St. Rep. 880; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Preston v. Loughran*, 58 Hun, 210, 12 N. Y. Supp. 313.

In this connection let us apply the test that the trustee shall not be permitted to deal with the corpus for his individual benefit or protection, where self-interest will conflict with the duty he owes to the cestui que trust, and thus determine whether the Title Company has violated the rule. Its duty was to collect and apply the rents, issues, and profits arising during the life of the agreement; that is, so long as the trust relations, if they may be so called, continued. When these relations ceased or were brought to an end, there was nothing left under the agreement for it to do, no duty pending or owing to the plaintiff. Was it bound thenceforth to fold its hands and watch the disintegration of the property upon which it had a lien, wholly powerless to protect itself from loss by interposing its bid? It had an interest in the property to subserve, and why could it not protect that interest by taking over the property? Its stipulated duty had been fully performed. The foreclosure of the paramount lien had rendered it powerless to do more. This very contingency was within the contemplation of the parties when the agreement was entered into, so that, the duty having come to an end under the very terms and spirit of the agreement, there could be no further impediment in the way of the Title Company protecting itself. Marquam had been served as fully by the Title Company as

he had stipulated for under the agreement, and, to require more, the duty must be found to rest elsewhere than upon the contractual relations of the parties. But, the Title Company having discharged its duty to the plaintiff, there was nothing left to conflict with self-interest, and, having an interest in the property to subserve, it could properly bid for the protection of that interest. We are unable to find any duty resting elsewhere, under any principle of equity with which we are familiar, requiring more of the Title Company than it was bound to perform by the terms of its agreement. When such duty ended without its fault or connivance by the foreclosure under the paramount lien, then was it free to act as any other creditor in the protection of its interest. This must be so, upon the plainest principles of equity and fair dealing. No authorities have been presented that in any way militate against this conclusion, nor have we been able to find any; while, on the other hand, it finds ample support in the cases above cited. If there had been a redemption by Marquam, and an accounting by the Title Company had been required, it would have been by reason of the law regulating redemptions, and not by virtue of any subsisting contractual relations between the parties.

The remaining question is one of fact. It is asserted that the conduct of the Title Company in the matter of the execution of the trust and the proceedings for the foreclosure of the mortgage and the execution sale thereunder were such as to make it a trustee of the title for the plaintiff *ex maleficio*. This position involves three substantial contentions: First, that it was the duty of the Title Company to advance whatever money might be necessary, in addition to the income from the property, to pay the taxes and interest on the mortgage; second, that it did not apply the whole of the net income to the payment of such interest and taxes, but wrongfully diverted a large amount thereof to the payment of itself for services rendered and interest on money advanced by it, and thereby suffered a default in the interest payments, in consequence of which the mortgagee declared the entire loan, both principal and interest, due 14 days before maturity, and commenced the foreclosure suit; and, third, that it induced and brought about the foreclosure suit for the purpose of acquiring the title to the property.

The question as to whether the Title Company was guilty of breaches of its duty prior to the foreclosure suit was tried out in the former litigation between the parties, and it was there held that the Title Company did not agree to advance money necessary to pay the interest on the mortgage and taxes, and that it had "not collected from said real property, held by it under said trust agreement, funds sufficient, when applied as stipulated by said agreement, to pay any part of the interest notes in the complaint men-

tioned, maturing on the 13th day of February, the 13th day of May, the 13th day of August, or the 13th day of November, 1900, nor had it misapplied or converted the same," but "had conducted and managed said trust carefully and honestly, and had punctiliously accounted for all sums collected and received by virtue thereof"; *United States Mortgage Co. v. Marquam*, 41 Or. 403, 69 Pac. 37, 41. It would seem, therefore, that all such questions are concluded by the former litigation. But, however that may be, we have examined the present record with care, and are unable to find anything to substantiate the charges made. The claim that the Title Company agreed to make advances to meet the interest payments on the mortgage and taxes is not borne out by the testimony, and is contrary to the terms of the written agreement between the parties.

The charge that the default in the payment of the interest on the mortgage and the consequent foreclosure thereof were due to the failure of the Title Company to apply the net income from the property to the payment of the interest as it matured is completely refuted by the fact that it appears from the tabulated statement of the income and the disbursements therefrom, appearing in the brief of counsel for respondent, that if the Title Company had applied the entire gross income from the property during the life of the mortgage, less the necessary operating and miscellaneous expenses, it would not have kept the interest paid. Indeed, there would have been an actual deficiency at the maturity of every one of the interest notes, except four. From the time the Title Company assumed control of the property until the maturity of the first interest note, the gross receipts were \$8,800.15, operating and miscellaneous expenses, \$4,355.78, leaving a net balance of \$4,453.37, while the interest note was for \$5,250; so there would have been a deficiency of \$796.63. At the maturity of the second interest note, on a like basis, the deficiency was \$644.20, and at the date of the third \$1,122.21. At the maturity of the fourth interest note there was a surplus of \$1,676.86, but this was not sufficient to make up for the previous deficiencies. Thus we might go through the entire time covered by the life of the mortgage, with similar results. This calculation includes, among the receipts in January, 1899, an item for \$5,000, deposited with the Title Company by the lessee of the Marquam theater as security for the performance of its contract, and for which plaintiff was not entitled to credit; and it does not include the 3 per cent. commission to the Title Company for services in collecting the rents, etc., which it was clearly entitled under the contract to deduct from the income before applying it to the payment of interest. So there is no foundation for the claim made by the plaintiff. In addition to this the application of the income was made by the Title Company, from time to time, with his full knowledge

and acquiescence. Itemized statements of the receipts and disbursements were rendered to him quarterly, from the 13th of February, 1895, to the 13th of June, 1899. In several instances he gave his note for the balance shown to be due by the statements, and in others retained them without objection. The parties have therefore given to the contract by their conduct a practical construction, which, even if doubtful, the plaintiff is not now in a position to question.

The claim that the foreclosure suit was commenced by the Mortgage Company, at the instigation and request of the Title Company, with the design of securing the property, is contradicted by the testimony of the officers of both companies and the circumstances of the case. On the contrary, the evidence shows that the Title Company used every reasonable effort within its power, short of increasing its own indebtedness against the plaintiff, to obviate the necessity of a foreclosure. Mr. Young, the president of the Mortgage Company, testified that he had had several conversations with Mr. Ross, the manager of the Title Company, in which he (Ross) endeavored to obtain a reduction of the interest on the loan, or some adjustment which would avoid a foreclosure, and made various suggestions looking to that end; that at Ross's request the commencement of the suit was postponed on account of the hopes held out that the plaintiff would be able to procure a new loan, and the foreclosure thereby be rendered unnecessary; that prior to commencing the suit Ross frequently urged the Mortgage Company to refund the loan at a lower rate of interest, or extend the time for the payment thereof. Mr. Hurd, the assistant secretary of the Mortgage Company, testified substantially the same. He says: "I recall that the default of Marquam in the payment of his interest was frequently discussed between us, and Mr. Ross made various suggestions looking to the adjustment of the matter in such a way as to preclude the necessity of the foreclosure of our mortgage. Mr. Ross was very desirous to avoid a foreclosure of the mortgage, and was very anxious to see foreclosure proceedings postponed as long as possible, in case they should become necessary." And, again: "The foreclosure suit was deferred, in reliance on a statement of the Title Guarantee & Trust Company that the rents were increasing, and in the hope that funds could be secured by P. A. Marquam for the replacing of his loan, thus rendering the foreclosure on our part unnecessary. * * * Mr. Ross, on different occasions prior to the foreclosure, took up with me the question of extending this loan at a lower rate of interest for the benefit of P. A. Marquam, but we at no time felt justified in acceding to his request." Mr. Ross says that he made several attempts to refund the loan, and applied to life insurance companies, trust companies, and other financial institutions for money for

that purpose, but was unable to effect his object.

There is no testimony in the record showing or tending to show that the Title Company was anxious or solicitous to have the mortgage foreclosed. Indeed, the action and conduct of its officers indicate a contrary purpose. The plaintiff was indebted to it in the sum of about \$40,000. The only security was a lien upon the property, subject to a prior mortgage of \$300,000 and interest, due the Mortgage Company. The Title Company knew that, if this mortgage was foreclosed, it could probably protect its own interest only by purchasing at the foreclosure sale and taking care of the first mortgage. This was a condition it evidently hoped to avert, and for that purpose its manager seems to have exercised all the diligence within his power, but without avail. Much stress is laid upon the fact that after the Mortgage Company had determined to proceed with the foreclosure suit Mr. Ross was first employed as its attorney, although he subsequently retired, and the suit was actually brought and conducted by another. We are not able to give this circumstance the force and effect claimed for it by the plaintiff. There was necessarily no conflict in the interests of the Mortgage Company and the Title Company in the foreclosure proceedings. The mortgage was admittedly a first lien upon the property, and it was therefore but natural for the Title Company to endeavor to make the expenses of the foreclosure as light as possible, as it could only protect itself by paying or taking care of the first lien and accruing costs. Nor was there any fraud in the agreement made by it with the Mortgage Company, under which Ross purchased at the sale under the decree of foreclosure, concerning the manner of payment of the amount due under the decree. That was a matter wholly between them, and not one which the Title Company was bound to disclose to the plaintiff. The duties as trustee ceased with the foreclosure, and thereafter it stood in the same position as any other junior mortgagee in possession whose mortgage has been foreclosed, and was entitled and had a right to make any satisfactory arrangements with the prior mortgagee by which its own interest could be subserved and protected.

It may be said in this connection, however, that Marquam was advised by the officers of the Title Company several days before the sale that arrangements could probably be made to carry a purchaser of the property for \$300,000, and that, if he could secure some one to pay the balance, they would co-operate with him to the fullest extent, if desired, in securing a loan for that amount from the Mortgage Company; but he was unwilling or unable to do so.

Without further extending this opinion, it is enough to say that after a careful and exhaustive examination of the record and

argument we are all in full accord with the trial judge as to the facts, but are unable to agree with him in his construction of the contract between the plaintiff and the Title Company. As a consequence, the decree of the court below must be reversed.

STATE v. SMITH.

(Supreme Court of Oregon, Dec. 4, 1905. On Rehearing, Jan. 30, 1906.)

1. CRIMINAL LAW—CHANGE OF VENUE.

Where affidavits presented for change of venue on the ground of prejudice of the inhabitants of the county against accused were contradictory, and there was no difficulty in securing a jury, a conviction would not be reversed on appeal for alleged error in denying such application.

2. PERJURY—EVIDENCE.

Where, in an action for injuries alleged to have been sustained on a defective city sidewalk, accused testified that the plaintiff fell into a hole in the sidewalk at night, and fractured his kneecap, evidence that about the same time such injury was alleged to have occurred the plaintiff in such action and accused were in two other cities, and claimed that the same injury occurred on their defective streets, until a physician who was called stated that the injury was of long standing, when the plaintiff admitted the same in accused's presence, was admissible, as showing accused's knowledge of the falsity of his evidence.

3. SAME—ELEMENTS OF OFFENSE.

In a prosecution for perjury, it is incumbent on the state to show, not only that the accused made the alleged false statements, but that he knew them to be false, or that he stated them under such circumstances that knowledge of the falsity would be imputed to him.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Perjury, §§ 55-61.]

4. CRIMINAL LAW—EVIDENCE—CURING ERROR.

Where a letter signed with defendant's initials was taken from him by the sheriff while he was in jail awaiting trial, and indicated guilty knowledge, error of the court, if any, in admitting the letter in evidence without proof that it was written by defendant, was cured by defendant's subsequent admission, while a witness in his own behalf, that he wrote the letter.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3139.]

5. SAME—INSTRUCTIONS—DUTY OF COURT—STATUTES.

B. & C. Comp. § 139, requiring the court, in charging the jury, to state all matters of law which the court thinks necessary for their information in giving their verdict, does not make it the duty of the court, in the absence of a request, to charge on all collateral matters.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1800.]

6. SAME—REQUESTS—TIME.

It was not error for the court to refuse to give a specific instruction with reference to evidence of the character of accused, where the request was not made before argument, nor until after the jury had returned for further instructions on other matters.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2008.]

7. SAME—INSTRUCTIONS COVERED BY CHANGE.

Where, in a prosecution for perjury, the court, as a part of its general charge, instructed that perjury must be proved by the testimony of two witnesses, or one witness and corroborating circumstances, it was not error for the

court to omit to recharge such rule as a part of an additional instruction, given at the jury's request, that if defendant in a certain action testified that the plaintiff was in bed three months and testified with a view of the jury giving damages, knowing it to be false, that would be perjury for which he could be convicted, though every other statement he made was true.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

On Rehearing.

8. PERJURY—EVIDENCE.

Where, in a prosecution for perjury, in testifying concerning an alleged injury to L. by a defect in a city sidewalk, H. testified that L. pretended to be lame, in making a claim against another city, and that defendant then claimed to have been with L. at the time he was injured, and was to be a witness for him in the prosecution of such claim; the relationship existing between defendant and L. was sufficiently shown to indicate defendant's knowledge of L's physical condition, and the character of the business in which they were engaged.

Appeal from Circuit Court, Clatsop County; Thomas A. McBride, Judge.

Josiah S. Smith was convicted of perjury, and he appeals. Affirmed.

George Noland and W. J. Donovan, for appellant. Harrison Allen, Dist. Atty., for the State.

BEAN, J. The defendant was convicted of the crime of perjury for testifying falsely while a witness for the plaintiff in an action brought by one Charles R. Lane, under the assumed name of John L. Bock, against the city of Astoria, to recover damages for an injury alleged to have been received by him on account of a defective street. The case for the prosecution tended to show that the defendant and Lane were friends and acquaintances residing in Contra Costa county, Cal.; that Lane was and had been lame for many years from a fractured kneecap which had not united; that in the summer of 1900 he and the defendant came north, visiting Seattle, Portland, and Astoria; that while in Astoria Lane claimed to have stepped or fallen through a hole in the street, fracturing his kneecap, and subsequently, in February, 1902, under the name of John L. Bock, sued the city to recover damages therefor. The defendant was a witness for Lane in such action, and testified on the trial thereof that his name was George R. Rogers, and that the true name of the plaintiff was John L. Bock; that on the 21st of August, 1900, while he and the plaintiff and one Charles Smith were walking along Duane street, plaintiff fell or slipped into a hole in the planking of the street, which he could not see on account of the darkness, and sustained an injury to his kneecap and leg; that Smith and the witness picked him up and carried him to his lodgings and called a physician, who put the leg up in a plaster cast; that he was taken to Portland the next day and from there to Oakland, Cal.; that while in Portland a physician was called and readjusted the bandages on the leg; that af-

ter he reached Oakland he was in bed for about three months with his leg done up in plaster of paris; that the leg was seen by the witness several times; that since the plaster cast was taken off Lane had not been able to do anything on account of the injury. The state was also permitted to prove by a witness Harmon that, when the defendant and Lane were in Seattle, Lane, under the assumed name of Meyers, pretended to have received an injury to his knee through a defect in the street, and he and the defendant made a claim against the city for damages on account thereof and employed an attorney to prosecute an action therefor, and that while in Portland, about the same time the accident was alleged to have occurred in Astoria, Dr. Rockey was summoned by defendant to attend Lane, who pretended to be suffering greatly from an injury to his knee which he and the defendant said was received on one of the streets of Portland. The doctor, however, upon an examination, readily discovered that the injury was of long standing, and Lane so admitted to him in the presence of the defendant. The record contains several assignments of error which will be noticed in their order.

1. The motion for change of venue was addressed to the sound discretion of the trial court. It was based on the affidavit of the defendant's counsel, showing, or tending to show, that considerable prejudice existed against the defendant in the city of Astoria, and that there had been much comment on the case in the local papers. The counter-affidavits on behalf of the state, however, were to the effect that, while the case had been frequently discussed by the public and in the newspapers, no substantial prejudice existed against the defendant and he could, in the opinion of the affiants, secure a fair and impartial trial in the county. After the motion was overruled the trial proceeded, and there seems to have been no difficulty in securing a jury. The ruling of the court in denying the motion for change of venue will, therefore, not be disturbed. *State v. Pomeroy*, 30 Or. 17, 46 Pac. 797; *State v. Humphreys*, 43 Or. 44, 70 Pac. 824; *State v. Armstrong*, 43 Or. 207, 73 Pac. 1022.

2. Assignments of error are predicated upon the overruling of defendant's objections to the evidence of Mr. Harmon and Dr. Rockey, concerning the circumstances and actions of the defendant and Lane while in Seattle and Portland, and Lane's condition and defendant's knowledge thereof. The objection urged to this testimony is that it tended to prove the commission by the defendant of crimes other than the one charged in the indictment. But it is not open to the objection suggested. The evidence was offered and admitted as tending to show that the testimony given by the defendant on the trial of the action of *Bock v. Astoria* was not only false, but was known to him at the time to be false. Perjury consists in the willful giv-

ing, under oath or affirmation, of false testimony, material to the issue or point of inquiry, before a court or tribunal having legal authority to inquire into the cause or matter under investigation, and in a prosecution therefor it is incumbent on the state to show that the accused made the alleged false statements, knowing them to be false or under circumstances from which such knowledge may be imputed to him. In other words, that the oath was willfully and corruptly false. *Hughes*, *Crim. Proc.* § 1582; 22 *Am. & Eng. Enc. Law* (2d Ed.) 689. For this purpose the evidence objected to was clearly competent. It tended to show that defendant knew the actual condition of Lane's knee, and that the injury was not caused by the accident alleged to have occurred at Astoria, and his testimony to that effect was knowingly false.

3. While the defendant was in jail awaiting trial the sheriff took from him a letter signed with his initials, "J. S. S.," and which, on its face, shows that it had reference to the criminal charge then pending against him, and advises the person for whom it was intended, but not named therein, to "get out of the way" so he could not be found or apprehended by the prosecution. The letter was admitted in evidence and read to the jury without proof that it was written by the defendant, and it is insisted that this was error. Whether the letter was in defendant's handwriting or not, it was in his possession, had reference to the criminal charge then pending against him, indicated a guilty knowledge, and, as he is presumed to have known its contents, it was probably competent without proof of the handwriting to go to the jury along with the other evidence in the case, for whatever it was worth. *Lovelance v. State*, 12 *Lea*, 721. But, however that may be, the error, if any, was cured by the subsequent admission of the defendant while on the stand, as we understand his testimony, that the letter was in fact written by him. *Robinson v. Nevada Bank*, 81 *Cal.* 106, 22 *Pac.* 478; *People v. Goodwin*, 132 *Cal.* 368, 64 *Pac.* 561.

4. The defendant gave some evidence of his previous good character. In its charge to the jury the court made no reference to the question of character, and no exception was taken to its action in that regard, nor was it previously requested to instruct on that phase of the case. After the jury had been deliberating on their verdict for a time they came into court for further instructions upon another question, and while there, defendant's counsel called attention to the failure to instruct as to the effect of previous good character, and requested an instruction upon that subject. The court refused to give the instruction as asked, or any instruction on that point, because not presented or requested until after the jury had retired for deliberation, in violation of a rule of court that requests for instructions should be submitted

before the argument of a case is begun. In charging the jury, the court is required by statute "to state to them all matters of law which it thinks necessary for their information in giving their verdict." B. & C. Comp. § 139. And, in doing so, it may be its duty to give general instructions covering the law of the case, but it is not thereby made its duty to instruct the jury on its own motion on all collateral matters. If counsel desires instructions upon any particular point, he must request it at a seasonable time, and he cannot sit by while the jury is being charged, and then complain because some particular instruction was not given or point covered. *Page v. Finley*, 3 Or. 45; *Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. 309; *State v. Foot You*, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537; *State v. Magers*, 36 Or. 88, 51, 58 Pac. 892; *Smitson v. Southern Pacific Company*, 37 Or. 74, 89, 60 Pac. 907. And a request for an instruction comes too late after the jury has retired to deliberate upon their verdict, even if they come into court for additional instruction on some other matter. *State v. McNamara*, 100 Mo. 100, 107, 13 S. W. 938; *Williams v. Commonwealth*, 85 Va. 609, 8 S. E. 470; *Grubb v. State*, 117 Ind. 277, 20 N. E. 257, 725.

5. It was not error in charging the jury when they came in for further instructions that, if defendant testified on the trial of the action of *Bock v. Astoria* that the plaintiff "was in bed three months, and testified with a view of the jury giving damages, and that he knew it to be false, that would be perjury for which he could be convicted, if every other statement he made was true," without including therein the rule that perjury must be proven by the testimony of two witnesses or one witness and corroborating circumstances. That matter had been fully covered in the general charge, and it was not necessary for the court to repeat what it had already said.

It follows that the judgment must be affirmed, and it is so ordered.

On Rehearing.

The objections to the admission of the testimony of Harmon and Rockey were argued and considered together and as a consequence we naturally assumed that the testimony was substantially the same. It seems, however, that we were in error in stating that Harmon testified that while in Seattle, Lane claimed to have received an injury to his "knee through a defect in the street." Harmon's testimony was that in 1900, he had a desk in the office of John B. Hart, a lawyer in Seattle, and sometimes made collections and served papers for Hart; that in July or August of that year the defendant and Lane, who then assumed the name of Meyers, came into Hart's office with one Hughes, who was picking up damage cases, and bringing them to Hart to try; that Hughes said to Hart, "Here is the man Meyers I was speaking to you about, who was hurt, and here is the

witness Smith;" that Hart said, "All right, boys, come in," and they stepped inside and stood there talking; that Lane and the defendant came into Hart's office later, and the witness believed they made a contract or drew up some kind of an agreement, and a claim or complaint was prepared and the witness heard the parties say that it had been filed; that Lane walked with a cane at the time he came into the office; and that the defendant claimed to have been with him at the time he was hurt. Although it thus appears that Harmon did not testify directly Lane's injury as alleged was to his knee or from a defect in the street, the effect of his testimony was that Lane pretended to be lame and from a hurt or injury received in Seattle, for which he was making a claim against the city, and that the defendant claimed to have been with him at the time he was injured, and was to be a witness for him in the prosecution of such claim. This was sufficient to render the evidence competent as tending to show the relationship that existed between Lane and the defendant, the latter's knowledge of the physical condition of the former, and the character of business in which they were engaged.

The record in relation to the identification of the letter taken by the sheriff from the defendant while in jail is somewhat confusing, but a re-examination confirms us in the conclusion stated in the former opinion.

Petition denied.

(47 Or. 271)

GELDARD v. MARSHALL.*

(Supreme Court of Oregon. Dec. 4, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE APPLIANCES.

Where an employer intrusts the duty of selecting appliances furnished to the workmen, he is not liable for injuries to a servant caused by negligence of fellow servants in failing to select safe appliances for use; but, if the master performs the duty of selecting such appliances himself, he is liable for the exercise of reasonable care in making the selection and continuing the use of the appliances selected.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 173, 175, 178, 302.]

2. SAME—QUESTION FOR JURY.

In an action for injuries to a servant by the breaking of rope used in lowering a heavy timber, evidence held to require submission to the jury of the question whether defendant, who was present directing the work himself, selected the rope from a supply furnished, or delegated such selection to plaintiff's fellow servants.

3. SAME—CUSTOM—EVIDENCE.

Where, in an action for injuries to a servant by the breaking of a rope attached to a heavy timber, it appeared that the master was present at the time, directing the work, evidence of a custom under which it was the duty of plaintiff's fellow servant to make selections from rope furnished by the master for use as needed and to call attention to the fitness or unfitness of rope provided for use was inadmissible.

Appeal from Circuit Court, Multnomah County; Arthur L. Frazer, Judge.

Action by Matthew Geldard against J. L.

*Rehearing denied April 2, 1906.

Marshall. From a judgment in favor of defendant, plaintiff appeals. Reversed.

S. B. Linthicum, for appellant. J. C. Bro-nough, for respondent.

WOLVERTON, C. J. This is a second appeal by plaintiff in this action; he having failed to secure a verdict and judgment, of which he complains. The facts developed at the trial are substantially the same as those appearing at the former trial. The statement thereof as formerly made (43 Or. 438, 73 Pac. 330) will therefore suffice for the present.

The pivotal, and, as we have concluded, the vital, question impending, arises upon the defendant's attempt to establish the existence of an alleged custom between the master and his workmen, whereby, the master having furnished suitable appliances, the workmen are required to make the selections therefrom for present use, and that for making improper or unfit selections, which conduce to an injury, the master is not liable. The nature of the alleged custom is inferable from certain questions put to witnesses Griffith and Bridges, and also from others put to Marshall, the defendant, and his answers thereto. Griffith was asked: "What would be the custom of using a rope of that kind, as to who should call attention to the fact as to whether or not the rope was sufficient to stand the use?" And again: "What would be the custom of an ordinarily prudent man engaged in that business, where a supply of ropes are furnished and on hand from which selections could be made by the servants in charge, in using a rope of that kind, as to who should call attention to the fact as to whether or not the rope was sufficient to stand the use?" Bridges was asked: "What is the custom, among reasonably prudent men engaged in your business as to who shall look out for the ropes when a number of ropes are accessible?" And Marshall: "What arrangements, if any, were made for the replacing of rope which became defective?" to which he answered: "There was plenty there to pick from. It was understood, if a man was handling the ropes, the man looked at the rope he was using, and if there was anything wrong with it—" Here was an interruption, and later the following question was propounded: "What is the general custom, in work of that kind, as to replacing defective ropes?" To which the witness answered, over objection: "In this city, wherever a man goes to work with a rope, he is supposed to look at the ropes and pick one out to suit himself, if there are ropes there, and if there is any thing wrong with the rope he leaves it, and reports it to the party that supplies the ropes, if there is no other rope there. It is just like making a scaffold. When a man is putting up a scaffold, one man for another, the man going out on the scaffold looks to see whether the scaffold is safe."

An analysis of these questions indicates that the defendant was endeavoring to establish two supposed customs, or, rather, perhaps, two phases of one custom; one being as to whose duty it was, as between master and servant, to call attention to the fitness or unfitness of the rope for the use, and the other as to whose duty it was to make selections from rope that had been provided by the master for use as needed. But did the conditions call for inquiry touching any custom? Or, rather, was it not a mere matter of inquiry respecting the primary and correlative duties and responsibilities of master and employé, to be ascertained under the conditions and circumstances then existing? There was evidence tending to show that the defendant was present with the workmen, and was himself directing the work, and that there was plenty of rope provided from which to make selections when needed. It does not appear, however, who made the selection of the particular rope then in use, although there is evidence from which it is inferable that the defendant knew or ought to have known of its condition at the time. Now, the simple question is, did the responsibility of the selection and continued use of this rope rest with the defendant, or was it a duty that devolved upon the workmen? The question is, under the evidence as we view it, a mixed one of law and fact. It will be remembered that the plaintiff was not using the rope at the time of his injury, but was employed in another service, so that it becomes the measure of a duty of a co-employé in the premises. We said in *Robinson v. Taku Fishing Co.*, 42 Or. 537, 541, 71 Pac. 790: "When the selection of materials or the adaptation or construction of appliances to suit them to the work in hand is such as is within the scope of the employment, and may be properly left to the workmen in their capacity as such, and is so left to them by the master, he is relieved of responsibility for their negligence, and whether a particular case falls within the duty of the master or that of the employé becomes a mixed question of law and fact, to be submitted to the jury as to the fact under legal rules, its determination depending upon the facts of the case." In the nature of things there are certain duties that a master may well leave to the discretion and judgment of his employés, or he may himself act in the discharge of them. If he does the latter, he is responsible for his negligence committed in such discharge. If, however, he intrusts the duty to his employés and they act negligently in the premises, their negligence cannot be imputed to the master, and thus a master would not rest accountable for the negligence of a fellow servant.

Thus, in *Brady v. Norcross*, 172 Mass. 331, 52 N. E. 528, an action to recover damages for an injury received from a fall occasioned by the giving way of a temporary staging upon which plaintiff, one of the workmen,

was engaged in the course of his employment, it was stated as a rule of law applicable in the case that, "if the plaintiff's employers furnished sufficient quantities of suitable materials for staging, employed suitable workmen, and did not themselves undertake the duty of furnishing the staging as a structure, but only of supplying materials and labor by which it might be built and from time to time adapted to the work, and if the duty of furnishing or adapting the staging as an appliance for use in the work of finishing the room was intrusted to or assumed by the workmen themselves, within the scope of their employment, the employers are not answerable to the plaintiff for his injury"; but that, "on the other hand, if the staging was furnished by the employers as a completed structure, or if they themselves supervised and directed its construction, or if, relying upon its construction by their workmen for themselves, the employers negligently failed to provide suitable and sufficient materials, or negligently hired incompetent workmen, the employers might be answerable to the plaintiff." Upon the second appeal (174 Mass. 442, 449, 54 N. E. 874), the court say: "Without reciting the evidence in detail, it is sufficient to say that the questions whether the plaintiff was in the exercise of due care, whether there was negligence in the care of the staging, whether that negligence, if any, was attributable either to Douglas or to Smith, and whether either or both of them was a person whose chief duty was that of superintendence, and to whom as a part of that duty the care of this staging was intrusted by the defendant, seem to us to be upon the evidence questions of fact for the jury, and not of law for the court." So it is if a person is employed to do a piece of work and in doing it is to furnish his own appliances, or if he assumes to select and adapt the necessary appliances in order to a prosecution of the work, the employer could not be held liable for his acts of negligence in that regard. The duty would constitute a part of his engagement. Neither could a fellow servant hold the employer responsible in that particular, if the workmen themselves were competent in the service.

A pertinent example is instanced in *Robinson v. Blake Mfg. Co.*, 143 Mass. 528, 533, 10 N. E. 314, which supposes that the work to be done was the moving of a heavy substance, requiring the use of a simple fulcrum and lever, and the employer's foreman in charge of the work should be left to provide them at the place where the work was to be done, and he should take a common stone for the fulcrum and a scantling or a rail from a neighboring fence for the lever, and the stone should roll or the lever break, entailing injury to a workman, and from which it is deduced that the selection of the materials and appliances was a part of the work to be done and not within the implied duty and

undertaking of the employer. In the case alluded to, the agent of the defendant, who employed plaintiff and others to assist him in taking out an old condenser and putting in a new one, inquired of plaintiff if he had any blocking, to which he replied that he had, and he was directed to get it, but in using it it proved to be the cause of the accident complained of; and it was held that, in view of the circumstances disclosed and the nature of the work to be done, the place of its execution, and the character of the means and appliances required to aid the workmen, it was a question for the jury to determine whether, in the absence of any express contract upon the subject, the duty according to the understanding of the parties rested upon the defendant or upon those who should undertake to do the work.

These cases are illustrative of the principles which we are impressed, govern in the present instance, and we will cite still another: *Great Northern Ry. Co. v. McLaughlin*, 70 Fed. 669, 17 C. C. A. 330. The injury was caused by a steel rail falling upon plaintiff while he was engaged with others in loading it upon a car. One Johnson, who was foreman of the yard, hired and discharged the workmen and directed their work. In the absence of plaintiff, who was directed to help with the work, the foreman selected some skids to be used in the loading from a number lying in the yard. The workmen suggested to the foreman that one of them was too short, and was, therefore, unsafe, and objected to its use; but the latter further examined it and directed the workmen to proceed with its use. The plaintiff, having subsequently returned to his work, knowing nothing of the controversy about the skid or its condition, was injured, as above indicated, because of its unsuitableness; and it was held that whether Johnson was acting as a vice principal, and whether plaintiff was injured through the negligence of his fellow servants, or through a risk assumed by him, or through the negligence of the railway company, were for the jury. In the course of the opinion the learned judge who announced it assumed that the duty of selecting and placing the skids might with propriety have been left with the workmen. If such had been the case the company would not have been liable for the negligence of the workmen in using the objectionable skid. In further course of the opinion it is said: "The controlling question often turns more upon the character of the act performed than on the title of the officer or agent of the master, and of the relations of the workmen to each other. When Johnson's attention was called by the workmen to the fact that the skids were of unequal length and unsafe, it was his duty, in relation to his position with the railway company, to have either procured other and safe skids, or directed the workmen to do so."

From these authorities it was for the jury

to determine, under the testimony of the case at bar, whether the defendant was directing the work, and whether, having furnished a quantity of rope, if such was the case, he himself assumed the duty of making the selection of such as was needed in the work. If he did these things and was careless, or did not use reasonable caution and prudence in making the selection, he would be liable; and, further, if he had made a proper selection, having assumed that duty, and the rope subsequently became unsafe by use, and he was made aware of the condition, or should have ascertained or known of it by proper precaution and foresight, and failed to supply another, he would yet be responsible. But if, on the other hand, he left the selection entirely to the workmen, and they were acting in the discharge of that duty, then the defendant would not be responsible for their negligent act in that particular, or if the rope became defective by reason of use, and the defendant was not aware of it, but the workmen were, and continued in the use of it without making another selection, the jeopardy would have been theirs, and a fellow servant engaged in the same service, though not intrusted with making the selection, would have the same responsibility. These are all matters for the jury under the evidence. Now, what room was there for the supposed custom or customs sought to be established? The matters sought to be determined were of fact, and not of custom. It was inquired what would be the custom as to who should call attention to the fact as to whether or not the rope was sufficient to stand the use. The inquiry pertains not to a custom. If a workman saw that the rope or an appliance in use was defective or unsafe, it was his duty, not suggested by any custom or usage, but for self-protection, and the protection of his collaborators, to call prompt attention to the fact or supply the remedy, if within his authority; otherwise, by a continuation in the service with the defective appliance, he assumed the risk of accident. It is a mere question of duty, not regulated by custom, unless you raise custom to the dignity of law, and then the inquiry would be as to the rule of law, which would be for the court to ascertain, without inquiry as to the fact. And, again, it was inquired what would be the custom among reasonably prudent men engaged in such business as to who should look out for the ropes when a number are accessible. From the rules of law governing in the premises, as we have heretofore ascertained them to be, it is perfectly apparent that this matter of inquiry was not of a custom, but of a fact. If the employer intrusted the duty of selecting the ropes from a supply that he had furnished to the workmen, then the responsibility of selection and having in use a safe rope would rest with the latter; but if, on the other hand, he acted in the discharge of that duty, and was present to

oversee and direct the work and to observe and determine as to the fitness of the appliances, then the responsibility rested with him to have in use a suitable and safe rope, and nothing could relieve him therefrom, except that he had used reasonable prudence and precaution in making the selection and continuing in the use thereof. Common prudence is not measured by custom or by rule, but by the exigencies of the occasion, which is solvable by the facts and is for the jury to determine. The effect of allowing the alleged custom to be proven was, therefore, to take from the jury questions material to the controversy, namely, whether the master was in personal charge and hence supervising the work, or, having provided suitable appliances—that is, rope suitable and safe for use—the workmen were left to make the selection and to see to its condition while in use. The circuit court was in error, therefore, in admitting the proofs, and for that reason alone the judgment must be reversed, and the cause remanded for such further proceedings as may seem appropriate, not inconsistent with this opinion.

Other questions were presented, but the conclusion reached renders it unnecessary that we should consider them now.

Reversed and remanded.

OLIVER v. WRIGHT et al.

(Supreme Court of Oregon. Dec. 4, 1905.)

1. HUSBAND AND WIFE—PROPERTY—TENANCY BY ENTIRETY.

A conveyance of real property to a husband and wife creates a tenancy by the entirety, and upon the death of either spouse the survivor takes the whole estate.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 73.]

2. ATTACHMENT — RIGHTS OF CREDITOR — MERGER IN JUDGMENT.

Where a judgment quasi in rem is rendered against attached property, directing it to be sold to satisfy the debt of the attaching creditor, the right which the latter has secured by the seizure under the writ of attachment becomes merged in the lien of a judgment.

3. SAME—JUDGMENT—LIEN—NATURE AND EXTENT.

A judgment for plaintiff in attachment proceedings becomes, when docketed, a lien upon all the real property of the judgment debtor, but does not establish any specific interest in his land.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attachment, §§ 749, 750.]

4. TRANSFER OF PROPERTY SUBJECT TO LIEN—EXECUTION SALES.

Where all the land subject to a general judgment lien is conveyed by the judgment debtor in separate tracts, and to different persons, the judgment creditor, if he is obliged to resort to an execution, must satisfy his judgment by a sale of the land conveyed in the inverse order of its alienation.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1386.]

Appeal from Circuit Court, Union County; Samuel White, Judge.

Suit by Turner Oliver against Joseph Wright and others. From a decree of dismissal, plaintiff appeals. Reversed.

This is a suit to enjoin the sale of certain real property on execution. The facts are that the defendant Joseph Wright, as plaintiff, commenced an action April 4, 1892, in the circuit court for Union county against Mary A. Boothe and Mary C. Walling as defendants, and, having sued out an attachment, he caused to be seized all the interest of either of such defendants in or to block 21 in the town of Union, and 42 days thereafter he secured a judgment against them for the sum of \$247, with interest at 10 per cent. per annum, \$40 attorney's fees, and the costs and disbursements, and an order was made directing that the real property so attached be sold to satisfy the judgment; a proper docket entry thereof having been made on the day the judgment was given. At that time Mary A. Boothe and her husband, Luke J. Boothe, were the owners in fee of an undivided seven-eighths of such block 21, and also of all the following described premises: Commencing at a point 60 feet south of the southwest corner of block 23 in the town of Union, thence south 200 feet, thence east 210 feet, thence north 200 feet, and thence west 210 feet to the place of beginning; the latter tract being known as the Nodine block. The marital relation existing between Mr. and Mrs. Boothe continued until November 4, 1892, when he died in that county, leaving her surviving. Mrs. Boothe, in consideration of \$1,800, executed to the plaintiff, Turner Oliver, August 12, 1893, a warranty deed for the undivided seven-eighths interest in block 21 in that town; and, the deed having been duly recorded on that day, he has ever since been in possession of the premises, claiming to be the owner thereof in fee. Mrs. Boothe, on November 20, 1894, for the expressed consideration of \$1, executed a bargain and sale deed of an undivided one-half interest in the Nodine block to R. Eakin, who conveyed to others such interest, which is now held by the defendants H. F. Raymond and Aggie Paddock, and is of the reasonable value of \$1,000. Mrs. Boothe thereafter died intestate, leaving certain named defendants as her heirs. Wright caused to be issued June 15, 1897, a special execution, directing the sale of the real property so attached; but, no levy having been made, the writ was returned wholly unsatisfied. A general execution was issued on this judgment May 8, 1899, which was returned without attempting to make any levy thereunder. Another general execution was issued March 28, 1900, pursuant to which certain real property of Mary C. Walling that had not been attached was sold, and the sum of \$200 was credited on the judgment. Wright also procured another special execution June 23, 1904, directing the sale of the real property so attached to satisfy the remainder due on the judgment, obey-

ing the command of which the defendant C. C. Pennington, as sheriff, levied upon plaintiff's interest in such block 21, and advertised the premises for sale, whereupon this suit was instituted; the complaint setting out the facts, the substance of which is hereinbefore stated, and averring that, in consequence of the issuance of a general execution and of the sale of real property thereunder that had not been attached, Wright abandoned any lien that he may have secured by seizure of such interest in block 21, under the writ of attachment. The prayer for relief is that the property owned by Mrs. Boothe, which became subject to the lien of Wright's judgment, might be sold on execution in the inverse order of its alienation, so that the undivided one-half of the Nodine block, inherited by the defendants, her heirs, be first disposed of, and, if the sum realized therefrom be insufficient to satisfy the judgment, that resort be had to the remaining half of that block, owned by H. F. Raymond and Aggie Paddock, a sale of which will satisfy any remainder that may be due. The defendants Wright and Pennington filed their respective answers, and, the averments of new matter therein having been put in issue by replies, a trial was had, resulting in a decree dismissing the suit, and plaintiff appeals.

W. M. Ramsey, for appellant. T. H. Crawford, for respondents.

MOORE, J. (after stating the facts). The transcript shows that Wm. Wilson and others September 22, 1885, by a warranty deed, conveyed to "Luke J. Boothe and Mary Ann Boothe" an undivided seven-eighths interest in and to block 21 in the town of Union, and that Bertha Nodine and her husband, April 5, 1887, by a similar deed, conveyed to "L. J. Boothe, Sr., and Mary A. Boothe" the Nodine block, particularly describing it. These grantees are not named in either deed as husband and wife, but it was stipulated at the trial in the lower court that at the times such conveyances were respectively made they sustained that relation, which continued until November 4, 1892, when the husband died, leaving Mrs. Boothe as his survivor. Whatever the rule may be in other jurisdictions in respect to a deed executed to a husband and wife of real property, it is settled in this state that such a conveyance creates a tenancy by the entirety, and that upon the death of either spouse the survivor takes the whole estate. *Noblitt v. Beebe*, 23 Or. 4, 35 Pac. 248; *Howell v. Folsom*, 38 Or. 184, 63 Pac. 116, 84 Am. St. Rep. 785; *Hayes v. Horton* (Or.) 81 Pac. 386. Therefore on November 4, 1892, when the marital relation that had theretofore existed between Luke J. Boothe and Mary A. Boothe was severed by his death, she, eo instante, as his survivor, became the owner of, and was vested with, an estate in fee simple of the real property which was held by them as tenants by the

entirety at his death. Whether or not the inchoate right of survivorship of either spouse, as tenant by entirety of real estate constitutes "property," within the meaning of that word as used in the statute (B. & C. Comp. § 296), so as to render such possible interest, before it accrues, by the death of a husband or of a wife, subject to seizure by writ of attachment, or what the effect may be of issuing a general execution upon a judgment directing the sale of attached property, we do not deem necessary to a decision herein. The property of a defendant in an action is attached as security for the satisfaction of any judgment that may be recovered. The purpose of such ancillary proceeding is to prevent the owner from voluntarily disposing of or encumbering his property, and to preclude other creditors from securing prior liens thereon, and when a judgment, quasi in rem, is rendered against such property, directing it to be sold to satisfy the debt of the attaching creditor, the latter's qualified right, secured by the seizure under the writ of attachment, becomes merged into the lien of the judgment.

In the case at bar no intervening rights of third persons have accrued subsequent to the attachment, and prior to the entry of Wright's judgment, that can affect any of the real property, the title to which became vested in Mrs. Boothe, so as to demand a levy on an execution upon the specific premises so originally seized, in order to protect his rights. The docketing of this judgment became a lien upon all the real property, the title to which vested in Mrs. Boothe in severalty upon the death of her husband, but such judgment did not establish any specific interest in her land. The particular source from which a creditor derives the money necessary to satisfy his judgment would ordinarily appear to be a matter of indifference so far as he is concerned, and, as a debtor in making payment to a person having two or more demands against him may compel the crediting of the money tendered on account of a designated debt, so, too, a judgment debtor who conveys in separate tracts to different persons all his real property that is subject to a general judgment lien thereby forces his creditor, if he is obliged to resort to an execution, to satisfy his judgment by a sale of the real property so conveyed in an inverse order of its alienation. *Knott v. Shaw*, 5 Or. 482. This rule does not contravene the doctrine announced in *Dickson v. Back*, 32 Or. 217, 51 Pac. 727, where it was held that a deed, absolute in form, purporting to convey real property, but intended by the parties as security for the payment of a debt, was a mortgage, and did not transfer the title to the premises, but only created a lien thereon, in enforcing which it was decreed that the assets should be marshaled, and that the land should be sold upon execution issued on a judgment

that was a prior lien, but not in an inverse order of incumbrances. The decision in that case proceeds upon the theory that, as *Dickson's* mortgage was subordinate to the lien of the judgment, the equities, each being a lien, were equal, and hence the first in time should prevail, and that, if the plaintiff in that suit desired to be subrogated to the rights of the judgment creditor, he should pay off the prior lien. In the case at bar it will be remembered that plaintiff's interest and title to the real property in question is evidenced by Mrs. Boothe's deed, and not by any lien upon or incumbrance of the land which would necessitate a marshaling of the assets.

Believing that the rules of equity, as adopted in this state, demand that the real property which is subject to the lien of Wright's judgment should be sold in an inverse order of alienation, the decree is reversed, and one will be entered here directing the sale upon execution, first, of the premises of which Mrs. Boothe died seised; second, the land conveyed to R. Eakin; and, third, if necessary, the real property so conveyed to plaintiff.

SEED v. JENNINGS et al.

(Supreme Court of Oregon. Dec. 4, 1905.)

1. TRUSTS—CONVEYANCE OF LAND—EVIDENCE—SUFFICIENCY.

Evidence held to show that a deed by a father to his minor son was intended as an absolute conveyance, and not as a mere conveyance in trust for the father.

2. DESCENT AND DISTRIBUTION—ADVANCEMENTS—CONVEYANCE OF PROPERTY.

A voluntary conveyance of property by a parent to a child, expressed in the deed as made in consideration of love and affection, is presumed to be an advancement, and title passes to the son.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, § 407.]

3. INFANTS—CONVEYANCES BY INFANTS—DISAFFIRMANCE.

Where a father conveyed property to his minor son, and the son reconveyed the same during minority, but promptly disaffirmed the reconveyance on coming of age, the title after the disaffirmance was in the son.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, §§ 54, 62.]

4. FRAUDULENT CONVEYANCES—WHO ARE CREDITORS.

One having a right of action for damages against another for tort is a creditor of the wrongdoer, within the meaning of B. & C. Comp. § 5508 et seq., declaring conveyances of property made with intent to hinder, delay, and defraud creditors void as to such creditors.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 641.]

5. SAME—RIGHT OF ACTION—ESSENTIALS.

To enable a creditor to maintain a suit to set aside a conveyance by his debtor as fraudulent, he must show an unsatisfied judgment or an attachment upon a cause of action existing at the time of the conveyance, or on a cause of action arising subsequent thereto, in which latter case the conveyance must be shown to

have been made with the express intention of defrauding subsequent creditors.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 629-634.]

6. SAME—VOLUNTARY CONVEYANCES.

A voluntary conveyance of property is constructively void as to existing creditors of the grantor, but valid as to subsequent ones, unless impeached for actual fraud.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 188, 189.]

7. SAME—EXISTENCE OF CAUSE OF ACTION—EVIDENCE.

The existence of a cause of action by a creditor against his debtor at the time of a voluntary conveyance of property by the latter must appear from the record in the action in which the creditor recovers judgment against the debtor, in order to enable the former to set aside the judgment for fraud against him as an existing creditor.

8. SAME—EVIDENCE OF FRAUD—SUFFICIENCY.

Evidence of improper conduct on the part of the grantor in a voluntary conveyance to plaintiff, committed subsequent to such conveyance with the wife of defendant, is not sufficient to show that the conveyance was made for the purpose of hindering, delaying, or defrauding defendant in the collection of any judgment which he might recover against the grantor on account of such conduct, in the absence of evidence that the grantor anticipated an action by defendant, as for alienation of affections, or that he had any reason for putting his property out of his hands on that account.

Appeal from Circuit Court, Multnomah County; A. F. Sears, Jr., Judge.

Suit by John G. Seed against O. O. Jennings and others. From a decree for defendants, plaintiff appeals. Reversed.

This is a suit to enjoin the sale of real property in Multnomah county, on an execution issued on a judgment recovered by the defendant Jennings against John S. Seed, the father of the plaintiff. On January 4, 1901, John S. Seed was the owner of the property in controversy, and on that day he and his wife conveyed it to the plaintiff, their son, then about 18 years of age, by warranty deed for the expressed consideration of "love and affection, and one dollar," and this deed was duly recorded. Thereafter, and on or about September 1st, the plaintiff who was about to go to Chicago for a short time, made to his father a reconveyance of the property with the knowledge expressed however, of all the parties that the deed could be disaffirmed by him on becoming of age. This deed was not placed on record. Seed remained in possession of the property with his wife and son until about the year 1902, when he and his wife separated, since which time the property has been in the possession of the plaintiff. On July 10, 1904, the plaintiff became of age and immediately notified his father that he disaffirmed and repudiated the deed previously made by him and demanded to have it canceled. On June 11, 1904, the defendant Jennings commenced an action at law against John S. Seed to recover damages for alienating the affections of his wife, which it was alleged occurred within

one year from the filing of the complaint. Seed made default, and such proceedings were thereafter had in the action that on September 12, 1904, Jennings recovered a judgment against him for \$5,000, and his costs and disbursements. An execution was issued on the judgment and the property in question seized by the sheriff, and advertised for sale when this suit was commenced by the plaintiff to enjoin the sale, on the ground that the property belonged to him, and not to his father. The defenses to the suit are, in substance: (1) That the transfer of the property by John S. Seed to the plaintiff was made in trust for the grantor, and the trust was subsequently executed by a conveyance thereof by the plaintiff; (2) that at the time of the transfer, Seed was liable in damages to Jennings for alienating the affections of his wife; and such transfer being voluntary, and without consideration, was void as to him. The defendants had decree in the court below, and plaintiff appeals.

J. C. Moreland, for appellant. J. C. Brnaugh, for appellees.

BEAN, J. (after stating the facts). There is no evidence to support the claim that the deed from John S. Seed to the plaintiff was made in trust for the grantor. W. A. Cleland, who drew the deed, testified that Seed said to him at the time that his arrangement with his then partner was not satisfactory and that he was going to close out his business, and leave the country, and desired to deed the property in question to his son and another tract to his wife, "so they would be taken care of." Mrs. Seed says that prior to the making of the deed Seed had often talked of going away, and, as she was not provided for, she told him that she wanted him to give her one of the houses, and he said that he would do so, and would deed the other to the plaintiff "for his education." This is all the testimony in the record as to the purpose for which the deed was made, and clearly shows that it was intended at the time as an absolute conveyance of the land by the father to his son. A voluntary conveyance of property by a parent to a child expressed in the deed as in this case to be in consideration of love and affection is presumed to be an advancement (1 Am. & Eng. Enc. Law [2d Ed.] 765; Lott v. Kaiser, 61 Tex. 665); and this presumption applies here as there is no evidence to rebut it. The title of the property, therefore, passed from John S. Seed to the plaintiff, and as the attempted reconveyance thereof by the plaintiff, made in September, 1901, was promptly disaffirmed by him on coming of age, the title is now in him. Tucker v. Moreland, 10 Pet. 58, 9 L. Ed. 345; Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 662, and note; Scranton v. Stewart, 52 Ind. 68; Long v. Williams, 74 Ind. 115; Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233.

But it is urged that, in any event, Jennings

had a cause of action against Seed at the time the deed was made for alienating the affections of his wife, and was therefore in legal contemplation a creditor of Seed, and as to him the deed is void, because made voluntarily, and without consideration. Whatever the rule may be in other jurisdictions, it is the doctrine here that one having a right of action for damages against another for tort is a creditor of the wrongdoer within the meaning of section 5508 et seq., B. & C. Comp., declaring conveyances of property made with intent to hinder, delay, and defraud creditors, void as to such creditors. *Barrett v. Barrett*, 5 Or. 411; *Philbrick v. O'Connor*, 15 Or. 15, 13 Pac. 612, 3 Am. St. Rep. 139; *Coolidge & McClaine v. Hencky and Forward*, 11 Or. 327, 8 Pac. 281; *Hunsinger v. Hofer*, 110 Ind. 390, 14 N. E. 463; *Farnsworth v. Bell*, 5 Sneed, 532, footnote. To enable a creditor herein to maintain a suit to set aside a conveyance by the debtor as fraudulent and void, he must show an unsatisfied judgment or an attachment upon a cause of action existing at the time of the conveyance (*Dawson v. Sims*, 14 Or. 561, 13 Pac. 506; *Clark v. Anthony*, 31 Ark. 546); or on a cause of action arising subsequent thereto, and that in the latter event the conveyance was made with the express intention of defrauding subsequent creditors (*Crawford v. Beard*, 12 Or. 447, 8 Pac. 537; *Bennett v. Minott*, 28 Or. 339, 39 Pac. 997, 44 Pac. 288; *Morton v. Denham*, 39 Or. 227, 64 Pac. 384). A voluntary conveyance of property is constructively void as to existing creditors (*Elfelt v. Hinch*, 5 Or. 255; *Davis v. Davis*, 20 Or. 78, 25 Pac. 140; *Flynn v. Baisley*, 35 Or. 268, 57 Pac. 908, 45 L. R. A. 645, 76 Am. St. Rep. 495), but valid as to subsequent ones, unless impeached for actual fraud (14 Am. & Eng. Enc. Law [2d Ed.] 309; *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 17 Atl. 946, 14 Am. St. Rep. 732). Now, in this case the cause of action upon which Jennings recovered judgment against Seed, as shown by the record in such action, did not exist at the time of the conveyance by Seed to his son, nor for some time thereafter. The record consists alone of the complaint, the order of default, and the judgment. The complaint was filed July 11, 1904, and charges an overt act, committed on July 8th, previous, and that prior to the filing of the complaint, and "particularly within the last year," Seed had insinuated himself into the favor and good graces of Jennings' wife, alienating her affections; but there is no charge that this wrongdoing commenced prior to the date of the conveyance in question.

To avoid a voluntary deed because fraudulent as to existing creditors, the cause of action must exist at the time the conveyance is made, and this must appear from the record in the action in which the judgment was recovered. The *Holladay Case* (C. C.) 27 Fed. 830; *Goodnow v. Smith*, 97 Mass. 69. So that the evidence does not disclose that

Jennings is entitled to have the deed set aside because the judgment recovered by him against Seed was on a cause of action existing at the time the conveyance was made. Nor is there sufficient evidence to show that the deed was made for the purpose of hindering, delaying, or defrauding Jennings in the collection of any judgment he might recover against Seed, on account of his subsequent conduct or to defraud any of Seed's creditors. There is no evidence that Seed was in debt in any sum at the time, nor that he has since become indebted or liable in any amount except on the judgment Jennings recovered in September, 1904. There is no testimony in the record showing or tending to show any improper conduct between Seed and Mrs. Jennings except the allegations of the complaint in the action brought by Jennings, which was taken as confessed and the testimony of plaintiff elicited on cross-examination, to the effect that a few days before the deed was made he and his mother saw Seed and Mrs. Jennings come out of a down-town building at about 11 o'clock at night, and that a personal encounter ensued between the two women and that he (witness) had seen his father and Mrs. Jennings together at the theater, and out riding several times prior to that date. This is perhaps sufficient to show improper conduct by Seed and Mrs. Jennings, but there is no evidence that Seed anticipated an action by Jennings on account thereof, or that he had any reason for putting his property out of his hands on that account.

It follows that upon the record before us the decree of the court below must be reversed, and one entered here in favor of plaintiff.

STATE v. RICE, State Treasurer.

(Supreme Court of Montana. Jan. 9, 1906.)

1. SCHOOLS AND SCHOOL DISTRICTS—NORMAL SCHOOLS—STATE FUNDS—INVESTMENT.

Const. art. 11, § 12, provides that the funds of all state institutions of learning shall forever remain inviolate, and shall be respectively invested under such regulations as may be prescribed by law and that the interest from such invested funds, etc., shall be devoted to the maintenance and perpetuation of such respective institutions, and Laws 1905, p. 5, § 5, provides that the State Treasurer shall keep all moneys derived from the sale of timber from lands granted in aid of the State Normal School, in a separate fund from which he shall pay the interest on certain Normal School bonds as it accrues and the principal at maturity. *Held*, that as soon as the Treasurer receives any money from the sale of normal school lands or timber, payable into the normal school fund, he is required to invest the same and is authorized only to use the interest and the rents from leased lands for the maintenance of the school.

2. PUBLIC LANDS—SCHOOL LANDS—STATUTES.

Act Cong. Feb. 22, 1889, granted lands to the state of Montana for "state normal schools," and conferred on the state Legislature authority to prescribe the manner in which such lands should be held, appropriated, and disposed of, and Const. Mont. art. 11, § 12, provides that

the funds of the State Normal School shall be invested by the State Treasurer and only the interest from the invested funds, together with the rents from the leased lands, might be used for the maintenance and perpetuation of the school. *Held*, that the congressional act referred only to the manner of the management and disposition of the lands themselves, while the constitutional provision provided for the control of the funds derived therefrom, and that such sections were therefore not in conflict.

3. SCHOOLS AND SCHOOL DISTRICTS—NORMAL SCHOOLS—FUNDS—INVESTMENT.

Laws 1905, p. 5, authorizing the issuance of bonds for the equipment of a state normal school, and providing (section 5) that the State Treasurer shall keep all moneys derived from the sale of lands, or sale of timber from lands granted in aid of such school, in a separate fund, and out of the fund pay the interest on the bonds as it accrues and the principal at maturity, was in violation of Const. art. 11, § 12, requiring normal school funds so obtained to be invested and the income only used for the maintenance of the school.

Mandamus by the state, on relation of Charles S. Haire, against James H. Rice, as State Treasurer. Writ denied.

M. S. Gunn, Carpenter, Day & Carpenter, and W. T. Pigott, for relator. Albert J. Galen, Atty. Gen., and W. H. Poorman and E. M. Hall, Asst. Attys. Gen., for respondent.

HOLLOWAY, J. The Ninth Legislative Assembly of Montana passed an act entitled "An act to enable the Normal School land grant to be further utilized in providing additional buildings and equipment for the Montana State Normal College," approved February 2, 1905. This act authorizes the state board of land commissioners to issue bonds, sell the same, and apply the proceeds to the erection, furnishing, and equipment of an addition to the present State Normal School building at Dillon. It is provided that the funds realized from the sale or leasing of the lands granted by the United States to Montana for state normal school purposes (100,000 acres), and the licenses received from permits to cut timber on any of said lands, are pledged as security for the payment of the principal and interest on such bonds, except such sums as may be necessary to pay other bonds heretofore issued. There is the further provision that the state of Montana shall not be liable for the payment of the bonds or the interest. Pursuant to the provisions of this act, the state board of land commissioners issued coupon bonds to the amount of \$75,000, dated May 1, 1905, in denominations of \$1,000 each, bearing interest at 4 per cent. per annum, payable semi-annually, and caused the same to be executed as prescribed by such act. Thereafter such bonds were duly advertised for sale by the State Treasurer, and the state board of land commissioners submitted a bid for said bonds at par as an investment for the permanent common school fund, which bid was accepted, and, presumably, the money for the bonds paid over to the credit of the building fund of the Normal School, although this

does not appear affirmatively from the petition filed herein. This relator, having performed services in connection with the erection of the addition to the State Normal School building, presented a claim for \$1,200 to the executive board of the State Normal School, which was allowed and approved by that board, and allowed and ordered paid by the state board of examiners, a warrant issued for the same by the State Auditor, and this warrant presented by the relator to the State Treasurer, who refused to pay it. Thereupon this proceeding in mandamus was commenced to compel the State Treasurer to pay said warrant. An alternative writ and an order to show cause issued, and upon the return the State Treasurer, represented by the Attorney General, moved to quash the alternative writ and dismiss the proceedings, upon the ground that the petition for the writ does not state facts sufficient to entitle the relator to any relief.

The contention of the respondent is that the act of the legislative assembly above referred to is unconstitutional, first, because the act authorizes the expenditure of funds received from the sale of the normal school lands for the payment of these bonds; second, because the issuance of said bonds increases the indebtedness against the state of Montana to an amount in excess of \$100,000; and, third, because the act authorizes the expenditure of the money for the erection of a building for the State Normal School. By the provisions of section 17 of the act of Congress, approved February 22, 1889 (25 Stat. 676, c. 180), commonly known as the "Enabling Act," there was granted to the state of Montana "for state normal schools" 100,000 acres of the public land. Other grants were made for the School of Mines, the Agricultural College, the State Reform School, the Deaf and Dumb Asylum, and the State Capitol buildings; and by other sections of the same act a grant of 72 sections of the public land was made for a university, and grants, additional to those mentioned in section 17, for the State Capitol buildings and Agricultural College. Other like grants of land were made by the same act to the states of North Dakota, South Dakota, and Washington, and of the grants made by section 17 it is said: "And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the Legislatures of the respective states may severally provide." Section 5 of the act of February 2, 1905 (Laws 1905, p. 5), provides that the State Treasurer shall keep all moneys derived from the sale, leases, or sale of timber from lands granted in aid of the State Normal School, in a separate fund to be known as the "State Normal School Fund," and out of this fund he shall pay the interest on these bonds as it accrues, and the principal at maturity. Section 12 of article 11 of the Constitution of Montana provides: "The

funds of the State University and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the state against loss or diversion. The interest of said invested funds, together with the rents from leased lands or properties shall be devoted to the maintenance and perpetuation of these respective institutions."

Beyond question the State Normal School is one of the institutions of learning to which reference is here made, and, as it is the only one with which we are directly concerned in this proceeding, we may paraphrase section 12 above as follows: The funds of the State Normal School, from whatever source secured, shall be invested as prescribed by law, and the interest from such invested funds, together with the rents from leased lands belonging to the normal school grant, shall be devoted to the maintenance of such Normal School. The provisions of this section of the Constitution are mandatory and prohibitory. Section 27, art. 3. The funds referred to mean all funds. They shall be invested to draw interest, and used for no other purpose. The interest from such invested funds, and the rents from lands belonging to this grant which have not been sold, and not the principal sum derived from the sale of such lands or from the sale of timber, shall be used for the maintenance and perpetuation of the Normal School, and for no other purpose. If, then, the principal sum received from the sale of lands belonging to the normal school grant must be invested to draw interest, that principal sum cannot be used to pay off the principal or interest on the bonds authorized by the act of February 2, 1905, as provided by such act. It is apparent from the most casual reading of section 12 of article 11 of the Constitution, and section 5 of the act of February 2, 1905 (Laws 1905, p. 5), above, that as soon as the Treasurer receives any moneys from the sale of normal school lands or timber therefrom into the "State Normal School Fund" such moneys shall be invested to draw interest, under such regulations as may be prescribed by law, and that only the interest on such invested funds, together with the rents from leased lands, can be devoted to the maintenance and perpetuation of the Normal School. If this section of the Constitution is to be given force and effect, it is apparent that the act in diverting the moneys received from the sale of normal school lands, or the sale of timber therefrom, to the payment of these bonds, is in direct violation of the provisions of this section of the Constitution.

But on behalf of the relator it is contended that by the terms of section 17 of the enabling act the lands granted to the state for normal school purposes are to be held, ap-

propriated, and disposed of for normal school purposes in such manner as the Legislature of Montana may provide, and that this act is sufficiently broad to warrant the Legislature in borrowing money and pledging such lands for the payment of the principal and interest. And it is further contended that, if section 12 of article 11 of the Constitution contravenes the provisions of section 17 of the enabling act, section 12 is invalid and of no force or effect. It is perfectly apparent, then, that, in order to hold the act of the Legislature approved February 2, 1905, binding and the bonds issued in pursuance thereof valid, this court must hold section 12 of article 11 of the Constitution inoperative and of no effect. However, as the Constitution of Montana is the supreme law of this state, aside from the provisions of the Constitution of the United States and the treaties made and statutes enacted in pursuance thereof, it becomes incumbent upon this court to reconcile, if possible, the provisions of our Constitution with the enabling act under which the Constitution was adopted and the state admitted into the Union; for, however reluctant a court is to declare unconstitutional and invalid an act of a legislative assembly, it will with even greater hesitation hold inoperative and invalid a provision of a state Constitution. It is to be observed that the lands granted to the state by the enabling act are granted for specific purposes which are clearly defined—100,000 acres are granted for state normal schools, and the only limitation upon the grant is that such lands shall be held, appropriated, and disposed of exclusively for the purposes mentioned, in such manner as the Legislature may provide. Under section 17 above the Legislature might designate the agent to select and classify the lands. It might specify that the lands should be sold at private sale or at public auction. It might specify the quantity of land to be sold at any one time, or the amount to be sold to any one individual. It might provide the terms upon which the land should be sold, and the price to be received for it. It might make suitable provision for renting the land, and fix the amount to be let to any one person and the price at which it should be let; and, finally, it might make provision for the sale of growing trees upon the lands selected under the terms of this grant. All of these provisions in section 17 were met by legislative enactment comprised in title 8, pt. 3, of the Political Code.

The question now arises: Does section 12 of article 11 of the Constitution contravene the provisions of section 17 of the enabling act? Is there any conflict between the provisions of the enabling act which grants to the State Legislature authority to prescribe the manner in which these normal school lands shall be held, appropriated, and disposed of, and the provisions of section 12 of article 11 of the Constitution, which provides that the funds of the State Normal

School shall be invested, and only the interest from the invested funds, together with the rent from leased lands, may be used for the maintenance and perpetuation of the State Normal School? We are of the opinion that there is no conflict whatever. Under the provisions of section 17 of the enabling act the Legislature has to do only with the manner of the management and disposition of the lands themselves, and cannot control the funds derived from sales or leases, except in conformity with the constitutional provisions of section 12 of article 11 above. The lands were granted to the state of Montana, not to the Legislative Assembly. The Legislature may say how the lands shall be held; but it is the state which holds them, which has title to them. It is the state which says what shall be done with the lands. The Legislature may prescribe the manner of holding or disposing of them, but the title passes from the state, and the funds derived from sales or leases pass to the state, to be disposed of by the state as it may see fit, subject only to the condition that they shall be used exclusively for normal school purposes. The state may act through its constitutional convention, and, if it does so, such action is conclusive. In the absence of constitutional provision, it may act through its Legislative Assembly. Therefore, when the Constitution says that all moneys coming into the state normal school fund, from whatever source, shall be invested and only the interest and rental from leased lands shall be used for normal school purposes, the Legislature may prescribe the manner in which the funds shall be loaned, but it cannot say that they shall go into any other channel. The absence of any constitutional provision respecting the grant for Capitol Building purposes, and the grant of the Penitentiary at Deer Lodge City and the lands connected therewith, left the Legislature free to make such disposition of these grants as it saw fit, so long as the original purpose of the respective grants was observed. In the very highest sense the purpose of the grant in aid of the State Normal School is observed and carried into effect by section 12 of article 11 of the Constitution. In the wisdom of the framers of that instrument provision is made for the support of our State Normal School for all time. The principal sums derived from the sales of the lands or of timber are made to serve this institution by earning interest which may be applied to its maintenance and perpetuation, while the principal sums themselves are kept inviolate.

A great deal of consideration was given by counsel to the question whether or not the language of section 11 of the enabling act modifies the language of section 17; and, while we are of the opinion that it does not do so, under our view of the case it is not necessary to give further attention to this feature of the case. Neither are we disposed to enter into a discussion now as to

whether the bonds authorized by this act increase the state debt. So far as the other question is concerned, it need only be noticed in passing. The United States granted 100,000 acres of land to Montana "for state normal schools." The Congress was only concerned in seeing that this grant was applied to the purpose for which made. It was apparent that, in order to be available, the lands must be utilized, and the Congress therefore left it to the Legislature of this state to designate the manner in which such lands should be held, appropriated, or disposed of; but it went no further than this. It did not attempt to say when the normal school should be instituted, how many normal schools should be established, or how the funds derived from the sale or leasing of these lands should be controlled or made to work out most effectually the end sought by the grant. The constitutional convention adopted Ordinance No. 1, whereby the grant of these lands was accepted upon the terms and conditions provided in the act; and as an extra precaution and as an additional safeguard section 12 of article 11 of the Constitution was adopted, making the grant in fact an endowment, and only the interest and rental immediately available for the use of the school and such interest and rental may be used for any legitimate purpose connected with the maintenance or perpetuation of the school.

But it is said that other like bond issues have been made against these various land grants, and that for a number of years the legislative and executive branches of this state government have given to section 17 of the enabling act the construction for which contention is now made by this relator, and that such construction ought to be given great weight by this court. But, as said before, such construction has the effect of nullifying a section of our state Constitution, and this court ought to be slow indeed to declare such a result, no matter if the legislative and executive branches of the state government may have done so. Furthermore, the rule that contemporaneous construction by the department specially delegated to carry into effect a particular provision of law shall raise a strong presumption that such construction rightly interprets the provision only becomes effective when there is a reasonable doubt as to the meaning of the provision. Such construction can never abrogate the text or fritter away its obvious sense. And acquiescence for no length of time in a construction by the co-ordinate branches of government which has the effect of nullifying a provision of the Constitution will justify a court in adopting such construction unless it is the only reasonable one. Cooley on Constitutional Limitations (7th Ed.) 104-106. Furthermore, such construction, to be available as an argument, must have been uniform, and such is not the fact with reference to the subject now under

consideration. The enabling act was passed February 22, 1889, and it is not contended that any attempt was ever made by the legislative or executive departments of the state government to give to section 17 the construction now claimed for it by relator prior to March 6, 1895, when the first of these bond issues was authorized (sections 1630-1637, Pol. Code), so that the construction thereafter given by the Legislature was not in fact contemporaneous with the passage of the act. But, on the other hand, the constitutional convention met in July, 1889, and adopted section 12 of article 11 as the expression of its interpretation of section 17 of the enabling act, and the Second Legislative Assembly passed an act entitled "An act to provide for the selection, location, appraisal, sale, and leasing of state lands," approved March 6, 1891 (Laws 1891, p. 174a), by the terms of which it is specifically provided that all moneys derived from the sale of these lands shall be invested, and only the interest of such invested funds and rental from leased lands shall be used for the purpose for which the grant was made. These provisions were re-enacted in an act of the Third Legislative Assembly, approved March 9, 1893 (Sess. Laws 1893, p. 49), and again re-enacted in a code provision (section 3509, Pol. Code) approved February 25, 1895. Thus, within five months after the enabling act was passed, we have a construction of section 17 of it, by the constitutional convention, directly opposed to the view now urged by relator, and we further have apparently the same construction placed upon it, or at least an attempt to carry into effect the idea of the framers of the Constitution, by every session of the Legislature, barring the first, which did not accomplish anything in the way of legislation, from the time of the passage of the enabling act to March 6, 1895; and it does not affect the result to say that the various institutions had not been established prior to 1893.

It would seem that the early sessions of our Legislature understood that the Congress meant that the state of Montana should in the first instance build the necessary buildings for a State Normal School out of its own proper funds, and that this bounty should constitute an endowment for the maintenance and perpetuation of such school for all time to come thereafter; and that this was the construction given to section 17 of the enabling act by our Legislative Assembly is demonstrated by the action taken by it at the time these several state institutions were established. The Third Legislative Assembly provided for the establishment and location of the Agricultural College, the University, the Normal School, and School of Mines, and made an appropriation for each of these institutions. That for the State Normal School is similar to the others, and provides for an appropriation of \$15,000, and respecting this appropriation the act says:

"The money hereby appropriated, shall be expended under the direction of the state board of education, in the manner and under such restrictions as may be provided by law, and for the purpose of establishing said State Normal School, by commencing the construction of suitable buildings for maintenance of said State Normal School." It was clearly the understanding of the Legislative Assembly at that time that the state must erect the buildings, and it provided for the commencement of such work evidently with the idea that future Legislatures would make other appropriations to complete the work then initiated. So that the construction given to section 17 of the enabling act by the Montana Legislature has not been uniform, even if the terms of that section were of doubtful meaning, which does not appear to be the fact. We do not think that the construction given to that section since 1895 has been done under such circumstances, or that the result to be anticipated from a different construction now by the courts is of such character as to render applicable here the maxim "*Communis error facit jus*." While we do not agree with the reasoning of the Supreme Courts of Washington and North Dakota respecting the meaning of section 11 of the enabling act, it is interesting to note that they have held legislation of the character of the act of February 2, 1905, invalid, and bond issues similar to that authorized by our Legislature void, and that, too, under the same enabling act and somewhat similar constitutional provisions. *State ex rel. Heuston v. Maynard*, 31 Wash. 132, 71 Pac. 775; *State v. McMillan* (N. D.) 96 N. W. 310. The act of the Legislature now under consideration in authorizing the expenditure of moneys received from the sale of normal school lands, or the timber on lands granted in aid of the State Normal School, for the payment of these bonds or the interest accruing thereon, is in direct violation of the provisions of section 12, art. 11, of the state Constitution, and is therefore void and of no effect; and, being so, the State Treasurer rightly refused to proceed under it and cannot be coerced by mandamus.

The alternative writ of mandamus is quashed and these proceedings are dismissed. Dismissed.

BRANTLY, C. J., concurs.

MILBURN, J. I concur in the opinion. I think it is well, however, inasmuch as a great deal is said in the opinion, and very properly, in regard to contemporaneous construction, that the statements made in the body of the bonds themselves in respect of the validity thereof should appear. Section 3470 of the Political Code declares that the Governor, the Superintendent of Public Instruction, the Secretary of State, and the Attorney General shall constitute the state

board of land commissioners. As appears from an inspection of the bonds, these officers signed each of said bonds. In each bond appears the following statement: "It is hereby recited and certified that this bond is issued in strict compliance with and conformity to * * * the Constitution and laws of the state of Montana, and that all acts, conditions and things required and necessary to be done precedent to the issuance of this bond, and in the execution thereof, have been duly, properly, regularly and legally done, had and performed, and the full faith and diligence of the state board of land commissioners are hereby irrevocably pledged for the faithful collection and application of said funds for the payment of this bond and the interest thereon as herein and in said act provided." As shown in the opinion, the bonds are not in compliance with the Constitution. I think it proper that this construction of the law by the several executive officers of the state, who are the present incumbents of the said offices and who signed the bonds, given at the time of the issuance of the bonds, should appear as part of the history of the case. That part of section 17 of the enabling act saying that "the lands granted * * * shall be held, appropriated, and disposed of exclusively for the purpose herein mentioned, in such manner as the Legislatures of the respective states may severally provide," means, in my opinion, in a few words, this: That the Legislature may say how the lands may be sold, but does not mean that they shall say what shall be done with the proceeds. The Constitution, in my opinion, is controlling in the matter, and is not in violation of any of the provisions of the enabling act.

(33 Mont. 321)

OLEMMONS v. GILLETTE et al.

(Supreme Court of Montana. Dec. 18, 1905.)

1. PUBLIC LANDS—GRANTS TO STATE—VESTING OF TITLE—SURVEY OF LAND—NECESSITY.

A grant by the federal government to a state of school lands, described by the designation of section numbers only, vests no title in the state to any specific portion until the official survey is made and approved by the federal authorities.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, §§ 30, 138.]

2. SAME—CONVEYANCE BY STATE—PASSING OF TITLE.

As a state to whom school lands described by section numbers has been granted by the federal government acquires no title to any specific portion until the official survey has been made and approved by the federal authorities, it cannot assert title to any portion and convey the fee or grant a lease thereof.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 153.]

3. SAME—INCLOSING PUBLIC LAND—RIGHT OF POSSESSOR—EQUITABLE RELIEF.

A citizen inclosing a section of land of the public domain in violation of Act Cong. Feb. 25, 1885, c. 149, 23 Stat. 321 [U. S. Comp. St. 1901, p. 1524], declaring unlawful all inclosures of public lands made without color of title, being

without right of possession or color of title, and without hope of acquiring title, cannot call on equity to prevent another from trespassing on the land.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 25.]

4. SAME—DAMAGES—RECOVERY.

A person inclosing a section of land of the public domain for the purpose of pasturing his stock thereon has no right to recover damages for the pasturing of the land by another and the consequential injury resulting from his being compelled to allow his stock to run at large on the common range; the title to the land being in the federal government, and it alone having a right to sue for an injury to it.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, §§ 23, 25.]

5. SAME—EQUITABLE RELIEF.

Where a person inclosing a portion of the public domain has no right to maintain an action for the depasturing of the land by another, he cannot have the incidental relief by way of injunction restraining the latter from continuing to depasture the land.

Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

Action by William Clemmons against Warren C. Gillette and another. From an order refusing to dissolve an injunction pendente lite, defendants appeal. Reversed.

Walsh & Newman, for appellants. James Donovan, for respondent.

BRANTLY, C. J. This cause is before this court on appeal from an order of the district court of Lewis and Clarke county, refusing to dissolve an injunction pendente lite. The writ was issued upon the verified complaint alone, which states three causes of action, namely, for a trespass alleged to have been committed by the defendants in the summer of 1903, for a like trespass committed in the winter of 1903 and 1904, and for an injunction to restrain further trespasses, which it is alleged are threatened, until the rights of the parties may be finally adjudged. The plaintiff in his third cause of action alleges in substance that on or about January 1, 1903, he secured from the state of Montana, through the officers of its land department, a lease of section 16, township 16 N., of range 3 W., in Lewis and Clarke county; that he paid to the state the annual rental therefor and went into the actual and peaceable possession thereof; that he is now in possession, and is and has been entitled to such possession since the date mentioned; that within the past 30 days, the plaintiff being in the actual and peaceable possession as aforesaid, the defendants have cut the wire fence erected by plaintiff inclosing said land, have torn down the gates leading to the same, and have removed the lower wire of the fence for the purpose of driving their sheep thereon, and are about to take possession of the land for the season of 1905, and to depasture the same with their sheep; that the defendants, as plaintiff is informed and believes, are insolvent and unable to respond in damages; that the plaintiff has arranged to graze on the said land for the year 1905 registered

cattle and standard-bred horses; that he has no other place where he can graze the said cattle and horses; that they cannot be turned out upon the open range without coming in contact with ordinary range stock; that, if he is compelled by the action of defendants to turn them upon the open range, it will impair their value and usefulness for breeding purposes for the season of 1905; and that, if the defendants are allowed to continue their trespasses in breaking down the inclosure aforesaid, the land of the plaintiff will be depastured, and the plaintiff will be compelled to allow his said stock to run at large upon the common range, at a loss to him of from \$4,000 to \$5,000. The complaint was filed and the injunction issued on June 20, 1905. On July 22, 1905, the court heard the motion of defendants for a dissolution of the writ. It was based upon the ground, among others, that the plaintiff had no interest in the lands and premises described in the complaint. The defendants filed a demurrer to the complaint. The motion was heard upon the complaint, affidavits, and documentary evidence; the allegations of the complaint being admitted, except that the defendants are insolvent. This is controverted. After consideration of the evidence submitted, the motion was denied. The evidence showed that the lands in controversy are a part of the unsurveyed public domain; that on or about January 1, 1903, the plaintiff, having obtained an alleged lease of them from the register of the state land office, at once entered into possession and erected a four-wire fence inclosing the lands, for the purpose of pasturing the stock mentioned in the complaint; that his lease was renewed for the year 1904, but not for the year 1905, because such renewal, though requested by plaintiff, was refused; and that plaintiff has no other right to the possession than such as he obtained by virtue of his inclosure made under the alleged lease from the state of Montana for the years 1903 and 1904.

The question presented for determination, therefore, is whether a person, by inclosing portions of the public domain, thereby acquires such a right therein as will enable him to protect his possession against repeated trespasses thereon by other persons having an equal right to the use and enjoyment thereof. Incidentally, also, arises the question whether the state acquires such a right, under its grant from the United States government of lands in aid of common schools, as to enable it, prior to the official survey by the United States, and the approval of the plat by the Commissioner of the Land Office of the United States, to lease the lands so granted, and thus give a right to a citizen of the state to the use and enjoyment thereof, to the exclusion of other citizens. The question of the right of the state to make sales or valid leases of lands granted to it for school purposes by the United States, prior to the official survey thereof, is referred

to as incidental, because the respondent does not, in this court, rely, except incidentally, upon a lease from the state for the protection of his alleged right to the exclusive use of the lands in controversy. He relies mainly upon his actual, peaceable possession of the land as a part of the public domain. He concedes that it is unsurveyed, and that, until it is surveyed, the state has no title which it may convey; and this concession we think properly made. For it seems to be the rule, applicable to such grants, that, though they operate for some purposes as grants in present, conveying the fee, yet, until the official survey is made and the plat has been approved by the federal authorities, the grant is not effective to vest title to any specific portion of the land described by the designation of section numbers only. *Middleton v. Low*, 30 Cal. 596; *Medley v. Robertson*, 55 Cal. 395; *Linn v. Scott*, 3 Tex. 67; *United States v. Montana L. & M. Co.*, 196 U. S. 573, 25 Sup. Ct. 367, 49 L. Ed. 604. Even a partial survey of the particular section is not sufficient to identify it. *United States v. Birdseye* (C. C. A.) 137 Fed. 516. The reason of the rule is that until the subject of the grant is identified there is no particular portion of the great body of lands in which it is included to which the state may assert title or over which it can exercise exclusive right. The concession logically carries with it the further concession that for the same reason the state may not carve out of the subject of the grant a less estate than the fee and convey that. In other words, if it cannot, for the reasons stated, convey the fee, it may not for the same reason grant a lease.

So far as we are aware, the state has never by any legislation assumed, or attempted to assume, control of unsurveyed school lands. So we are relieved of the necessity of discussing further any right of the plaintiff founded upon a lease from the state; for, though the respondent contends that, even if the state cannot convey title, yet, since he went into possession and erected his inclosure under a lease which the state assumed to execute, he is in possession under color of title, it is apparent that this lease could have no efficacy whatever as a protection for his unlawful occupation. We therefore pass to the question presented for decision, to wit: May one citizen unlawfully inclose a portion of the public domain and protect his possession, thus acquired and held, against the trespasses of another citizen, who also has right of entry thereon, by invoking the injunctive power of a court of equity? That the inclosure of the plaintiff is violative of the statute of the United States prohibiting the fencing of public land is clear. Congress has declared unlawful all inclosures of any public lands, in any state or territory, made or maintained by any person, party, association, or corporation, without color of title, made or acquired in good faith, or an asserted right thereto, by

or under claim made in good faith with a view to entry thereof at the proper land office under the laws of the United States. Act Feb. 25, 1885, c. 149, 23 Stat. 321 [U. S. Comp. St. 1901, p. 1524]. The violation of this prohibition is made a misdemeanor, for which severe penalties are exacted. *Id.* It is practically admitted that the plaintiff has no foundation for his claim to the land in controversy, other than his inclosure; nor is it asserted or proved that he expects or intends to acquire title to the land within it from the United States. Indeed, we think it may be assumed that he cannot do so, for the area inclosed cannot be acquired by a single citizen under any provision of the laws of the United States. So he stands before a court of conscience, asserting that he is a trespasser and misdemeanor, without right of possession or color of title, and without hope of acquiring any, and demands that it use its power to aid him in maintaining his unlawful course, and that, too, against a citizen who has the same right of entry that he has himself. No case has been called to our attention in which a court has used its power for this purpose, and it seems to us that every principle of justice is against it.

The action was not brought for damages for the destruction of the fence or other improvements, but for the depasturing of the land and the consequential injury wrought by plaintiff's being compelled to allow his standard-bred stock to run at large upon the common range. The purpose for which the injunction is sought is to prevent further injury of the same kind. The United States government has for many years encouraged its citizens in this Western country to use the public domain to pasture their flocks and herds. So long has this condition of affairs prevailed that it may be said that the government has granted to each citizen a license to go upon and use these pastures. *Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618. No citizen, then, has a right to take away or destroy or limit this privilege, and, if he does so, as plaintiff has done in this case, he should not be heard by a court of equity to allege his wrong as a reason why a court of equity should protect him. The cases cited by plaintiff are not in point. In *Monroe v. Cannon*, 24 Mont. 316, 61 Pac. 863, 81 Am. St. Rep. 439 this court considered the rights of citizens under the fencing law of this state. The question decided was whether, under the statute (Pol. Code, § 3258), one citizen is at liberty to drive his stock upon the land of another and depasture it, though it is not inclosed by a legal fence, as provided by section 3250. It was held that when one person knowingly and willfully appropriates another's land in this way, though it be not fenced at all, he is liable for the damages sustained by the owner. It will be noted that the plaintiff in that case was admittedly the owner of the land in controversy, and that the defendant,

knowing this fact, caused his sheep to be herded thereon and depastured it. And so with the other cases cited. None of them recognize the right of one person to sue and recover for damages for injury by others to the lands claimed by him, where such claim is not founded upon some color of title under the laws of the United States, or a settlement with bona fide intention to acquire title.

Plaintiff contends that, since he is in the actual, peaceable possession, and the federal government makes no complaint, he is, as against the defendants, the owner of the fee, or, at least, entitled to maintain his possession. He says that the courts will not sanction the enforcement of individual rights by violence, or look with favor upon a citizen who assumes to take the law into his own hands, and by mere might or power do what he should invoke the law to do for him; for this course would encourage violence and crime. This is conceded. What we here say has no application to actions at law for injuries to property belonging to the plaintiff; nor to summary actions to recover possession of real estate, the actual, peaceable possession of which is taken or detained from the plaintiff by force accompanied by circumstances of terror, authorized by statute to prevent breaches of the peace. In such cases the title to land is not involved. We think, however, different principles should apply where the plaintiff seeks to recover for damage to land to which he shows he has no other right but a tortious possession. The proprietary title to the public lands is in the United States, and it alone can maintain an action for injury to them. If plaintiff could maintain this action for depasturing this land, he could maintain one for the cutting of timber thereon, or removal of mineral therefrom, upon the strength of his inclosure alone. That he can maintain an action for either of the latter injuries no one will claim. If the action may not be maintained for the depasturing of the land, then it must follow that the plaintiff cannot have incidental relief by way of injunction.

The order is reversed.

Reversed.

HOLLOWAY, J., concurs.

MILBURN, J. I concur in the above opinion. Nothing therein contained should be considered as implying at all that the state of Montana has not some property interest in sections 16 and 36 of the unsurveyed government lands. I do not think that the opinion is intended to convey an idea that the state has no interest, but I think it would be better to say so in plain language. In 1895, at the time the Codes were passed, it appears to me certain that the Code commissioners, as well as the Legislature, understood that the state had some interest in these sections when unsurveyed; for they

made provision in section 3489 of the Political Code (section 2339, same Code, as submitted by the commissioners), for the benefit of persons desiring to purchase such lands, who had "made improvements thereon prior to March 6, 1891, if the land was surveyed at that time, or if unsurveyed, then prior to the survey." Such legislation certainly was an inducement, if not an invitation, to people to settle upon unsurveyed school lands; and it is hard to suppose that the commissioners and the Legislature would intentionally invite or induce a citizen to violate any law of the United States. This section was repealed in 1899, and is now only worth mentioning for what it is worth as going to show that this question of the state having some interest in unsurveyed school lands has not always been understood to be entirely settled in favor of the United States and against the people of this state.

(33 Mont. 348)

LOVE v. FLAHIVE et al.

(Supreme Court of Montana. Dec. 18, 1905.)

1. PUBLIC LAND—LAND DEPARTMENT—FINDINGS OF OFFICERS—CONCLUSIVENESS.

In the absence of fraud, the findings of the officers of the Land Department on all questions of fact are conclusive on the courts, regardless of whether they are contrary to the preponderance of the evidence or not.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 301.]

2. SAME—HOMESTEAD—PREFERENCE APPLICATION.

Where applications for homestead entry on the same land were filed simultaneously after the expiration of three months from the date the official plat was approved and filed in the local land office, a finding of the Secretary of the Interior that the applicant who had preserved his right to the land intact since his settlement should be given preference over the other, who had relinquished or abandoned his right, in the absence of evidence that such right had ever been established prior to the date of settlement by such other applicant, was proper.

3. SAME—FINDINGS—QUESTION OF FACT.

As between two simultaneous applications for entry of homestead land, the question as to which of the applicants had made the prior settlement was a question of fact for the determination of the Land Department.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

Action by Edward H. Love against Annie Flahive and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Toole & Bach and Chas. E. Pew, for appellant. E. E. Hershey and Woody & Woody, for respondents.

BRANTLY, C. J. This action was brought to obtain a decree declaring the defendant Annie Flahive trustee for the benefit of the plaintiff of the legal title to the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 22, township 20 N., of range 26 W., in Missoula county. The defendant Lansing is made a party because he appears of record as a holder of a mort-

gage upon the property from his codefendant. The debt secured by this mortgage is alleged to have been paid, except a small balance. The district court sustained a general demurrer to the complaint, and, plaintiff declining to amend, entered judgment for the defendants. Plaintiff has appealed from the judgment.

The complaint is prolix, and contains much matter that is immaterial. The pertinent facts, as they appear from its allegations and the exhibits attached to and made a part of it, are substantially as follows: In May, 1882, the plaintiff, being a citizen of the United States and qualified to acquire a homestead upon the public domain under the federal homestead laws, settled upon the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 27, township 20 N. of range 26 W., and built a house thereon. He claimed this land, and also the land in controversy immediately to the north. He fenced it all, except the north 20 acres of the disputed portion. One Michael Flahive, the husband of the defendant Annie Flahive, then worked for him and built the fence. The land had not been surveyed. In October, 1884, Michael Flahive made settlement on the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 22. He built a house thereon, and thereafter claimed the whole of that quarter of the section as his homestead. He was also qualified to acquire a homestead under the laws of the United States. He retained possession of the west half of the quarter section, and also of the unfenced portion of the east half, and cultivated it. The official survey was made in 1886, but the plat was not approved and filed in the local land office until December 11, 1888. On January 2, 1889, the plaintiff executed the papers necessary to enter the land claimed by him. On January 16th Flahive executed the papers necessary to enter the S. E. $\frac{1}{4}$ of section 22. It does not appear distinctly from the allegations of the complaint when the applications were tendered to the officers of the local land office. However the fact may have been, in the subsequent controversy between the parties as to which of them was entitled to enter the land in dispute, these officers found and declared that the entries were tendered simultaneously, and by a decision made on August 20, 1890, fixed the date as June 14, 1889, and, inasmuch as the plaintiff appeared to have been the first settler, recognized his claim, permitted him to make the entry, and rejected Flahive's application as to the disputed portion. This decision was, upon successive appeals to the Commissioner of the General Land Office and the Secretary of the Interior, affirmed; the decision of the Secretary of the Interior being rendered on January 12, 1894. In the meantime Flahive died. The defendant Annie Flahive, his widow, thereupon filed a motion for a rehearing; the ground alleged being that subsequent to his settlement in 1882 the plaintiff had, by a sale, parted with his interest in the portion

of section 22 in controversy to one Rundall, who in turn had sold to Flahive, with the result that the plaintiff's right to entry was subject to that of her husband, Flahive. The rehearing was granted, and the matter referred to the local officers for proof. Again the decision of these officers was in plaintiff's favor. Upon final appeal to the Secretary of the Interior this decision was reversed, and the rights of the defendant Flahive held superior to those of the plaintiff. This decision was rendered on December 26, 1896. A motion for rehearing by the plaintiff on the ground that the records of the local land office showed that his application for entry was in fact made prior to that of Flahive, and as early as April 5, 1889, was denied on March 15, 1897. Thereupon Flahive's entry was allowed, and patent issued to Annie Flahive. In making the decision of December 26, 1896, the Secretary of the Interior had before him evidence from which he found that subsequent to the date of plaintiff's entry in 1882 he had sold his interest, whatever it was, in the land in dispute to one Rundall, who in turn sold it to Flahive, and held that, such being the case, and the two entries having been tendered simultaneously, the Flahive application should be given preference. By the motion for rehearing by plaintiff there was submitted the question whether, upon the records, the application for entry by the plaintiff had not in fact been made prior to June 14, 1889, and as early as April 5, 1889. It does not appear from the allegations of the complaint that such was the case, nor that the finding by the officers of the local land office that the entries were tendered simultaneously was erroneous. The decision of the Secretary of the Interior held in effect that, since the entries were tendered simultaneously, it was of no consequence whether June 14th or April 5th was the correct date; that the result of the sale by the plaintiff was the same in either event; and that it operated as an estoppel against plaintiff's claims to preference.

The contention is made that the officers of the Land Department erred in holding that the fact of plaintiff's application for entry was tendered to the officers of the local land office as early as April 5, 1889, was immaterial, since, if the application was in fact made at that time, he, being the first settler, had the preference. The further contention is made that, if the applications were tendered simultaneously on June 14, 1889, the plaintiff was entitled to the preference, because, Flahive having failed to avail himself of his preferential right during the three months following the approval of the survey and the receipt of the plat at the local land office (Rev. St. U. S. § 2266, 21 Stat. 140, §§ 2, 3), the right of plaintiff under his prior settlement became again superior, even if it be conceded he had lost it in the first instance by sale to Rundall subsequent to such settlement. In other

words, let it be conceded that the sale operated as an estoppel to his assertion of a claim to preferential entry until the expiration of the time during which Flahive had the exclusive right—that is, until the expiration of the three months after the receipt of the plat at the local land office; the plaintiff's old right revived, and he should have been given preference, though the applications for entry were tendered simultaneously. It is said that in deciding both matters there was error in the application of the law to the facts, and plaintiff invokes the rule that whenever the officers of the Land Department of the United States have misconstrued the law involving the rights of entrymen, or have made a misapplication of it to the facts of the particular case, with the result that a patent has been issued to the wrong person, and thus an injustice is done to another who is of right entitled to it, a court of equity will hold the former a trustee for the latter, and decree title accordingly. This rule is well settled. *Small v. Rakestraw*, 28 Mont. 413, 72 Pac. 746, 104 Am. St. Rep. 691; *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485. But we think it has no application to this case.

In holding that it was not material whether the plaintiff's application to make entry was in fact tendered on April 5 or June 14, 1889, the Secretary's decision was clearly right. By the decision of August 20, 1890, it was found by the local officers that the entries were tendered simultaneously. So far as the record shows, this finding was never questioned. Nor was the date of filing ever questioned until, by the motion for a rehearing, decided by the Secretary on March 15, 1899, the Secretary held that, even if the local officers were mistaken in fixing June 14th as the date, the fact of simultaneous application still remained unquestioned, and that the difference in the date did not avail. If it be assumed that the finding of the local officers was erroneous, as not being in accordance with the preponderance of the evidence, or that the decision of the Secretary was wrong for the same reason, yet what the evidence before them was does not appear; and, if it did, this court could not assume to review it and reach a different conclusion, for, in the absence of fraud, the findings of the officers of the Land Department upon all questions of fact are conclusive upon the courts. *Small v. Rakestraw*, *supra*, and cases cited. Again, it is manifest that if the plaintiff, after his settlement, had sold his interest to Flahive, the latter had the exclusive right of entry until March 11, 1889. As between the two applications tendered before that date, Flahive was entitled to preference. If plaintiff's right had been sold or abandoned by him, it must follow that his settlement in 1882 could not be recognized as initiating any right of preference over Flahive, who had preserved his from the date of settlement in 1884. After the ex-

piration of the three months from December 11, 1888, the parties stood upon equal footing, and the one first tendering his application was entitled to preference. Since they were tendered simultaneously, and both parties founded their claim of right upon their first settlement, the Secretary of the Interior concluded that the Flahive right, which had been preserved intact, should be given preference over one which had been relinquished or abandoned; nothing appearing to show that the latter had ever been re-established prior to the date of Flahive's settlement. After a claim has once been abandoned the right to it may be acquired by any other person who desires to take it.

Counsel for appellant have devoted much of their argument to the contention that the Secretary, in his decision of December 26, 1896, holding that the plaintiff was estopped by his sale to Rundall to claim a preference right, undertook to adjudicate the equities between the parties, whereas all these matters should have been left to be determined by a court of equity having cognizance of such matters. It is of no consequence whether the result of the sale be called an estoppel or an abandonment. The fact that there was a sale made was material in an investigation of the questions then before the Secretary, and entirely within his jurisdiction to decide, to wit: Who made the prior settlement and was therefore entitled to entry? This being a question of fact, it was within the jurisdiction of the department to decide it, and, in the absence of fraud, its finding must be deemed conclusive. *Small v. Rakestraw*, supra, and cases cited.

The judgment of the district court was correct, and must be affirmed.
Affirmed.

MILBURN and HOLLOWAY, JJ., concur.

DORAIS v. DOLL et al.

(Supreme Court of Montana. Dec. 18, 1905.)

1. APPEAL—REVIEW—DISCRETION OF TRIAL COURT—CONTINUANCE.

Under Code Civ. Proc. § 774, providing that a court may permit the amendment of pleadings on such terms as it deems proper, the refusal of a continuance, on permitting an amendment to the complaint in an action against an administrator so as to allege the presentation of the claim to the administrator, as required by Code Civ. Proc. §§ 2604, 2612, was not ground for reversal, in the absence of an affirmative showing of abuse of discretion.

2. ADMINISTRATORS—PRESENTATION OF CLAIMS—AFFIDAVIT IN SUPPORT.

Where a claim against an administrator is verified by the affidavit of the claimant, the use of the words "to the knowledge of said claimant," instead of "to the knowledge of the affiant," the words used in the statute (Code Civ. Proc. § 2604), does not render the affidavit insufficient.

3. SAME—ATTACHING WRITTEN INSTRUMENT.

Where a claimant against an administrator had entered into a contract for the sale of ice to a firm of which the decedent was a member,

had then made a compromise with the firm, and had finally made an oral agreement for the payment of the amount last agreed upon in installments at certain dates, his claim was not based on either of the prior contracts, but on the oral agreement, and hence did not fall within Code Civ. Proc. § 2607, providing that a copy of the instrument on which a claim is founded must accompany the claim.

4. SAME—REJECTION OF CLAIM.

Where a claim against a decedent's estate was presented at the office of the administrator's attorney, who under the administrator's direction indorsed the claim "Rejected" and signed the administrator's name, there was a sufficient compliance with Code Civ. Proc. § 2607, requiring the rejection or allowance of claims by the administrator.

5. TRIAL—RECEPTION OF EVIDENCE—OBJECTIONS.

In an action by an assignee of a claim, an objection to any testimony as to the assignment was too broad to raise the point that oral evidence of the assignment was inadmissible because it was in writing.

6. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEDENTS.

Under *Sess. Laws 1897*, p. 245, the testimony of plaintiff in action against an administrator as to an assignment to him of a claim against the decedent, on his consent, was incompetent, and even a general objection would have been sufficient to exclude it.

7. TRIAL—RECEPTION OF EVIDENCE—MOTION TO STRIKE OUT.

A motion to strike out the testimony of two witnesses to an assignment of claim, where the testimony of one was competent for certain purposes, was properly denied.

8. ASSIGNMENTS—EVIDENCE—SUFFICIENCY.

Evidence of an oral assignment of a claim, to which no legal objection was interposed, was sufficient to justify a finding that the assignee was the owner of the claim, though there was a written assignment which had been lost, and though the best evidence was not introduced.

9. APPEAL—BRIEF—ASSIGNMENT OF ERROR.

Error not assigned in the brief on appeal, as required by rule 10, subd. 3, of the rules of the Supreme Court (57 Pac. vii), will not be considered.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

Action by D. Dorais against George E. Doll, Con. Fleming, administrator of the estate of T. P. Fleming, deceased, and others. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant Fleming appeals. Affirmed.

Chas. O'Donnell, for appellant. Kirk & Clinton, for respondent.

BRANTLY, C. J. This action was commenced by one Louis Dupuis to recover a balance alleged to be due upon a settlement between the parties for ice sold and delivered by plaintiff to defendants. At the time the transactions occurred out of which the controversy arose T. P. Fleming, with his co-defendants George E. Doll, T. E. Fitzgerald, and W. O. Fisk, were dealing in ice in the city of Butte, under the firm name of the "Consumers' Pure Ice Company." During the pendency of the action Dupuis for value assigned his claim to Dorais, who was substituted as plaintiff in his stead. The three defendants, other than Fleming, defaulted,

and, judgment having been entered against them, the action proceeded against Fleming alone in the name of the assignee. In the meantime Fleming died, and the present defendant, his administrator, was substituted as defendant in the action. Amended and supplemental pleadings were filed to meet the changed relations of the parties. Upon a trial in the district court plaintiff had judgment. This appeal is from the judgment and an order denying defendant a new trial.

The issue presented by the pleadings and tried by the district court was whether the estate of T. P. Fleming is liable for the amount of plaintiff's claim; the administrator alleging that it grew out of dealings between Dupuis and the Consumers' Pure Ice Company prior to the time when T. P. Fleming became a copartner. Error is assigned upon the action of the district court in refusing to grant the defendant a postponement of the trial, in admitting evidence, and in submitting certain instructions to the jury. Contention is also made that the evidence is insufficient to sustain the verdict.

1. When the cause was called for trial, the plaintiff by leave of court filed an amendment to the complaint, by which he incorporated therein the necessary allegation (Code Civ. Proc. §§ 2604, 2612) that his claim had been presented to the administrator of Fleming for allowance within the time prescribed by law, and had been by him rejected (Code Civ. Proc., § 2604). Counsel for defendant moved for a postponement of the trial for 20 days to enable him to prepare an amended answer. The ground alleged was surprise; but counsel, though asked by the court to show wherein he was taken by surprise, declined to do so. Thereupon the court overruled the motion, but postponed further hearing until the opening of the afternoon session, when the trial proceeded. Defendant alleges prejudicial error. Under section 774 of the Code of Civil Procedure the court had discretionary power to permit the amendment under such terms as it deemed just and proper. This it did. It does not appear that defendant was surprised by the presentation of an issue which he could not meet, or that he did not meet it with all the evidence available in any event. In the absence of an affirmative showing of an abuse of discretion by which prejudice was suffered, the assignment must be held to be without merit. *Jorgenson v. Butte, etc., Co.*, 13 Mont. 288, 34 Pac. 37; *Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 27 Mont. 288, 70 Pac. 1114; *Christiansen v. Aldrich et al.*, 30 Mont. 446, 76 Pac. 1007.

2. For the purpose of showing that his claim had been presented to the administrator and rejected by him, the plaintiff, over objection of defendant, was permitted to introduce, with other evidence, the original claim found in the files of the district court in the matter of the estate of T. P. Fleming, with the indorsements thereon. The objec-

tions made were that the claim was not properly verified by affidavit, that there was not attached to it a copy of the instrument upon which it was founded, and that it did not appear therefrom that it had been rejected. Error is alleged in this regard. The claim as presented to the administrator was supported by the affidavit of both Dupuis and Dorais. The affidavit of Dorais was in form and effect such as is required by section 2604, supra, except that it closed with the words "to the knowledge of said claimant," instead of "to the knowledge of the affiant," the words used in the statute. This section permits a claim to be presented by the claimant himself, or by some one in his behalf. When presented by another in his behalf, the accompanying affidavit must set forth the reason why the claim is so presented. In such a case the statements must be to the knowledge of the "affiant." But, when the claimant acts for himself, the term "claimant" meets all the requirements of the statute, for the affiant and the claimant are one and the same person. The affidavit in question was sufficient. But, to make the matter doubly sure, the claim had the affidavit of Dupuis attached also. To this extent the plaintiff went further than the statute requires, in the absence of a demand by the administrator of satisfactory vouchers or other proofs in support of the claim under the provisions of section 2604, supra. It does not appear that any such demand was made in this instance. The cause of action stated in the complaint is for a balance due on a settlement between Dupuis and the Consumer's Pure Ice Company, a copartnership consisting of T. P. Fleming and others. The evidence shows that in December, 1899, and February, 1900, the firm, Fleming not then being a member, had entered into written contracts with Dupuis for the sale and delivery of ice, and that after delivery to the amount of 3,230½ tons these contracts were abandoned, and upon a settlement, not under the terms of the contract, but by way of a compromise by which Dupuis agreed to take less for the amount delivered than he would have been entitled to otherwise, the amount agreed upon as due was \$2,205. It was then orally agreed that this amount should be paid, one-third in March, one-third on May 1st, and the balance on July 1, 1900. The claim thus appears to have been due, not upon the contracts or either of them, but upon the oral agreement, the result of which was an account stated. Such being the case, the claim was not "founded on a bond, bill, note or other instrument," within the meaning of section 2607 of the Code of Civil Procedure, which appellant cites. Touching the rejection of the claim, it appears that it was presented within the required time, at the office of the attorney of the administrator in accordance with the requirements of the published notice to creditors. The attorney, under the direction of the administrator,

indorsed the claim "rejected," and signed the administrator's name. This was a sufficient compliance with the statute. Code Civ. Proc. § 2606. But, even if the administrator had neglected to indorse it at all, the plaintiff had his option, after the lapse of 10 days from the date of presentation, to regard such negligence as a rejection and to proceed accordingly.

Contention is made that the court erred in overruling the defendant's objection to the testimony of one Martin Johnson touching the assignment of the claim by Dupuis to Dorais. This witness testified to a conversation had by Dorais, Fleming, and Dupuis in his presence, in which it was agreed that, since Dupuis was indebted to Dorais, Fleming might pay to Dorais the amount due to Dupuis from the firm. Fleming agreed for the firm to do this. The objection was: "We object to any testimony being given as to this assignment of this account from Louis Dupuis to D. Dorais." If the court had sustained this objection, the case would have been at an end. The fact that the assignment had been made was put in issue in the pleadings; for it was alleged in the complaint and denied in the answer, and it would have been impossible to prove it, whether made orally or in writing. Even if a written assignment had been produced, it would have been necessary to prove its execution by the testimony of some one before it could have been introduced. The purpose of counsel in making the objection, as appears elsewhere in the record, was to exclude oral evidence of the assignment, for the reason that it had been made in writing. The objection was too broad. The evidence was competent in any event to show an admission of indebtedness by Fleming, and for this reason it should not have been excluded altogether. It would have been proper to limit the effect of the evidence, either by a ruling made at the time or by a suitable instruction submitted to the jury, had counsel so requested; but, as counsel made no such request, he may not be heard to allege error upon the ruling. Later a motion was made to strike out this testimony of Johnson and that of D. Dorais upon the same subject; the ground of the motion being in effect the same as that of the objection to the testimony of Johnson. The evidence of Dorais was clearly incompetent, because, being plaintiff in the case as assignee of the claim against the estate, he could not be a witness in the action against the administrator. Even a general objection to his testimony would have been sufficient to exclude it. Sess. Laws 1897, p. 245. But the motion was too broad, since it included all the evidence of both witnesses. Such being the case, and the evidence of Johnson being competent for one purpose, the court was not in error in denying it.

3. The criticism of the instructions made by counsel have to do rather with the suffi-

ciency of the evidence to go to the jury than with their correctness as propositions of the law applicable to the case. It is not necessary to discuss them further than to remark that, though brief, they fairly submitted the case to the jury upon the issue tried.

4. The evidence was sufficient to go to the jury, though, to establish the assignment of the claim in suit by Dupuis to Dorais, the plaintiff did not present the best evidence. The assignment was in writing, but the writing had been lost. This was clearly established. Instead of offering evidence of its contents, the plaintiff relied upon the testimony of Johnson and Dorais as to the agreement made by Fleming, Dorais, and Dupuis heretofore referred to, and the affidavit of Dupuis attached to the claim presented to the administrator for allowance, in which, besides deposing to the matter required by the statute, Dupuis swore that the claim belonged to Dorais. This evidence was before the jury without legal objection or limitation as to its office in the case, and was sufficient to justify a finding for plaintiff of the fact that he is the owner of the claim.

5. The point was made in the oral argument that the judgment is not in accordance with the verdict of the jury. This point is also argued somewhat in the brief. The contention made is that the verdict of the jury was for \$1,470, without interest, while the court entered judgment for this sum, together with interest from April 23, 1902, at the rate of 8 per cent. per annum, thus increasing the verdict of the jury without warrant of law to \$1,699. This point is disposed of by the remark that the error, if it be such, is not assigned in the brief in compliance with the requirement of subdivision 3 of rule 10 of the rules of this court (57 Pac. vii), and may not be considered.

The judgment and order are affirmed.
Affirmed.

MILBURN and HOLLOWAY, JJ., concur.

POINDEXTER & ORR LIVE STOCK CO. v. OREGON SHORT LINE R. CO.

(Supreme Court of Montana. Dec. 18, 1905.)

1. EVIDENCE—RES GESTÆ.

In an action against a railroad company for killing an animal, the testimony of a witness that the section boss showed him where the animal was when struck, and stated that after it was struck he killed it, was not admissible as *res gestæ*.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 367.]

2. TRIAL—STRIKING OUT EVIDENCE.

Where evidence is admitted without objection, and the witness is cross-examined, it cannot be stricken out on motion.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 242-244.]

3. RAILROADS—KILLING STOCK—EVIDENCE—VARIANCE.

Under Code Civ. Proc. §§ 770, 778, providing that no variance is to be deemed material

unless it actually misleads the adverse party to his prejudice, and that no judgment shall be reversed by reason of any defect in the proceedings which does not affect the substantial rights of the parties, where the complaint in an action against a railroad company charges that defendant killed an animal, proof that it was injured and killed by the section boss to end its suffering was not such material variance as to require reversal.

4. SAME—INSTRUCTION—PRIMA FACIE PROOF OF NEGLIGENCE.

In an action against a railroad company for killing an animal, an instruction, under Civ. Code, § 951, that if the animal was killed as alleged the law presumed such killing to have been the result of defendant's negligence, was not improper because the proof showed that the animal was injured and killed by the section boss.

Milburn, J., dissenting.

Appeal from District Court, Beaverhead County; M. H. Parker, Judge.

Action by the Poindexter & Orr Live Stock Company against the Oregon Short Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Jno. G. Willis, for appellant. H. R. Melton and J. B. Poindexter, for respondent.

BRANTLY, C. J. This action was brought under section 951 of the Civil Code to obtain a judgment for the value of a bull, for that the defendant corporation, operating a railroad within the state of Montana, so negligently managed its locomotive and cars that the same ran against and over said bull and killed and destroyed the same, to the damage of plaintiff in the sum of \$100. The statute provides: "Sec. 951. Every railroad corporation or company operating any railroad, or branch thereof, within the limits of this state, which shall negligently injure or kill any horse, mare, * * * bull, * * * or any other domestic animal, by running any engine or engines, car or cars, over or against any such animal, shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof. * * *" It further provides that proof of the injury or killing shall be prima facie proof of negligence. At the close of plaintiff's case the defendant moved for a nonsuit on the grounds: (1) That the complaint does not state a cause of action; and (2) that the evidence does not show that the defendant, or any of its servants or employes, did injure or kill the animal in question. The motion being denied and defendant declining to offer any evidence, the cause was submitted to the jury, which found a verdict for plaintiff. Judgment was entered accordingly. The defendant has appealed from the judgment. Its validity is assailed on three grounds: (1) That the court erred to defendant's prejudice in refusing to strike out certain evidence; (2) in overruling the motion for nonsuit; and (3) in submitting to the jury a certain instruction.

1. One Sprinkle was called as a witness. He stated, among other things, that shortly after the accident he came to the place

where it occurred and found there the section crew; that he saw the animal and knew it to be the property of the plaintiff; that the section boss pointed out to him the place where it was when struck by the train, and told him that, after the animal had been struck, he (the section boss) had "knocked him in the head." From other testimony it appears that the animal's back was injured, and that the section crew, being of the opinion that it would die in any event, killed it to end its sufferings. This evidence was admitted without objection, and the witness was fully cross-examined. Thereupon a motion was made to strike out the evidence in so far as it detailed the statements made by the section boss, on the ground that it was hearsay and incompetent. This evidence was clearly incompetent upon any theory. The declarations of the section boss were not a part of the *res gestæ*. They were not admissible as such under the statute (Code Civ. Proc. § 3126), for they were not concurrent with the main transaction—the accident—nor did they spring from it as spontaneous, voluntary statements induced by it and explanatory of it. While the declarations or admissions of an agent are admissible, as against his principal, when made within the scope of his authority and accompanying the act upon which it is sought to charge his principal, after a transaction has been closed, his subsequent declarations are narrative of a past transaction and are mere hearsay. *Ryan v. Gilmer*, 2 Mont. 517, 25 Am. Rep. 744; *Hogan v. Kelly et al.*, 29 Mont. 485, 75 Pac. 81; *Durkee v. Central Pac. Ry. Co.*, 69 Cal. 533, 11 Pac. 130, 58 Am. Rep. 562. The declarations under consideration do not even have the merit of being those of an agent who had control or management of the train. So far as the relation of the section boss to the matter of the running of the train was concerned, he stood as a stranger to the accident in question. The running of trains was a matter entirely beyond the scope of his authority. Upon no theory, then, could his declarations be treated in any other light than that of a stranger who witnessed the accident. But, though this is true, it does not follow that the court erred in refusing to strike out the evidence. Counsel sat by and permitted the evidence to be heard without objection. He cross-examined the witness, though it was apparent from the beginning that his testimony was hearsay. It was also apparent for what purpose it was introduced. Then, for the first time, he endeavored to have it excluded. Had objection been made to its introduction, the court would doubtless have excluded it. As it was, the effort to have it excluded came too late. "The practice, whether in civil or criminal cases, of deliberately permitting evidence to be given without objection in the first instance, and then moving to strike it out on grounds which might readily have been availed of to exclude it when offered, is not to be tolerated."

People v. Long, 43 Cal. 444. See, also, People v. Samario, 84 Cal. 484, 24 Pac. 283; People v. Nelson, 85 Cal. 421, 24 Pac. 1006; Wheelock v. Godfrey, 100 Cal. 578, 35 Pac. 317. Complaint is made that a like error was committed by the court in refusing to strike out testimony of Walter Poindexter to the same or similar declarations of the section boss. The record does not show that any such motion was made.

2. Contention is also made that the complaint does not state a cause of action under the statute. In this contention we think counsel is in error. It states a cause of action under the statute for the negligent killing of an animal. The contention is made, however, that, since the allegation of the complaint is that the defendant killed and destroyed the animal in question, and the evidence tends to show that it was only injured, but that it was killed by the section boss to end its suffering, the court in not sustaining the motion for nonsuit committed error. Contention is also made that the evidence does not show that the injury was done by the engine or cars of the defendant.

It is true that there is a variance between the proof and the allegation in the pleading; but it is manifest that the injury to the animal was fatal, and that for all practical purposes it was killed. In other words, the proof tends to establish the fact that the killing by the section boss merely hastened what would inevitably have been the ultimate consequence of the injury. Section 770 of the Code of Civil Procedure provides: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been misled, the court may order the pleadings to be amended, upon such terms as may be just." Evidently the defendant was not misled by this variance. Substantial justice was done between the parties, and, in view of the further provision of that Code (section 778) "that the court must, at every stage of an action, disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect," we do not think the judgment should be reversed. The pleadings and proof must correspond; but, in view of the provisions of the statute, supra, it would seem an exceedingly technical application of this rule to reverse the judgment because of this variance. Proof of an injury, which would inevitably result in death to the animal injured, substantially supports an allegation of killing. Though the evidence is not strong—that tending directly to show that the animal was killed by being struck by a train being in part hearsay—yet, assuming, as we have done, that the hearsay portion of it is properly in the case, and that it tends to support the theory that the

killing was done by the train and not by other means, it, with this evidence, was sufficient to go to the jury, and the finding of the jury thereon may not be disturbed.

3. The court instructed the jury, in substance, that, if the bull was killed in the manner and form alleged in the complaint, the law presumed such killing to have been the result of defendant's negligence. This instruction declares the statutory rule. Civ. Code, § 961. It is argued that, since the proof shows that the killing was actually done by the section boss, the instruction is not applicable to the facts. In view of what has already been said touching the probative effect of the evidence under the allegations of the complaint, it is apparent that this contention must be held to be without merit.

The judgment is affirmed.

Affirmed.

HOLLOWAY, J., concurs.

MILBURN, J. I dissent. The statute under which this action is brought is special, and a complaint drawn under it must be strictly within its provisions if the plaintiff desires to avail himself of its special benefits. Where words peculiar and essential are used in the statute, the same or words of the same signification must be employed in the pleading. Ordinarily, in a damage suit, where negligence must be proven affirmatively, it must be expressly alleged; but in cases under this statute, when an animal is injured or killed because of violent contact with cars or engines, the Legislature, with special regard for owners of the animals who cannot expect to find witnesses who saw the accident and who actually know under what circumstances the animal was killed, has provided that negligence will be presumed from the injury or killing by such contact. It was perhaps unnecessary for the Legislature to use both words, "injure" and "kill," as the word "injure" would have been sufficient to include both ideas; but it has used both words. The complaint alleges that the animal was "killed and destroyed." The word "destroyed" apparently is another way of trying to say "killed"; that is, it is used tautologically. The animal might be injured and not destroyed, but it could not be killed without being destroyed. The evidence tends to show that the bull was seriously injured, probably fatally; but this is not alleged in the complaint. It was not killed by the railroad. It was killed by a man with a sledge hammer. Killing with a sledge hammer is not killing by contact with railroad rolling stock. The company is not responsible for the acts of the slayer in the premises; and, if it were, this action would not lie under the peculiar statute under such circumstances, because the animal was not killed by contact with the rolling stock. A suit of a different character might be brought and maintained. The plaintiff could have amended its complaint in the court below to comport

with the evidence. It did not offer to amend. There was not any suggestion of an amendment. Plaintiff does not appear in this court by brief or otherwise, and I do not think that this court ought of its own motion to violate the rules of the English language for plaintiff's benefit.

In some states, in case of railroad accidents, where some people are killed and others seriously injured, it is provided by law that in case of the killing of a passenger the company may not be mulcted in damages in a sum exceeding \$5,000, leaving it to the court and jury, in suits for damages for injuries not resulting in death, to assess against the company such compensatory and punitive damages as in reason and law should be found, in sums often exceeding \$5,000. If a passenger receive injuries which in all probability would soon result in his death, and some person should shoot him dead in order to put him out of his misery, would any court for one moment listen to the plea of the railroad company that it had killed the passenger, and, therefore, ought not to be mulcted in a sum exceeding \$5,000, if sued for damages for the injury; the patient lingering some weeks before his tragic killing by a stranger? I think not. I do not think that the statutes referred to in the opinion of the majority of the court were intended by the Legislature to be invoked by us to cure in this court mistakes, errors, and omissions which the plaintiff, upon simple suggestion to the court below, could have cured by inserting in his pleading words telling what was meant to be alleged. I think the holding in the majority opinion is a bad precedent to be followed, possibly, in cases of much more importance. We should, in my opinion, decide this case upon the record as made by plaintiff below, and not upon what it should have been, but was not.

LAWRENCE v. HALVERSEN.

(Supreme Court of Washington. Jan. 31, 1906.)

1. PARTNERSHIP — EXISTENCE OF RELATION — EVIDENCE—SUFFICIENCY.

In a suit for the dissolution of a partnership and for an accounting, defendant answered, denying the partnership, but testified that plaintiff and defendant intended to enter into a partnership for the purchase of a lot and the erection of a building thereon; that defendant was to furnish \$1,000 cash; that plaintiff was to put up a building free from all incumbrances; and that defendant was to sell the property and give plaintiff his share. The building was practically completed under the terms of the agreement, and defendant took possession, to the exclusion of plaintiff. *Held*, that a finding of the existence of a partnership was justified, entitling plaintiff to relief.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 76.]

2. EQUITY — RETENTION OF JURISDICTION — DISSOLUTION OF PARTNERSHIP — RELIEF AWARDED.

A complaint alleged a partnership between plaintiff and defendant in the purchase of a lot on which a building was to be erected, set forth

the terms of the agreement, and alleged that defendant after the erection of the building took exclusive possession of the property, and prayed for a dissolution of the partnership, for an accounting, and for judgment compelling defendant to convey to plaintiff. *Held* that, as equity acquired jurisdiction of the action, it had the power to compel defendant to convey a half interest on plaintiff paying a specified sum found on the accounting to be due defendant.

3. SPECIFIC PERFORMANCE — JUDGMENT—CONDITIONS.

A judgment requiring defendant to convey property to plaintiff, on plaintiff paying to defendant a specified sum, should fix a definite time within which it should be paid.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 426.]

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by John Lawrence against Alexia Halversen. From a judgment for plaintiff, defendant appeals. Modified.

Saulsberry & Stuart, for appellant. S. D. Wingate, for respondent.

DUNBAR, J. The complaint alleged, substantially, that the plaintiff was a contractor and builder in the city of Seattle; that in the month of March, 1903, an oral contract of copartnership was entered into between the plaintiff and defendant, by the terms of which contract it was agreed that the copartners should purchase a certain lot described in the complaint; that plaintiff should improve such lot by grading it and erecting thereon a house, the plaintiff to perform the work and the defendant to furnish such sums as should thereafter be agreed upon between the parties, and that said house and lot should be owned by the plaintiff and defendant as copartners; that, in pursuance of said contract, the plaintiff entered into a contract for the purchase of the aforesaid lot, paid \$30 on account, and in consideration thereof, and that on the 11th day of April, 1903, said contract of purchase was consummated by the execution of a deed for the conveyance of the aforesaid lot to defendant, upon the payment by the defendant of the sum of \$695, being the balance due on account of the consideration money; that it was orally agreed by and between the plaintiff and the defendant, immediately after the execution of the deed to the defendant, that the plaintiff, as a part of his share to be contributed toward the partnership, should grade the lot and excavate for and put in a cement foundation upon which to erect the house, and that such grading was done and the foundation made; that it was afterwards further agreed that a certain double flat building should be erected to cost about \$2,800, of which amount the defendant should furnish \$1,000 upon the demand of the plaintiff as the work progressed, and the plaintiff should furnish the plans, together with lumber, material, labor, etc.; that in accordance with the said agreement the work of erecting the building was begun and progressed, with certain changes mutually

agreed upon; that the plaintiff had carried out his part of the partnership agreement in erecting the said building; that the defendant had expressed herself as well satisfied with the work; that on January 5, 1905, the defendant took possession of the building and lot, claiming absolute title and ownership therein, has had possession since, refused to account to plaintiff for his interest or profits in the property, and denied any right or interest of the said plaintiff in the property, and refused to settle up in any manner whatever, or to convey to the plaintiff his undivided one-half interest in said property. The prayer is for the dissolution of the partnership; that the defendant be required to pay to plaintiff the amount which shall be found due him on account of the use and occupation of the said building and lot; that the defendant be directed and required to pay to the plaintiff an amount equal to one-half of the costs of the improvements, and be directed and required to grant and convey one equal undivided one-half interest in and to the land in dispute. A demurrer was interposed to the amended complaint. The record does not show what disposition was made of it, but presumably it was denied, as the defendant interposed an answer to the amended complaint. The answer is, in effect, a general denial of all the essential allegations of the complaint. The defendant denied that she took possession of the property on January 5, 1905, but said that she had continuous possession of the property since she bought the same in 1903; she having admitted that she had bought the same and paid for it herself—in short, denied any right or interest of the plaintiff in or to said property, admitted that no accounting was made, but denied that she was under any obligation to make any accounting, and alleged that the plaintiff had no interest, right, or title in one undivided one-half, or any other interest, in said house and lot. Upon the trial by the court the facts were found substantially as alleged in the complaint, with the addition of the fact that, on the question of the accounting, \$631 was due the defendant from the plaintiff by reason of the amount furnished by each and of the paying of the taxes and of the bills paid generally in the prosecution of the work, and the judgment was that the plaintiff, upon the payment of the sum of \$631 to the defendant, was entitled to a decree declaring, adjudging, and decreeing him the owner of an equal undivided one-half interest in and to all that certain tract of land described in the complaint, free from any and all incumbrances. From this judgment this appeal is taken.

An examination of this record shows conclusively to our minds that the court was warranted in making the findings of fact which it did make. The defendant at first, in harmony with her answer, denied any interest of the plaintiff in the land, testified that no partnership agreement had ever been

entered into between them in relation to the land, and that the respondent had no interest in the matter, excepting that she had agreed to give him a certain amount of money for building a certain kind of a house. This position was afterwards abandoned, and the appellant testified, in so many words, that the original idea was that there was a partnership ownership of the lot, and that plaintiff was to contribute half, and they were to improve the lot as they could agree; and she finally testified as follows, in answer to the question: "Will you just state to the court—probably the court is informed, but I am not and I would like to know—just exactly what the terms of that contract were. What were the terms of that contract; just as briefly as you can?" "I was to furnish \$1,000 cash. He was to put up a two-story—of five rooms in each story—building in first class way and manner, and keep it free from all incumbrances and debts, and I to sell that house and he would get his share when that property was sold." The testimony of the appellant, as a whole, outside of the testimony of the respondent and his witnesses, shows conclusively that there was a partnership agreement between them, that the house was started and practically completed under the terms of the agreement, and that the appellant finally became dissatisfied, by reason of the character of material furnished by the respondent and the character of work which she claimed he was doing and the changes made in the original plans, and summarily ended the contractual relations between the appellant and respondent, by going into the house and taking possession of the same, and, as she says, throwing the appellant's tools out of the house. It is hardly necessary to say that a partnership cannot be terminated in this manner.

It is, however, technically contended by the appellant that inasmuch as this was an action for a specific performance of a contract, and the court found that there was an obligation on the part of the respondent to pay the appellant \$631, the performance of the contract could not be adjudged. It makes no difference what name may be given to an action under our system of pleading, whether in this case the action is denominated an action for specific performance or an action for an accounting, or for the dissolution of a partnership. The prayer in this case seems to be for all three. Our Code provides what the pleadings shall consist of in an action, whether that action be termed an action at law or an action in equity. The complaint is a plain and concise statement of facts constituting a cause of action, with a demand for the relief which the plaintiff claims. But it does not necessarily follow that, if the plaintiff demands relief it is not entitled to under the statement of facts set out in the complaint, it will not be awarded any relief at all. Whatever relief it is entitled to under the facts stated, the court

will award. Equity is frequently invoked for the very purpose of preventing a multiplicity of suits. The rules governing it are more flexible than the rules of law, and justice can be done the parties in one action. It is frequently said that equity needs no other court to finish its work, because of the rule that, when it once takes jurisdiction of a case, it will maintain jurisdiction to the end and adjudicate the rights of the parties. When a court of chancery acquires jurisdiction for any purpose, it will as a general rule proceed to determine the whole cause, although in so doing it may decide questions which standing alone would furnish no basis of equitable jurisdiction. Bispham's Principles of Equity (6th Ed.) § 37. It is a well-established rule that equity, having taken jurisdiction for one purpose, will retain it for others necessary to final settlement of all matters involved in the litigation between the parties growing out of and connected with the subject-matter of the suit, and will decide all incidental matters necessary to enable it to make a final determination of the whole controversy. (Beach on Modern Equity Jurisprudence, vol. 1, § 21); the only limitation being that the matters adjudicated must be germane to, or growing out of, the matter of equitable jurisdiction, and not distinct legal rights not affected by adjudication of the equitable questions involved. This liberal doctrine has been followed by the courts in all the Code states especially, and also by this court in innumerable cases. We held in *Dormitzer v. German Savings & Loan Society*, 23 Wash. 190, 62 Pac. 862, that the plaintiff in an equitable action would be accorded such relief as he was entitled to, even if the bill be given a wrong name. And in *Jordan v. Coulter*, 30 Wash. 116, 70 Pac. 257, that, where defendant set up a contract and asked its specific performance by way of cross-complaint to an action against him for conversion, the court was warranted in decreeing a cancellation of the contract when it appeared to be nonenforceable, although plaintiff did not ask for such relief, under the rule that, when equitable jurisdiction attaches for any purpose, it extends to the whole controversy. And in accordance with this principle we said, in *McKay v. Calderwood*, 37 Wash. 194, 198, 79 Pac. 629, 631: "We have frequently decided, in principle, that under the provision of the Code, litigants cannot be expelled from the court at one door under the burden of accumulated costs, with the admonition to enter the court at another door with another accumulation of costs; but that, whatever rights the plaintiff has under the complaint, conceding its allegations to be true, will be tried out by the court, and the proper judgment in the cause rendered." So that, under the allegations of this complaint, which were justified by the testimony, the court was authorized to enter the judgment which it did enter in the cause.

It is, however, contended by the appellant,

and we think with some show of reason, that the court should fix some definite time when the money due appellant should be paid; that, inasmuch as it is not compulsory upon the respondent to pay at any time, it allows him to speculate in the value of the property; and that, if the property should become valuable hereafter, he could repay the appellant the \$631 and have a deed for half of the same, or, if he did not consider that the property was worth that much, there is nothing compelling him to make the payment. We think it would be nothing more than justice to compel the respondent to promptly comply with the judgment of the court in the matter of paying the amount found to be due from him, and the judgment will therefore be modified to the extent that the respondent shall, within 30 days from the filing of the remittitur in the lower court, tender or pay to the appellant the sum of \$631 lawful money of the United States; and, if not so paid, execution shall issue for said amount in favor of appellant, to be collected in the manner provided by law, either out of other property of the respondent or by the sale of the respondent's interest in the property in controversy.

As so modified, the judgment is affirmed, with costs to the respondent.

MOUNT, C. J., and HADLEY, FULLERTON, RUDKIN, ROOT, and CROW, JJ., concur.

LEESON v. SAWMILL PHOENIX et al.

(Supreme Court of Washington. Jan. 13, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISK—PROMISE TO REPAIR.

Where a servant complained of a defective appliance, and was promised by the superintendent and foreman that the same would be repaired as soon as the servant finished the job he was then working on, and he reluctantly continued at work and was injured before the job was completed or the promised repairs made, he did not assume the risk, unless the danger was so imminent that a workman of ordinary prudence would have regarded it too hazardous and would have refused to operate the machine under the circumstances.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 638-640.]

2. SAME—QUESTIONS FOR JURY.

In an action for injuries to a servant working with defective appliances under promise of repair, whether the danger was so apparent and imminent that he should have declined to use the appliance, notwithstanding the promise of repair, held under the evidence a question for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1068-1088.]

3. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.

In an action for injuries to a servant, where the only injury suffered by plaintiff was a hernia, and he was otherwise in good condition and able to do ordinary work, and the evidence of physicians was that the hernia could probably be cured by an operation which would not cost more than \$200 or \$300, and should not

necessitate absence from work of more than six weeks, a verdict for \$5,500 would be reduced to \$3,500.

Appeal from Superior Court, Spokane County; W. T. Warren, Judge.

Action by Alfred Leeson against the Saw-mill Phoenix and others. From a judgment for plaintiff, defendants appeal. Affirmed on condition.

R. J. Danson and Post, Avery & Higgins, for appellants. Graves & Graves and B. H. Klizer, for respondent.

ROOT, J. Respondent instituted this action to recover damages for an injury sustained while operating a lathe in the wood turning department of a mill owned by the defendant mill company. The facts were about as follows: There was in said department a small lathe, capable of turning a stick about four feet in length, and a large lathe to be used upon sticks much longer. The accident occurred while the respondent was operating the latter. Respondent, Alfred Leeson, was the wood turner for appellant. Defendant William R. Roy was the superintendent in charge of the mill at the time of the accident, and appellant John Peterson was the foreman. The accident was alleged to have been caused by the use of a broken socket which holds the rest, which steadies the chisel held by the operator in turning a stick. There are two of these sockets somewhat in the shape of the letter "L." The longer side of the socket rests on the timbers forming the table and is fastened down solid by a bolt, the head of which catches in a groove extending down the middle of this brace or socket, and is held down by a crosspiece under the timbers of the table. Extending from the upright arm of one of these braces or sockets to the other is a parallel bar forming the rest. By reason of the groove in the brace, the distance of the rest from the timber in the lathe can be regulated according to the size of the piece being turned, but when it is set it is perfectly solid. The timber to be turned, a square piece of wood, being fixed in the lathe, power is applied and the clamps and the stick they hold are made to revolve with great rapidity toward the rest. The turner takes a position in front of the rest, holding a chisel or gouge, which, with its handle, is about two feet long, in a slanting position and resting upon the rest. The blade is turned upward and toward the revolving timber, so that as it comes in contact with the chisel, the corners are cut off, and the timber is made round, beaded, fluted, or otherwise shaped as the operator desires. The handle projects below the rest, and is grasped there by both hands of the turner. The rest is necessary to this work, and must be perfectly solid, since, if it were loose or wobbly, the chisel could not be held firmly, and might catch in the revolving timber, with probable injury to the person holding it. At the time

of the accident one of the sockets or braces was defective, in that a piece had been broken out of one side of the arm resting on the table next to the groove, so that the head of the bolt would not catch and hold the brace. This brace or socket had been broken for some time; but respondent continued to use it without complaint until the day of the accident, or, as he maintains, two or three days before the accident, when he called both Mr. Roy's and Mr. Peterson's attention to it. During this time he fastened the socket down by some sort of a wooden contrivance arranged by himself. When he called Mr. Roy's attention to it, Mr. Roy told him to take the socket to the office, and he would have it fixed. This Leeson did in a few minutes, but later on in the morning he brought it back, and used it on another job. When the superintendent went to the office to get the rest to have it fixed that same morning, he found it gone, although he had seen it there a little while before. Respondent claims to have returned it and again taken it after having been told by Peterson that he must get out a certain order at once, which he could only do on the large lathe. Peterson swears that he did not tell Leeson to get the rest to do the work, and he did not promise to have it repaired. Leeson proceeded to use the broken socket, although he believed there was some danger in so doing. It was while Leeson was using the lathe, after having brought back the socket the second time, that the accident is alleged to have occurred. It is claimed that by reason of the rest being loose the handle of the chisel was thrown back, hitting appellant in the abdomen and rupturing him. It was about noon at the time, and appellant sat down and did not begin work until after dinner. He finished the rest of the five timbers which he had begun to turn that day, and continued working for three or four days before he went to see a doctor. He did not complain of being hurt to Mr. Roy till a day or two after the accident. He continued to work at the mill for a few days after he had seen the doctor. Plaintiff is an expert wood turner, a married man 47 years old, and was earning \$3.50 per day. The answer, by way of affirmative defense, alleges that whatever injury said plaintiff sustained was caused by his own negligent act, and that he, by his own negligence, contributed to and caused said injury, and that said plaintiff knew any and all danger which he would and did incur in performing said labor and voluntarily assumed any and all risk in performing said work. A trial was had before a jury which brought in a verdict of \$5,500 for the plaintiff. Challenges to the sufficiency of the evidence and motions for judgment were made by appellants at the close of respondent's case and at the end of all the evidence, all of which were overruled, except as to Roy. A motion for a new trial was duly made, and denied. The court

having sustained a motion for a nonsuit as to the defendant William R. Roy, judgment of dismissal was entered as to him. Judgment was entered against defendants Sawmill Phoenix and John Peterson for \$5,500, together with costs incurred. From this judgment said defendants appeal to this court.

Appellants assign error upon the action of the court in giving certain instructions and in refusing to give others requested by them. Some of the instructions complained of were faulty or defective; but we do not believe the giving of any of them was, or was capable of being, prejudicial to appellants. Some of those requested by appellants were correct statements of law, but inapplicable to this case. Others referred to matters properly covered by the instructions given by the court. We think that the charge given fairly covered the case, and that no reversible error was committed either in the giving or refusing of instructions.

Error is assigned upon the denial of the motions made for judgment at the close of respondent's case and at the termination of all the evidence. There is no doubt but that respondent would be held to have assumed the risk of the danger that occasioned his injury, were it not that he was working, as he maintains, under a promise to repair. In fact, respondent's counsel do not claim otherwise. The pivotal question is as to whether or not respondent was working under a promise to repair such as would take the case out of the ordinary rule of assumed risk. We think that he was. The superintendent promised to have the socket repaired or replaced by a new one as soon as respondent finished the job he was then working on. But before this repairing was done, another piece of work was presented. The foreman told him that it must be done immediately. It was necessary, or at least respondent believed it was necessary, to use the large lathe and the broken socket to perform this work. Respondent testified that the foreman told him to get and use this socket, and it would be repaired when the job was completed, and he did so very reluctantly. His evidence on this point, however, is somewhat confused, and not very satisfactory. We think, however, that from all of the evidence the jury could legally have found that both the foreman and superintendent promised to repair or replace this defective appliance, and that respondent continued to work with the same expecting that it would soon be repaired or replaced. It is urged, however, by appellant that the promise does not bring the case within the exception to the rule, for the reason that they did not promise to make the repairs or change until a definite time thereafter, to wit, until the job was finished, that respondent was working upon, and hence that the promise was not effective as to the piece of work he was then engaged upon. We cannot uphold this contention. Neither of the jobs

mentioned required much time—one but a few hours, the other about one day. Believing that the socket would be repaired or replaced within a few days, he was justified in trying to work with the broken appliance, unless the danger from it was so imminent that a workman of ordinary prudence would have regarded it too hazardous, and have refused, for that reason, to so use it. He admits that he knew there was some danger to be apprehended, but did not regard injury therefrom as probable. We cannot say, as a matter of law, that the danger was so apparent and imminent that he should have declined to use the broken socket notwithstanding the promise to repair or replace. Ordinarily intelligent, reasonable, fair-minded men might properly differ upon this proposition. Hence it was a question for the jury. That body having found the issue in favor of respondent, and the trial court having upheld the verdict, we feel bound thereby.

Appellants insist that the verdict is excessive. We think the contention must be sustained. Respondent placed upon the witness stand two physicians, one of these was Dr. Baker, who, among other things, stated as follows: "I think as a rule the majority of men with ruptures are fairly comfortable with a truss, others again are not comfortable. * * * I don't know about the percentage, but I think the majority are able to engage in physical exercise and carry on some light occupation." And upon cross-examination testified: "As applied to the risk to life, if the rupture is constantly kept within the abdominal walls by a truss, there is practically little danger of any serious complication as far as life is concerned." The other was Dr. Catterson, who upon direct examination was asked the following question, and answered as indicated: "Q. About what probability of recovery would there be? Are you able to state it any more definitely than you have? A. Oh, I should judge that at least 75 per cent. of these cases are permanently cured. Many of them are cured for the time being, but in a year or two the rupture returns again; the tissue gives way and they have the same condition back again." And upon cross-examination answered questions as follows: "Q. About what length of time does it take a patient to recover from an operation of this kind? A. Oh, a patient usually gets up in two weeks or three weeks; but it is usually necessary for them to keep pretty quiet for six weeks or two months before they are able to be around very much or to do work. Q. And after that, if there is a recovery, they are substantially in a normal condition, are they not? A. Yes; a very good condition. * * * Q. And I will ask you if, in your judgment, an operation could be successfully performed upon him? A. I think so, * * * Q. I will ask you if, in your judgment, you could not take this man and perform an operation

upon him, and make him practically in normal condition, in your judgment? A. Yes; so far as I can see. I see no reason why it could not be done. * * * Q. Isn't it a fact, as shown by the medical authorities, that one-sixth of the population are suffering with rupture? A. Yes; I think that is correct. * * * Q. Doctor, this operation, assuming that it was all successful, and so on, what would it cost for nurses, medicines, doctors, and hospital fees, and so on? A. Oh, somewhere in the neighborhood of \$200 or \$300; between \$200 and \$300 maybe."

The appellants placed upon the witness stand one Dr. Essig. At the close of this doctor's testimony the counsel for respondent admitted in open court that another medical expert whom the appellants were intending to call as a witness would, if called, testify in substance the same as Dr. Essig. And said counsel for respondent also in open court made the following statement: "I am willing to take Dr. Essig's testimony as correct. I think he exaggerated a little, but I am willing to take his testimony as stating the medical facts in the case if it will save you any time." Dr. Essig, among other things, testified as follows: "He has a rupture of the right side, what we call an 'inguinal hernia'; that is, a hernia that passes through a ring, what we call the 'internal ring.' * * * Q. Now, I will ask you to state what he can use, if anything, for the purpose of enabling him to work? A. He can wear a truss, or he can have an operation performed upon it to make a permanent cure. The truss, of course, is something that supports and prevents it from coming into the canal at all. Q. What was his general physical condition? A. Good. After the examination I asked him if there was anything else. He said absolutely nothing, excepting that. Q. What was his appearance as to being in normal condition in flesh and all? A. He appears to be in a healthy condition, aside from the condition of the rings. Q. I will ask you state to the jury, from the examination which you made and from your talk with him, whether in your judgment he can wear a truss and would then be able to work and perform the ordinary occupation which he follows of a turner? A. I discovered no reason why he might not do it; none whatever. Q. I will ask you what percentage of people the medical authorities show to be suffering with rupture? A. In perhaps about 16½ per cent. of the people that you meet upon the street, where there is no family history of hernia preceding—I mean in the ancestry—have hernias, or about 22½ per cent. of people whose ancestors have had hernia have it; about 16½ per cent. of those who give no ancestral history have it. In other words, about 16½ per cent. of the people that you meet in common every-day life are afflicted with hernia. * * * Q. I will ask you to state to the jury whether or not

In your opinion as a surgeon a skillful surgeon could perform a successful operation upon this plaintiff and cure him of this rupture—make him fully cured? A. I discovered no reason whatever to indicate otherwise. Q. About how long a time would it take from the time of the operation? A. I make it a rule in my own cases to keep them in bed about three weeks after an operation. I keep them longer after hernia operations than others because you are trying to close a natural canal in it and you want to be sure that your adhesions are all perfect; so I usually keep them three weeks. A great many keep them about two weeks. Foley, who does more operations than any man in the United States and possibly than any man living, keeps them two weeks. Q. About how long would it take him to recover if the operation was successful? A. Well, full recovery is a question that has to be determined by the lapse of some time. We occasionally have a relapse after an operation. If the patient gets on without a relapse, without a recurrence of it for a year, without getting down again, we consider that the cure is permanent. But inside of six weeks a case without any complication arising in it ought to be able to resume work. Q. And perform any ordinary labor, such as turning? A. Yes; any labor that he might ever have performed previously. Q. Now, then, I will ask you, in your judgment, without this operating, with the use of a truss, if this man can perform the usual avocation of a turner? A. Any properly fitted truss ought to enable that man to perform any labor that he has ever performed heretofore. * * * The probabilities are that there has always been that weak condition upon both sides, because it shows itself at this side of the ring, a feebly closed right. * * * Q. I mean if he has got a truss on, it don't hurt him? A. Not necessarily, no, sir; because thousands wear them and work hard every day. Thousands have them and work without feeling them. * * * A. I wouldn't charge him less than \$250. Q. What other expenses would he have? A. His hospital expenses. Q. How much would they be? A. Three weeks. * * * That would cost him anywhere from \$8 a week up to \$15, \$18, \$20, \$25, or \$30, depending on the kind of room he thought he ought to have. He would rest as well in the \$8 bed as he would in the \$30 bed. * * * A. Well, sir, the average death rate in 10,000 up to 1900 is nine-tenths of 1 per cent., and it has improved a little recently. * * * Q. There is, however, a risk attending the operation? A. There is no operation that is free from risk. * * * Q. All that you can say, or the most skillful of you, is that the probabilities are that a cure will be effected and a recovery had? A. Yes; that is all any man can say."

All of the doctors testified that respondent was in a healthy normal condition, with

the exception of the hernia. Respondent himself testified that since quitting work in the mill he had engaged a small part of the time in some occupations not requiring much physical exertion. The evidence given by the medical witnesses and by respondent and in his behalf does not in our opinion show an injury justifying an award of damages in the sum found by the jury. We believe that the sum of \$3,500 would be very ample compensation, and much more in accord with what is right in the premises. An excessive verdict in a case like this is not only an injustice to the defendants, but it is a menace to the welfare of the state, and should not be upheld.

The case will be remanded with the following instructions: If respondent, within 30 days from the filing of the remittitur in the superior court, shall file a relinquishment of so much of the judgment as exceeds the sum of \$3,500, the judgment in said sum will stand affirmed. If such relinquishment is not so filed within said time, the superior court is directed to enter an order granting a new trial. Costs to appellant.

MOUNT, C. J., and CROW and HADLEY, JJ., concur. FULLERTON and RUDKIN, JJ., concur in result.

PARKHURST v. DICKINSON et ux.

(Supreme Court of Washington. Jan. 13, 1906.)

1. ASSIGNMENTS—RIGHTS OF ASSIGNEE—UNAUTHORIZED ACTS OF ASSIGNOR.

One who has assigned an instrument may not thereafter make any contract with the obligor in the instrument which will affect the holder thereof.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments, §§ 156, 157.]

2. VENDOR AND PURCHASER—DEFECTS IN TITLE—RIGHTS OF PURCHASER—FAILURE TO DISAFFIRM CONTRACT.

Where the purchaser of land is given a deed thereto at the time of the execution of a memorandum of agreement, which provides for the approval of the title by his attorney, the purchaser, in order to rescind the contract and free himself from liability for the purchase money on the disapproval of the contract by his attorney, must tender a deed of reconveyance, and his failure to do so and subsequent disposition of the property to another constitutes an affirmation of the contract and obligates him to pay the purchase price.

Root, J., dissenting.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by R. F. Parkhurst against William R. Dickinson and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

George E. De Stelgner, for appellants, Jerold Landon Finch (Wilson & Thorgrimson, of counsel), for respondent.

FULLERTON, J. On and prior to October 11, 1901, one Wakefield was indebted to the appellant William R. Dickinson in the sum

of \$1,000, for money which he had received as the agent of Dickinson. At that time he held for sale certain real property which stood in the name of one Florence Ready. Wakefield proffered this property to Dickinson for a consideration of \$3,000, \$1,000 to be paid by the assumption of a mortgage on the property for that amount, \$1,000 by the cancellation of the debt from Wakefield to him, and \$1,000 in cash payable to Wakefield. Dickinson agreed to take the property provided the title proved satisfactory. Wakefield caused the property to be conveyed to Dickinson who paid him at that time \$500, and gave him a writing of which the following is a copy: "I have this day received from you deed of conveyance of the following described premises situated in King county, state of Washington, and particularly described as follows, to wit: Lot six (6) in block three (3) of Bigelow's addition to the city of Seattle, according to the recorded plat thereof; and paid to you the sum of five hundred dollars (\$500.00) upon the purchase price thereof, such purchase price to be in all one thousand dollars (\$1,000.00). Upon the approval of the title to said premises by my attorney and upon my being satisfied that there are no unpaid claims for labor or material furnished in the improvement of said premises, then I am to pay you the balance of the purchase price, to wit: the sum of five hundred (\$500) dollars." Thereafter an abstract of the title to the property was handed Dickinson's attorney for examination, and was pronounced by him to be defective. Dickinson thereupon sought to rescind, but as Wakefield was unable to repay the money advanced this was found to be impossible. After much negotiation the parties settled the matter in this manner; Dickinson made a deed to the property to Florence Ready, and placed it in escrow with instructions to deliver it to Wakefield on payment of the \$500 advanced on the purchase price of the property at the time the contract of purchase was entered into, and the \$1,000 Wakefield was then owing him. In the meantime Wakefield had assigned the writing above quoted for value, and in due course, it came into the possession of the respondent, who brought this action to recover upon it.

The foregoing is in brief the salient facts of the case, and on them the trial court held the respondent entitled to recover. It seems to us that this conclusion is just. After Wakefield had parted with his title to the writing he could make no contract with Dickinson that would affect the holder of that instrument. Nor did it become nugatory from the mere fact that his attorney pronounced the title defective. Doubtless this fact gave him the right to rescind the contract and to recover from Wakefield the money advanced him on account of the purchase price. To do this he was required to reconvey the property to his grantor and tender

the deed to Wakefield. But he chose to keep the property, and subsequently disposed of it so as to recover, not only the \$500 advanced as part of its purchase price, but the \$1,000 Wakefield owed him. This was an affirmation of the contract of sale, not a rescission, and the appellant thereupon became obligated to pay the money according to the promise contained in the writing. Affirmed.

MOUNT, C. J., and HADLEY and DUNBAR, JJ., concur. ROOT, J., dissents.

LAWYER LAND CO. v. STEEL et al.

(Supreme Court of Washington. Jan. 10, 1906.)

1. APPEAL—NOTICE OF APPEAL—METHOD OF TAKING APPEAL—SUFFICIENCY.

The filing of a notice of appeal and subsequently serving it, indorsing on the original "Filed," the day it was filed, the admission of service thereof, after filing, by a true copy, instead of first serving the notice and then filing it as provided by Ballinger's Ann. Codes & St. § 6503, providing that an appeal may be taken by the service of written notice and the filing of the notice with proof of service, is sufficient to give the appellate court jurisdiction, especially in view of Sess. Laws 1899, p. 79, c. 49, declaring that no appeal shall be dismissed for any defect in the notice of appeal, etc.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 2159.]

2. PROCESS—SUMMONS SERVED OUT OF STATE—REQUISITES.

Ballinger's Ann. Codes & St. § 4879, provides that the summons on defendant out of the state shall require defendant to appear and answer within 60 days after personal service out of the state. A summons summoned defendant to appear within 20 days after service of summons, if served within the state and within 60 days if served out of the state, and defendant answer the complaint. The summons was personally served out of the state. *Held*, that the provision relating to service within the state became surplusage, and the summons was good as a summons served out of the state.

3. APPEAL—REVIEW—RULINGS AGAINST PARTY NOT APPEALING.

A summons was served out of the state. Garnishment issued to reach defendant's property was based on a defective affidavit. The court authorized plaintiff to file an amended affidavit. Defendant made a motion to quash the summons and service thereof and the writ of garnishment. The court quashed the summons and service thereof, but denied the motion in other respects. *Held*, that the court, on appeal by plaintiff from the order quashing the summons and service thereof, could not review the court's ruling with respect to the allowance of an amended affidavit in garnishment.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3282.]

Appeal from Superior Court, Spokane County; Wm. A. Himeke, Judge.

Action by the Lawyer Land Company against Isabel R. Steel and another. From a judgment quashing the summons and service thereof, plaintiff appeals. Reversed.

E. H. Belden, for appellant. Danson & Williams, for respondents.

HADLEY, J. Respondents moved to dismiss this appeal on the ground that the notice of appeal was first filed and afterwards served. Section 6503, Ballinger's Ann. Codes & St., states that, when the appeal is not taken at the time of the rendition of the judgment, it may thereafter be taken by the service of written notice, and within five days after such service the original notice or a copy thereof, with proof or written admission of service, shall be filed in the office of the clerk of the superior court. It is contended that the order of service and filing as set forth in the statute is jurisdictional, and that failure to follow it is fatal to an appeal. Reference is made to the decisions of this court with regard to filing and service of a statement of facts, the order of which is the reverse of that specified with reference to the appeal notice. It is also pointed out that this court held in *State ex rel. Alladio v. Superior Court*, 17 Wash. 54, 48 Pac. 733, that on appeal from a justice of the peace to the superior court it is essential, in order to confer jurisdiction, that the notice of appeal shall be filed with the justice prior to service of a copy on the adverse party. The reasoning of the court with regard to the statement of facts was that in contemplation of law there can be no statement in a case until it has been first filed therein, and that no valid service can therefore be made by copy until there is an original statement. *Erickson v. Erickson*, 11 Wash. 76, 39 Pac. 241.

Again, the reasoning with reference to the notice in cases of appeal from justices of the peace was that, inasmuch as 20 days are allowed for taking an appeal, it becomes necessary to first file the notice with the justice and then serve a copy, with proof that it has been so filed, for reasons stated by the court, as follows: "Otherwise the party making such service could withhold the notice any length of time within the 20 days allowed for taking the appeal, and the adverse party would be compelled by continual inquiry to ascertain when the notice was filed with the justice, if at all, in order to know when the 10 days allowed by section 1634 for filing the transcript would commence to run. To impose this burden upon him would be contrary to the spirit of the act aforesaid, as well as against the express provisions of said section 1631, and would place such adverse party at a material disadvantage. Consequently the fact that the service preceded the filing cannot be regarded as an immaterial matter." *State ex rel. Alladio v. Superior Court*, supra. But, whatever reasons may have led to the decisions upon the above subjects, it is nevertheless true that they did not concern the particular statute now before us, and the suggested analogy is not controlling here unless the principle involved is essentially similar. Under section 6503, supra, a notice of appeal becomes such by reason of its service. It is specifically stated that it is the service that effects

the appeal; but, if the notice and an appeal bond shall not be filed within 5 days thereafter, the appeal then becomes ineffectual. The only purpose the filing of the notice serves in its relation to the adverse party is that, after the short space of 5 days, he is thereby informed without the necessity for further inquiry that the appeal has become effectual in that particular. In the case at bar the original notice bears the following indorsement, made upon it by respondents' attorneys the same day the notice was filed: "Due service of the within, after filing of original, by a true copy thereof, is hereby admitted at Spokane, Washington, this 28th day of June, A. D. 1905." It is therefore manifest that respondents knew at the time of the service that the original notice was then on file, which fact was to their advantage rather than otherwise, for the reason that no further inquiry on their part was necessary to inform them that, so far as the filing of the notice was concerned, the appeal was effected. We think it would be a sacrifice of the plainest common-sense view, and the substitution thereof of a pure and unreasonable technical view, to hold under the above statute that the mere fact that the notice was filed by the short space of a portion of a day before it was served was a jurisdictional defect. Particularly must this be so in view of the statute of 1899, which provides that "no appeal shall be dismissed for any informality or defect in the notice of appeal, the appeal bond, or the service of either thereof, or for any defect of parties to the appeal, if the appellant shall forthwith, upon order of the Supreme Court, perfect the appeal." *Sess. Laws 1899, p. 79, c. 49.* Respondents have been in no sense misled or prejudiced here, and no order from this court in the premises, as contemplated by the above statute, is necessary. The motion to dismiss the appeal is therefore denied.

This appeal is from an order quashing a summons and the service thereof. The essential part of the summons reads as follows: "You and each of you are hereby summoned to appear within twenty days after the service of this summons, exclusive of the day of service, if served within the state of Washington, and within sixty days if served out of the state of Washington, and defend the above entitled action in the court aforesaid, and answer the complaint of the plaintiff and serve a copy of your answer on the person whose name is subscribed to this summons at Spokane, Spokane county, state of Washington, and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint which will be filed with the clerk of said court, a copy of which is herewith served upon you." The summons and complaint were personally served upon respondents in the state of North Carolina. The affidavit of service is in all respects regular and sufficient. Section 4879, *Ballinger's Ann.*

Codes & St., provides as follows: "Personal service on the defendant out of the state shall be equivalent to service by publication, and the summons upon the defendant out of the state shall contain the same as personal summons within the state, except it shall require the defendant to appear and answer within sixty days after such personal service out of the state."

It is argued by respondents, and such seems to have been the view of the superior court, that, inasmuch as the summons was so drawn that it contemplated that a service might be made either within or without the state, it is fatally defective. It is contended that the duty was upon appellant in advance to determine whether service was to be made within or without the state, and that the summons should have been drawn with reference to one or the other only. It seems to us that the essential inquiry is, was the summons by its terms confusing or misleading to respondents? We cannot see that it was. It plainly told them that, if they were served without the state, they were required to appear within 60 days. That portion relating to service within the state became mere surplusage in view of the service that was made, and it was so manifestly such that it was in no sense confusing. We therefore think the court erred in quashing the summons and its service. Under the above statute the service was equivalent to service by publication.

Inasmuch as jurisdiction of the persons of respondents was not acquired by the above process, the motion to quash was made upon the further alleged ground that a writ of garnishment, which had issued to reach respondents' property, was based upon a defective affidavit, thereby depriving the court of jurisdiction of the property, even under the substituted personal service without the state in lieu of publication. The motion also stated that after the issuance of the writ of garnishment the court made an order authorizing appellant to file an amended affidavit in aid of the writ previously issued, and averred that such order was made without jurisdiction and was void. The court denied the motion to quash upon all grounds except that the summons was defective, and allowed respondents an exception to its ruling as to the portion of the motion denied relating to the amended affidavit in garnishment. Respondents have not appealed from that part of the court's order, and the effect of the ruling, therefore, was that the court had acquired jurisdiction of the property if the original summons had been sufficient. Respondents now argue that this court should hold that the ruling of the court upon the motion with reference to the amended affidavit in garnishment was erroneous, and that there was, therefore, no jurisdiction of the property. That part of the ruling is, however, not before us for review, since there is no appeal from it.

The only question brought up by the appeal is that brought by appellant, and it relates alone to the sufficiency of the original summons and its service. Having determined that those were sufficient, the judgment quashing the summons and service is therefore reversed, and the cause remanded, with instructions to vacate that part of the order appealed from and proceed with the action.

MOUNT, C. J., and FULLERTON, RUDKIN, ROOT, and DUNBAR, JJ., concur.

DEGGENDER v. SEATTLE BREWING & MALTING CO. et al.

(Supreme Court of Washington. Jan. 9, 1906.)

1. INTOXICATING LIQUORS—LICENSES—NATURE OF PROPERTY—TRANSFER.

Where the right to transfer a liquor license is recognized by statute, such license or right to transact the liquor business becomes a valuable property right, subject to barter and sale.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 110.]

2. FRAUDULENT CONVEYANCES—ASSIGNMENT OF LIQUOR LICENSE—EFFECT AS TO CREDITORS.

Under Pierce's Code, § 6549 (Sess. Laws 1890, p. 157), providing that mortgages may be made on all kinds of personal property; section 6550 (Sess. Laws 1890, p. 158), providing that every such instrument, within 10 days from the time of the execution thereof, shall be filed in the office of the county auditor; and 1 Ballinger's Ann. Codes & St. § 4578, providing that no transfer of personal property shall be valid as against creditors, where the property is left in possession of the vendor, unless the bill of sale is recorded within 10 days after such sale—a transfer of a liquor license is void as to creditors, where the instrument of transfer is not recorded, and the assignor retains possession of the license.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 439, 485.]

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by Nathan Deggender, as receiver, etc., against the Seattle Brewing & Malting Company, a corporation, and another. From an order temporarily restraining defendants from transferring a retail liquor license, etc., defendants appeal. Affirmed.

G. M. Emory, for appellant Brewing Company. Scott Calhoun, for appellant city of Seattle. Allen, Allen & Stratton, for respondent.

MOUNT, C. J. This appeal is from an order of the lower court temporarily restraining the defendants from transferring a retail liquor license issued by the city to one I. G. Morgan, and directing the Seattle Brewing & Malting Company to deliver the paper evidence of said license to the respondent. It appears from the complaint and the affidavits filed at the hearing that on December 20, 1904, the city of Seattle issued to I. G. Morgan, of the firm of Stumpf & Mor-

gan, copartners, a retail liquor license, authorizing the sale of liquors at retail for the term of one year at No. 1222 Second avenue, at what is known as the "Brooklyn Café," in said city. The consideration for such license was \$1,000, which was paid in advance. The money for the purchase of this license was furnished to Stumpf & Morgan by the Seattle Brewing & Malting Company. Morgan agreed to repay this money in monthly payments of \$100 each until the amount due was fully paid, and to secure the repayment executed an agreement as follows: "Collateral Pledge of License. Seattle, Washington, December 9, 1904. For and in consideration of money advanced and guaranties made in my behalf and for me, and for and in consideration also of the notes hereto attached, made payable by me to the said Seattle Brewing & Malting Co., I do hereby pledge all interest, claim or demand of whatsoever nature, I have now or may have in any sum of money or in any interest in that certain license of the city of Seattle directed to me, permitting the sale of intoxicating liquors at that certain place known as 'Brooklyn Café,' and I do authorize said Seattle Brewing & Malting Co., for the better securing to it of the full payment of any and all indebtedness of any kind whatsoever that may be due it from me, to take possession and control, by any means convenient, and with as little expense to me as possible, of any claim or interest in any money growing out of the said license, or of any interest in said license. The said license herein intended to be treated as a collateral pledge for the better securing of my indebtedness to the said Seattle Brewing & Malting Co., and I do hereby waive any proceedings of foreclosure upon the same, and direct that upon my failure to pay my indebtedness to the said Seattle Brewing & Malting Co., as agreed by the oral understanding, and by the terms and conditions of the annexed notes by me made, the said Seattle Brewing & Malting Co. is then and there to take possession of all interest I have in any manner or form in said license, and take possession and control of the said license as the said Seattle Brewing & Malting Co., shall see fit, without expense and without suit, the license certificate being left in possession of the pledgee herein for the purpose of complying with Ordinance No. 4,205. [Signed] I. G. Morgan. Witness: Charles A. Thorndyke." After the license was issued a retail liquor saloon was conducted by authority of the license, at the place therein described, by the firm of Stumpf & Morgan. On January 17, 1905, certain creditors of Stumpf & Morgan brought an action against them and attached all the property of the firm, including the saloon known as the "Brooklyn Café," and took possession thereof. The retail liquor license was at that time hanging upon the wall of the saloon. On January 21, 1905, an agent

of the Seattle Brewing & Malting Company obtained possession of the license certificate by taking it from the saloon. On January 26, 1905, respondent was appointed receiver of the assets of Stumpf & Morgan, and duly qualified, and thereupon demanded the possession of the license certificate, which was refused. The brewing and malting company, on January 27, 1905, presented to the city a petition, signed by themselves and said Morgan, for a transfer of said license to one Nick Kennedy, and also asking for a change of location for the use of the license. The ordinances of said city provided for a transfer of an unexpired license, and for a change of location by consent of the city, upon application therefor, and upon the observance of certain formalities. The city was about to make the transfer, when the respondent, as receiver, brought this action for a restraining order and for possession of the certificate of license.

Appellants argue that the license, or the right to do business, in controversy, is a personal privilege conferred by the city upon the licensee, and is not such property as is subject to debts of the licensee, and that none of the rights secured thereby can be enjoyed by the receiver; that the license is merely an intangible privilege. A number of the state courts have held in accord with this position of the appellants. See *Voight v. Board of Excise*, 59 N. J. Law, 358, 36 Atl. 686, 37 L. R. A. 292; *Feigenspan v. Mulligan* (N. J. Ch.) 51 Atl. 101; *State v. Lydick*, 11 Neb. 306, 9 N. W. 560, and cases there cited; *Bonnie v. Perry's Trustee* (Ky.) 78 S. W. 208; *Black on Intoxicating Liquors*, § 130. This rule is based upon the idea that the right is a species of public trust, conferred only upon those who possess certain qualifications; that it is a police regulation, and is therefore in no sense property. Under statutes which do not permit transfers of the license from one person to another, and where the right is a personal privilege only, we think the rule stated is undoubtedly correct. But where the statute recognizes the right of transfer from one to another, and where the right is a valuable right, capable of being surrendered and reduced to money, a different rule prevails. In such cases the license or right to do business becomes a valuable property right, subject to barter and sale. It is property with value and quality. The United States courts have held that liquor licenses issued under statutes authorizing a transfer are assets of an estate, under the bankruptcy act. *Fisher v. Cushman*, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292; *In re Becker* (D. C.) 98 Fed. 407; *In re Fisher* (D. C.) 98 Fed. 89; *In re Brodline* (D. C.) 93 Fed. 643; *In re Gallagher*, Fed. Cas. No. 5,192. Mr. Black, in discussing these cases and the question involved in this action, in his note appended to the case of *Fisher v. Cushman*, *supra*, at page

392, says: "If these questions [referring especially to franchises to collect tolls and the like] should again arise, it is probable that they would be decided in accordance with the rule laid down in regard to liquor licenses; the true test being found in the question whether the franchise or right is actually transferable, with the consent of the authorities and without any practical difficulty, and whether it has a market value and can be disposed of by sale." This, it seems in reason, must be the correct rule. If a license to sell liquors is transferable, valuable, and is subject to sale, it is certainly not merely a personal privilege, but it has all the attributes of property, except tangibility, and must be treated as property. *People v. Durante* (Sup.) 45 N. Y. Supp. 1073. In this case the ordinance under which the license was issued provided for a transfer of the license upon the observance of certain formalities, about which there is no practical difficulty. The license fee was \$1,000, payable in advance, and was so paid in this case. The license was good for one year from its issue. At the time the receiver took possession of the business the license had run only about one month. The license or right to do business, therefore, had a marketable value of about \$900. Under these circumstances the license was more than a personal privilege. It was valuable personal property, and an asset of the firm of Stumpf & Morgan.

Appellants contend that the brewing company is entitled to the license under the contract or collateral pledge quoted above. We think this contention is without force as against creditors. The agreement was neither executed, acknowledged, filed, nor recorded as required by law, and the license certificate was left in possession of Stumpf & Morgan. It has been held that a contract of this kind constituted an equitable mortgage, which was not included within a statute requiring mortgages upon "goods and chattels" to be filed, upon the ground that a liquor license did not fall within the classification of goods and chattels, and would therefore be enforced. *Niles v. Mathusa* (Sup.) 47 N. Y. Supp. 38. Our statute, however, provides that "mortgages may be made upon all kinds of personal property" (*Pierce's Code*, § 6549 [Sess. Laws 1899, p. 157]), and "every such instrument, within ten days from the time of the execution thereof, shall be filed in the office of the county auditor" (*Pierce's Code*, § 6550 [Sess. Laws 1899, p. 158]). No transfer of personal property shall be valid as against creditors, where the property is left in possession of the vendor, unless the bill of sale is recorded within 10 days after such sale. 1 *Ballinger's Ann. Codes & St.* § 4578. We have held above that the license was personal property. Whether we construe the contract as a bill of sale or a chattel mortgage, it did not conform to the statute in either event, and was

void as to creditors. It follows, upon the showing made, that the receiver was entitled to the possession of the certificate of license for the benefit of creditors, and that the court properly restrained the transfer thereof by the appellants.

The order appealed from is therefore affirmed.

CROW, ROOT, DUNBAR, HADLEY, and FULLERTON, JJ., concur.

CORS & WEGENER v. BALLARD IRON WORKS et al.

(Supreme Court of Washington. Jan. 9, 1906.)

1. CORPORATIONS — STOCKHOLDERS — SERVICES TO CORPORATION — COMPENSATION.

Evidence on a hearing on the report of a receiver of a corporation considered, and held sufficient to warrant a finding that a resolution adopted at a meeting of stockholders to the effect that certain stockholders should receive no compensation for their services, unless the business of the corporation should earn such amount above all expenses, had been ignored and waived by all parties connected with the management.

2. SAME — RECEIVER — PREFERRED CLAIMS — SERVICES.

Where all parties connected with the management of a corporation treated as a nullity a resolution of stockholders to the effect that certain stockholders should receive nothing for their services, unless the corporation should earn such sums over all expenses, such stockholders on the appointment of a receiver were entitled to have their claims for services preferred under Ballinger's Ann. Codes & St. §§ 5919-5923, giving a preference to claims for services.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2283, 2286.]

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by Cors & Wegener against the Ballard Iron Works and others. From an allowance of certain claims filed with the receiver of defendant, the Railway & Steel Supply Company appeals. Affirmed.

Ballinger, Ronald, Battle & Tennant, and F. E. Brightman, for appellant. Graves, Palmer, Brown & Murphy, and Aust & Terhune, for respondents.

CROW, J. On or about October 27, 1904, an order was made in this action appointing one H. R. Clise as receiver of the defendant the Ballard Iron Works, a corporation. At said time the respondents John S. Darville, William Darville, and Charles House, stockholders in said corporation, and respondents R. M. Darville and R. J. Darville, were all in its employ, having considerable sums of money due them for their personal services, as shown by books of said corporation. In compliance with an order of court, respondents filed their claims with said receiver, asking that the same be allowed as preferred claims for all sums severally due them for services rendered within six months

prior to his appointment. The plaintiff, Cors & Wegener, a corporation, and the appellant Railway & Steel Supply Company, a corporation, as general creditors, objected to any allowance of said claims, but especially opposed their allowance as preferred claims. The receiver's report being presented to the court, a hearing was had for the purpose of determining whether said claims were entitled to allowance, and, if allowed, were entitled to any preference. Evidence was admitted and findings of fact were made by the trial court, from which it appears that in August, 1902, said Ballard Iron Works was incorporated with a capital stock of \$5,000. That at said time said John S. Darville, as a stockholder, was elected president, said William Darville as a stockholder was elected manager, and said Charles House as a stockholder was elected foreman of the foundry, and from said time until October 26, 1904, severally continued in such employments. That on September 15, 1902, at a special meeting of the stockholders of said Ballard Iron Works, at which all the stockholders were present, the following resolution was regularly passed and adopted: "Ballard, Washington, Sept. 15, 1902. Upon a call from the president, the stockholders of the Ballard Iron Works met in special session, at the office of said company, at Fourth and Shilshole avenues, Ballard, Washington, on the 15th day of September, 1902. The meeting was called to order at eight o'clock Monday evening with President John S. Darville in the chair. The following stockholders being present: John S. Darville, William Darville, Charles House, Paul Hopkins, Andrew Anderson and E. J. Hopkins. The objects of the meeting being to settle the compensation of the stockholders working in the employ of said company, the following motion was made by Paul Hopkins and properly seconded and carried by Andrew Anderson, that: William Darville as acting manager of the company receive one hundred (\$100.00) dollars per month; John Darville, receive three and $\frac{50}{100}$ (\$3.50) dollars per day; and Chas. House receive four (\$4.00) per day, provided that the business made this amount over and above all expenses. There being no further business before the meeting, the same was adjourned in proper form." That said resolution was transcribed into the minutes of the meetings of said stockholders. That all parties connected with the business management of said Ballard Iron Works thereafter treated said resolution as a nullity, and by crediting said John S. Darville, William Darville, Charles House, and others with the full amounts of wages severally due them waived its provisions. That from the 15th day of September, 1902, until the date of the appointment of said receiver, a period of more than two years, said John S. Darville, William Darville, and Charles House had been credited with their salaries, and that said entries were made upon the books of said

Ballard Iron Works, under the direction of said claimants and of the secretary of said company. That said incorporation never did a paying business. That the services actually rendered by said claimants were of the reasonable value, and amounts credited to them, respectively. That at the time of the appointment of said receiver there was due from said corporation for wages to said several claimants the following sums: John S. Darville, \$467.55; William Darville, \$585.31; R. M. Darville, \$171.10; R. J. Darville, \$97.20; Charles House, \$333.27. That each of said claimants was at the time of the appointment of said receiver regularly in the employ of said corporation and had been continuously so employed for more than six months prior thereto. That of the amounts so due said claimants, the following sums were due to each, respectively, for wages earned within a period of six months prior to the appointment of said receiver: John S. Darville, \$379.77; William Darville, \$585.31; R. M. Darville, \$109.80; R. J. Darville, \$97.20; Charles House, \$333.27. That the following additional sums were also due for wages earned within the year immediately preceding said period of six months: John S. Darville, \$87.78; R. M. Darville, \$61.30. That immediately upon the appointment of said receiver said House filed with the auditor of King county a notice of lien for his claim, and that each and all of said claimants filed with the receiver their several claims in conformity to law and the order of the court. Upon said findings, conclusions of law and an order of distribution were made allowing as preferred claims the amounts severally due said respondents for their services rendered within the six months prior to the appointment of the receiver (Ballinger's Ann. Codes & St. §§ 5919-5923), and allowing as general claims the additional amounts found due respondents John S. Darville and R. M. Darville for services rendered by them prior thereto. From said order said Railway & Steel Supply Company as a general creditor has appealed.

The only assignments of error are that the trial court erred in making said findings of fact, except the finding that said resolution was regularly adopted at the stockholders' meeting on September 15, 1902, upon which resolution appellant now relies to defeat said claims; also that the court erred in its conclusions of law and the final order made. Upon argument appellant's main contention is that the court erred in its finding to the effect that all parties connected with the business and management of the Ballard Iron Works treated said resolution of September 15, 1902, as a nullity, and by crediting the full amount of wages to the several respondents herein waived the provisions of said resolution; appellant insisting that said finding is not supported by the evidence. We have carefully examined all the evidence and conclude that all of the findings made

by the honorable trial judge are fully sustained. The conduct of all the stockholders and interested parties during the entire period of more than two years, from the date of the adoption of said resolution to the date of the appointment of said receiver, shows that said resolution was not followed or observed in any respect by them. Amounts due the several employes, whether stockholders or not, were regularly credited to them upon the books, and, although not settled in full, partial payments were regularly made thereon from time to time as they needed funds. Not only was this done, but the capital stock was afterwards increased, and thereupon respondents William Darville and John S. Darville each subscribed for additional stock to the amount of \$500, and paid for the same with their earnings; the stock being charged to them upon the books of the company. There is no evidence showing or tending to show that appellant as a creditor ever knew of said resolution before the appointment of said receiver, or that it in any way relied on the same in extending credit to said Ballard Iron Works. The only question here involved is one of fact, and, having determined that the findings made by the court are all supported by the evidence, we think the conclusions of law and final order made necessarily follow.

The judgment is affirmed.

MOUNT, C. J., and DUNBAR, HADLEY, and FULLERTON, JJ., concur. ROOT, J., having been of counsel, did not participate.

CLARK et al. v. ELTINGE et al.
(Supreme Court of Washington. May 26, 1905.)

1. COSTS — APPEAL — PREPARATION OF TRANSCRIPT.

Ballinger's Ann. Codes & St. § 6523, provides for the allowance as costs to the prevailing party in the Supreme Court of the fees of the clerk below for preparing, certifying, and sending up the record on appeal. Supreme Court rule 14 (40 Pac. x) provides for the filing and service of a cost bill by the prevailing party on appeal, and further provides that, if no cost bill is filed and certified, the clerk will tax the costs of the transcript at the rate of 5 cents a folio. *Held* that, where it does not appear from the cost bill or from the affidavit thereto that the sum charged in the cost bill for the transcript constitutes the clerk's fees for preparing, certifying, and sending up the record, only 5 cents a folio will be allowed for the transcript.

2. SAME — BRIEFS.

Ballinger's Ann. Codes & St. § 6528, provides for the allowance as costs to the prevailing party on appeal of the necessary disbursements for the printing of briefs. Supreme Court rule 14 (40 Pac. x) provides for the filing and service of a cost bill, and further provides that, if no cost bill is served, printing the briefs will be taxed at 75 cents a page. *Held* that, where the affidavit to a cost bill fails to show that the amount paid for briefs was "necessarily paid," only 75 cents a page would be allowed for briefs.

3. SAME—EXPRESS CHARGES.

Neither Ballinger's Ann. Codes & St. § 6528, relative to costs on appeal in civil actions, nor the rules of the Supreme Court, provide for the recovery of express charges as costs, and items seeking a recovery of such charges will be disallowed.

4. SAME—STATEMENT OF FACTS—STENOGRAPHER'S FEES.

Under Ballinger's Ann. Codes & St. § 6528, providing for the payment as costs on appeal of sums actually paid or incurred as stenographer's fees, not exceeding 10 cents a folio, for making a transcript of the evidence included in the bill of exceptions or statement of facts, the prevailing party is entitled to tax as costs 10 cents a folio for the oral testimony of witnesses, etc., transcribed by the stenographer at his instance, but is not entitled to tax such costs for copies of documents received as exhibits in the case.

5. SAME—EXCEPTIONS TO TAXATION.

An exception to the taxation by the clerk of the Supreme Court of the costs of a transcript, on the ground that the transcript contains irrelevant, redundant, and immaterial matter, but failing to point out the matter complained of, will be overruled, as the clerk will not go over the record to determine what part thereof is irrelevant and redundant.

Exceptions to taxation of costs. Overruled.

For former opinion, see 80 Pac. 556.

The following is the opinion of the clerk on the taxation of costs:

"On the 18th day of April, 1905, the court filed its opinion in this case (38 Wash. 376, 80 Pac. 556) reversing the judgment of the lower court, and, within the 10 days thereafter allowed by the rules of court, the appellants served and filed their cost bill, in substantially the following words, omitting the title of the cause:

Transcript	\$ 35 00
Statement of facts	81 00
Opening brief	45 00
Expressage	75
Reply brief	28 50
Expressage	35
Docket fee	5 00
Attorney's fee	25 00

Total \$220 60

"State of Washington, County of Spokane
—ss:

"I, B. C. Mosby, first being duly sworn, say that I am the attorney for the appellants in the above-entitled action, and that the foregoing is a true bill of costs and disbursements incurred on the appeal of the said cause. B. C. Mosby.

"Subscribed and sworn to before me this 25th day of April, 1905. F. L. Taylor, Notary Public in and for the State of Washington, residing at Spokane, Washington. Seal of F. L. Taylor."

"Subsequently, and within 10 days after the service upon them of the cost bill, the respondents served and filed their exceptions thereto, fully raising the issue as to the sufficiency of the allegations of the cost bill to entitle the appellants to recover thereon.

"Rule 14 of the Supreme Court (40 Pac. x) is as follows: 'Rule 14. Cost Bills.—(1)

The prevailing party shall, within ten days after the filing of the opinion in a case, file with the clerk a cost bill, and serve upon the adverse party a copy thereof. If any adverse party objects to any item or items thereof, he shall serve upon the prevailing party exceptions to such cost bill, together with affidavits in support of his exceptions, if desired, and file the original, with proof of service, with the clerk of the court within ten days after service of the cost bill upon him. Whereupon the clerk shall tax the costs to which the prevailing party is entitled, and shall notify the parties of such taxation. Either party may except to the taxing of any item or items, or failure to tax the same, and shall serve such exceptions on the adverse party and file the same with the clerk within ten days after such taxation. Said exceptions shall be heard by the court on the first motion day after the expiration of five days from the date of service of such exceptions. If the party fail to appear at such time, the court will consider such exceptions upon the affidavits on file and the records in the cause, and determine the same.

(2) If no cost bill is filed and served, the clerk will tax as costs only the clerk's costs, printing of briefs at seventy-five cents per page, the statutory attorney fee, and the cost of transcript at the rate of five cents a folio. (3) Where a cost bill has been served and filed in time, and no exceptions thereto filed, objection thereto will be deemed to have been waived.'

"It therefore becomes the duty of the clerk at this time to tax the costs to which, in his judgment, the prevailing party is entitled, subject to an appeal to the court as provided above, and notify counsel thereof. Heretofore it has not been the general practice of the clerk to assign any reason for his conclusions, and where exceptions have been taken to the rulings of the clerk the court has very rarely filed an opinion in passing upon them. Hence I have thought it advisable to depart from the customary practice this once, and give the bar generally the benefit of my conclusions. Costs are allowed strictly in pursuance of the statutes, and unless some statutory authority therefor is found no costs at all can be allowed, and presumptions cannot be indulged in favor of a party claiming costs. Ballinger's Ann. Codes & St. § 6528, is the provision under which costs in civil actions are allowed in the Supreme Court, and is as follows: 'Costs shall be allowed in the Supreme Court, irrespective of any costs taxed in the case in the court below, to the prevailing party in the Supreme Court, on any appeal in any civil action or proceeding as follows: The fees of the clerk of the Supreme Court paid by the prevailing party, the fees of the clerk of the court below for preparing, certifying and sending up the records on appeal, or any supplementary record, paid by the prevailing party, and twenty-five dollars attorneys' fees, besides his

necessary disbursements for the printing of briefs, and any sum actually paid or incurred by the prevailing party as stenographer's fees, not exceeding ten cents a folio, for making a transcript of the evidence or any part thereof included in the bill of exceptions or statement of facts; but when the judgment of the court below shall be affirmed in part and reversed in part, or affirmed as to some of the parties and reversed as to others, or modified, the costs shall be in the discretion of the court, and when the judgment is reversed and a new trial ordered, the court may in its discretion direct that costs of the prevailing party shall abide the result of the action. When in the opinion of the Supreme Court a brief of the prevailing party shall be unnecessarily long, or improper in substance, the court may in its discretion order the disallowance as costs of any part or the whole of the disbursements for printing the same.'

"The first item excepted to is 'Transcript, \$35.' It does not appear, from the cost bill or from the affidavit thereto, that this item constituted the clerk's fees for preparing, certifying, and sending up the record. The transcript might have been prepared from office files, in which event the clerk would only be required to compare it with the records of his office and certify to it, for which the law authorizes him to make a charge of 5 cents a folio. It is true the transcript may have cost the prevailing party the sum charged, but under the statute they may only recover the amount paid the clerk, and as they make no claim to having paid the clerk any sum, I am of the opinion that they are only entitled to the sum of 5 cents per folio therefor, which by careful computation we find to be \$16.95.

"The next item is printing briefs. The statute allows the necessary disbursements for the printing of briefs, and in my judgment the affidavit to the cost bill should show that the amount paid was 'necessarily paid,' and, that fact not appearing in the affidavit, the statute has not, in my opinion, been sufficiently complied with to entitle the appellants to recover thereunder. I have therefore allowed 75 cents per page as provided by the rules, where no cost bill is filed, amounting to \$71.25.

"No provision either in the statute or rules is made for the recovery of express charges, hence those items are disallowed.

"Statement of facts: The statute reads: 'Any sum actually paid or incurred by the prevailing party as stenographer's fees, not exceeding ten cents a folio, for making a transcript of the evidence or any part thereof included in the bill of exceptions or statement of facts.' It is much more difficult in this instance to determine just what the Legislature meant, but in my judgment it meant such parts of the evidence as could not be made a part of the record without transcribing, such as the oral testimony of witnesses,

etc., and did not include copies of documents which were received as exhibits and filed in the case. I think the statute might also be construed to include copies of public records which from their nature, and inconvenience to the public, could not be spared by their respective custodians. The statute requires copies of the proposed statement of facts to be served upon the adverse party, but the maximum amount that can be recovered for the statement is 10 cents per folio, and no provision is made for a recovery for the copies. In this case the appellants filed the affidavit of the stenographer to the effect that the statement of facts contained not to exceed 405 folios, and that he made the same at the instance of the appellants. I am inclined to the opinion that there is a sufficient showing to entitle the appellants to recover at the rate of 10 cents per folio therefor, or \$40.50.

"Respondents also except to the transcript as containing 'irrelevant, redundant, and immaterial matter' not necessary nor used by the court in determining the issues. This may be true; but, as the irrelevant and redundant matter is not pointed out, the clerk will not attempt to go over the entire case simply for the purpose of determining what, if any, part of the record is irrelevant and redundant. That exception is therefore overruled. Attorneys filing exceptions to cost bills should bear in mind that, if they raise a question of fact by their exceptions, the burden of proof is upon them. This may seem to be a little incongruous, in view of the fact that the costs are in the nature of an original, unliquidated claim against the opposite party. But it seems to me that it would be decidedly impractical to adopt any other course. While there seems to be no provision of the statutes requiring the cost bills in the Supreme Court to be verified, manifestly they should be verified, otherwise an exception to some statement in the cost bill, which is verified, would necessarily control. The practice, therefore, is that upon serving and filing a cost bill verified, substantially in the language of the statute, within 10 days from the filing of the opinion, a prima facie case is made, which must be overcome by proof of the party excepting thereto."

PER CURIAM. Ordered that the motion to retax costs in this cause be, and the same is hereby, denied.

BLINCOE v. CHOCTAW, O. & W. R. CO.
(Supreme Court of Oklahoma. Sept. 8, 1905.)

1. EMINENT DOMAIN—DAMAGES—INJURIES TO PROPERTY NOT TAKEN.

In the exercise of the right of eminent domain under the statutes of Oklahoma, which provides for the appointment of commissioners to assess the injuries sustained by individuals because of the exercise of such right, which

statute contains a provision with reference to the duties of such commissioners, as follows: "And they shall inspect said real property and consider the injury which such owner may sustain by reason of such railroad; and they shall assess the damages which said owner will sustain by such appropriation of his land"—damages to be allowed are not limited to the real estate taken and injured, but may be such damages as the owner actually sustains to either his real or personal property by such appropriation of his land.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 371-377.]

2. SAME—MEASURE OF DAMAGES—INSTRUCTIONS.

An instruction of the court as follows: "The law does not permit you to fix speculative, boom, or fancy values upon the property in controversy, but the law requires you to determine the reasonable market salable value of the property if the owner was offering to sell on usual terms and a purchaser desired to pay"—is not erroneous because of the use of the word "boom" as here used; the court having in this and other instructions been careful to advise and instruct the jury that the market value as contradistinguished from a purely imaginative or speculative value must be their basis for the assessment of damages.

3. EVIDENCE—VALUE OF PROPERTY—CONDEMNATION PROCEEDINGS.

It is not error in the trial court, where a question of damages under the law of eminent domain is being tried, to reject evidence of offers to purchase other property in the neighborhood of the land in question, about the time condemnation proceedings were instituted.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 416-423.]

4. EMINENT DOMAIN — DAMAGES — MEASURE — INSTRUCTIONS.

In the trial of such case, an instruction to the jury as follows: "All these matters are proper for your consideration in determining the reasonable market value of the property, at the time it was taken, and the damages, if any, to the remaining lot, but you are not bound by this evidence alone. You have been permitted to make a view and inspection of the property in question, and you have a right to exercise your own judgment, based upon your inspection and observation, together with all the evidence which has been permitted to go to you during the trial. Remember all this evidence and your own observation is for the purpose of enabling you to form a correct judgment as to the reasonable market value, if any, of the remaining lot, caused by the excavation made by the railroad company on the lots that it took from Mr. Blincoe, and in your deliberation you must consider all the evidence that you believe credible and give it such weight as is in your judgment you deem it entitled to"—is not error.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 559, 564.]

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice John H. Burford.

Proceeding by the Choctaw, Oklahoma & Western Railroad Company against Edward L. Blincoe to condemn land. Judgment for plaintiff, defendant brings error. Reversed.

This is a proceeding instituted by the defendant in error in the district court of Logan county, to condemn lots 3 and 4 in block 63, East Guthrie, for a right of way and terminals for the defendant in error. At the time said condemnation proceedings

were instituted, plaintiff was the owner and in the actual possession of lots 3, 4, and 5 in said block 63, and at that time and for several years prior thereto had been making use of said lots as and for the purpose of a lumber yard, in which business of retailing lumber he was then and had been for several years engaged. Commissioners were duly appointed by the judge of the district court to appraise the damages to said lots 3 and 4 in said block 63, upon and across which the line of said railroad was projected, and on the 21st day of March, 1902, filed their report as to these two lots in the words and figures following, to wit:

Value of land taken.....	\$5,500 00
Value of improvements taken.....	2,200 00
Moving lumber.....	250 00
Total.....	\$7,950 00

The commissioners in their said report also state "that the said Choctaw, Oklahoma & Gulf Railroad Company has appropriated all of said described lots and tract of land," etc. To this award both parties excepted and demanded a trial by jury, and the cause was duly certified to the district court of said Logan county for trial. At the March term, 1903, the cause came on for trial before a jury, and, after the same had been concluded, and after the jury had deliberated upon their verdict, they returned into court and announced that they were unable to agree, and were therefore discharged. On the 21st of December, 1903, the cause again came regularly on for trial in said court before a jury, and during the course of this trial the following facts were developed, viz.: Lot 5 in the same block lies immediately contiguous to lots 3 and 4 and was owned and being made use of by Blincoe in connection with his lumber yard, and as a part thereof. Also at the time of the condemnation Blincoe had a large stock of lumber in the yard, and that the defendant in error immediately took possession of said lots 3 and 4 and the buildings and improvements thereon, removed the buildings and improvements, and excavated the ground to a considerable depth covering the whole of lots 3 and 4 and up to the line of lot 5, thereby making a retaining or supporting wall necessary to preserve the integrity of that lot. The action of the railroad company also made it necessary for Blincoe to remove the stock of lumber and other building material then on hand, from said lots 3 and 4. The evidence disclosed that from January, 1902, up to and after the time these premises were condemned, there was a very marked increase or appreciation in the value of all real estate in the vicinity of the premises condemned. At the conclusion of the evidence the jury were permitted, under the charge of a bailiff, to view the premises, and after their return into court were instructed by the court. The jury returned their verdict in the cause in the following

form: "We, the jury in the above-entitled cause do upon our oaths find the issues in favor of the defendant, and assess the amount of his recovery at the sum of \$7,500." Ten special questions were also submitted to the jury, among them the following: "Q. 1. What was the fair market value of the two lots of the defendant taken by the railroad company for right of way at the time of the condemnation? Ans. Six thousand five hundred dollars. * * * Q. 3. What was the value of lot 5 in block 63 at the time lots 3 and 4 were condemned by the plaintiff railway company? Ans. Twenty five hundred. * * * Q. 9. What was the value of lot 5 immediately after the railroad company completed its excavation on lots 3 and 4? Ans. Fifteen hundred dollars."

Joseph Wisby, J. C. Strang, and John Devereux, for plaintiff in error. Dale & Bierer, for defendant in error.

GILLETTE, J. (after stating the facts). Four assignments of error are set out in the petition in error herein, viz.: First, that the court erred in receiving incompetent evidence over the objection of the plaintiff in error; second, that the court erred in overruling a motion for a new trial; third, because the said judgment of the said district court is contrary to law and not sustained by the evidence; fourth, for error committed by the court in its charge to the jury, which was duly excepted to at the time by the plaintiff in error. These alleged errors will be discussed in the order in which plaintiff in error has presented them in his brief.

The first and principal proposition involved in this case arises on the rejection of evidence offered on the part of plaintiff in error tending to prove the necessary expense of moving his lumber yard from the lots 3 and 4, and in giving instructions No. 10. During the examination of plaintiff in error he was asked the following question: "I want to ask you, Mr. Blincoe, about the removal of your lumber, what did it cost you, or what was it worth to remove your lumber from those lots?" Which question was objected to, and the objection sustained. The tenth instruction to the jury is as follows: "Tenth. You are instructed that you cannot allow the defendant lot owner anything for injury to his business, or for removing his business from the property in controversy, or for any depreciation, if that existed, in the value of his stock of material by reason of having to move the same from the premises and to conduct his business elsewhere. The law does not allow a railroad company to acquire a mercantile business, or to take personal property by condemnation. All that the railway company has a right to take is the land with the improvements thereon; that is, the land with the buildings and improvements that were affixed to the lots. A railroad company has no authority to take anything else, and consequently cannot be charged for

anything else than the real estate taken, and any damages to the remaining portion not taken belonging to the same owner." It is to be observed that at the time of the condemnation the plaintiff in error had a large stock of lumber in the yard embracing lots 3 and 4 and 5, which he was forced to move, and as a part of his damages plaintiff in error offered to show what was the reasonable expense of making such removal of his lumber from the location taken by the railroad company, to another. This offer was refused, and this, together with the tenth instruction above set out, constituted the ground of error now being considered.

In the ruling upon the admission of testimony objected to, and in giving instruction No. 10, Chief Justice Burford, before whom the case was tried in the court below, manifestly followed the plain and unequivocal declaration of Lewis on Eminent Domain (volume 2 [2d Ed.] § 488), an authority quoted by nearly all the text writers and liberally cited by the courts in determining questions pertaining to eminent domain. That authority says: "But damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid"—citing *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 247, and many other authorities, a number of which we have carefully examined. Upon investigation of this subject we are of the opinion that the above paragraph from Lewis on Eminent Domain, general in its terms and apparently laying down a universal rule, cannot be sustained as the law of this case, and the ruling of the court and instruction given pursuant thereto must be held to be erroneous under the law of this territory. In the absence of constitutional provision, or statutory authority, or in a case where a constitutional provision or statute limits liability in the exercise of the right of eminent domain to the property actually taken, the limit of liability would be fixed by the value of what is taken, and consequential damages could not be considered. This is substantially the declaration of the Supreme Court of California in *Central Pac. R. R. Co. v. Pearson*, supra. The statute of that state then under consideration governing the action of commissioners appointed to condemn a right of way for a railway says: "They shall ascertain and assess the compensation for the land sought to be appropriated, to be paid by said company to the person or persons," etc. Commenting upon this provision of the statute, the court says: "The item of \$700 allowed Pearson for the supposed cost of removing his personal property from the premises was improperly allowed by the commissioners, and should have been stricken out by the court below. In cases of this character the landowner is entitled only to such damages, over and above the value of the land sought to be appropriated, as the statute

gives. Whether the statute gives only the cost of fencing, over and above the value of the land taken, as claimed by the appellant, it is unnecessary to decide for the purposes of this case. Upon that question the statute is by no means clear, but we are satisfied that it does not, in any event, allow compensation over and above the value of the land actually taken, the cost of fencing and cattle guards, and such damages as may accrue to that portion, if any, of the land of the landowner which is not taken, by reason of its severance from the part taken, and the construction of the railroad in the manner proposed. The cost of removal from the premises is not included." And in *Selden v. City of Jacksonville*, 28 Fla. 558, 10 South. 457, 14 L. R. A. 370, 29 Am. St. Rep. 278, it was held that a constitutional guaranty that private property shall not be 'taken' or 'appropriated' without compensation, did not embrace mere consequential damages resulting to property abutting on a street from a change of grade of the street or other improvements thereof, but only to a trespass upon or physical invasion of the property. The reverse of this, however, is held by courts determining like questions under different constitutional and statutory provisions.

Under the first Constitution of Illinois (1848), which provided that no man's property shall "be taken or applied to public use without just compensation being made to him," the Supreme Court of the United States, in *Transportation Co. v. Chicago*, 99 U. S. 635, 644, 25 L. Ed. 336, held that "persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction." In 1870 the Constitution of Illinois was changed so as to read, "Private property shall not be taken or damaged for public use without just compensation"; and under this provision the Supreme Court of Illinois, in *Rigney v. City of Chicago*, 102 Ill. 64, said that the framers of that instrument (Constitution of 1870) evidently had in view the giving of greater security to private rights by giving relief in cases of hardship not covered by the preceding Constitution, and that the new rule required compensation in all cases where it appeared "there has been some physical disturbance of a right either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally." This determination of the Supreme Court of Illinois was commented upon by the Supreme Court of the United States in *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638, and was by that court approved. The Supreme Court of the state of Washington (*Brown v. City of Seattle*, 31 Pac. 313, 18 L. R. A. 161), citing the change in the Illinois

Constitution, says the action of that state "has since been followed by West Virginia, Alabama, Missouri, Nebraska, Arkansas, Texas, Georgia, California, Colorado, Kentucky, Montana, and the Dakotas," and cites numerous decisions sustaining the construction given by the Supreme Court of Illinois to the language of its Constitution of 1870, and then says: "Every court in which the point has been raised has decided in favor of the private citizen, but, were it now presented to us for the first time in the history of the phrase, we should not be disposed to view it in any way different from that expressed in the cases we have cited. If private property is damaged for the public benefit, the public should make good the loss to the individual. Such always was the equity of the case, and the Constitution makes hitherto disregarded equity now the law of it." The Supreme Court of Colorado, in *City of Pueblo v. Strait*, 36 Pac. 789, 24 L. R. A. 392, quotes with approval the foregoing language of the Washington court.

From these cases it will appear that there is no general rule governing the manner in which damages to private property, when taken for public use, is to be measured. Such measurements must depend upon the constitutional or statutory law authorizing the taking, and consequential damages will be allowed when justified by such provisions. Is the taking and damage to personal property, under the law of eminent domain within the foregoing rule, applicable to real estate? If so, the exercise of this power over or upon the property of a citizen should carry with it the right of the citizen to recover all the damages he has suffered by reason of its exercise, whether to his real or personal property. The taking of private property for public use is said to be the exercise of the right of eminent domain, and with reference to it Redfield, on the Law of Railways (volume 1, p. 229), under the title of "eminent domain," says: "It is a distinct right from that of public domain, which is the land belonging to the sovereign. This is a superior right which the sovereign possesses in all property of the citizen or subject, whether real or personal, and whether the title were originally derived from the sovereign or not."

The tenth instruction of the court is not in harmony with the foregoing definition of eminent domain as set out in the above quotation from Redfield on the Law of Railways. This instruction, in harmony with the ruling of the court upon the introduction of testimony, instructs and advises the jury as the law in this case, where real estate is condemned and personal property injured and damaged because thereof, such injury and damage cannot be recovered in this action, and this we have attempted to show cannot be upheld unless it is in accord with the statute of the territory and the Constitution of the United States. We do

not think it is. The statute under which these condemnation proceedings were had reads as follows: "The commissioners shall be duly sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which such owner may sustain by reason of such railroad; and they shall assess the damages which said owner will sustain by such appropriation of his land." The language of our statute above quoted would seem to leave it immaterial whether or not a railroad company can "take personal property" by condemnation proceedings. If damages to personal property is incident and necessarily caused by the exercise of the power of eminent domain in taking land, then the "owner" is injured "by reason of such railroad." That the owner "by reason of such railroad" has been put to the expense of removing the stock of lumber then on hand is not disputed; neither can it be denied that the cost of such removal was made necessary by the condemnation of the real estate, and is an injury and damage to the owner to the extent of the cost of such removal. In other words, this ruling would permit the railroad to take the owner's land and thereby compel him to bear whatever expense may be consequent upon preserving his personal property, and yet be remediless therefor. If this shall be held to be the law, then the constitutional provision, "nor shall private property be taken for public use without just compensation," becomes almost as much a sword as a shield to the private citizen, for the compulsory addition to the cost of the personal property of the citizen is as much a taking as the absorption of the real estate itself. Nor is this conclusion relieved or its result modified to the citizen by the fact that the agency thus arbitrarily adding to the cost of his property cannot carry on the business in which he is engaged. The result to the citizen in this case is the same whether the railroad company are benefited by the expenditure or not. In either event the cost of removing the lumber is dead loss to him, occasioned by this taking of his real estate under this power of eminent domain.

In *Grand Rapids R. R. Co. v. Cheeseboro* (Mich.) 42 N. W. 69, the court, by Mr. Justice Campbell, say: "The damages in such a case must be such as to fully make good all that results, directly or indirectly, to the injury of the owner in the whole premises and interests affected, and not merely the strip taken"—citing a large number of cases, among them *G. R. & I. R. R. Co. v. Heisel* (Mich.) 11 N. W. 215, where the court again says: "It need hardly be said that nothing can be fairly termed compensation which does not put the party injured in as good a condition as he would have been in if the injury had not occurred. Nothing short of this is adequate compensation. * * *

And in *Judd v. Hull Dock Co.*, 9 Q. B. 413, it

was held that, where the property taken was a brewery in operation, the damages included the necessary loss in finding another place of business." And then say: "The following are cases where the damage done was, as in this case, distinct from the actual taking of property from the party injured"—citing a number of English cases. In *Chicago, etc., R. Co. v. Hock*, 118 Ill. 587, 9 N. E. 205, the court say: "The inconvenience and cost of removal of the business from the premises condemned are mentioned as elements of damage proper for consideration. This, however, is in harmony with the ruling in *St. Louis, V. & T. H. R. Co. v. Capps*, 67 Ill. 607." In the case of *A., T. & S. F. R. Co. v. Schneider* (Ill.) 20 N. E. 41, 2 L. R. A. 422, the following instruction to the jury was upheld, viz.: "The jury are further instructed that, in determining the amount of compensation to be awarded to the defendants in this case, they may properly take into consideration all evidence tending to show the actual value of the leasehold interest to the respective defendants of which it is proposed to deprive them; the actual loss to be suffered by these defendants, from the loss, destruction, or deprivation of the improvements placed by them in the properties specially adapted to the conduct of their business, if any, shown by their evidence; the reasonable cost of removal, and of refitting in other localities for the further conduct of business, as shown by the evidence." In *Hannibal Bridge Co. v. Schaubacher*, 57 Mo. 582, it was held: "Under a statute requiring the commissioners in condemnation proceedings to assess the damages which the owner of the land may sustain by reason of such appropriation, consequential damages resulting from the appropriation may be allowed. The assessment is not confined to the land actually taken." This statute differs from the Oklahoma act chiefly in the use of the word "damages," where our statute contains the word "injury." Both statutes were doubtless intended to cover the same ground and protect the same interests, and to the same extent, and neither one has any reference to speculative, imaginative, or hypothetical damages, but both were intended to and do refer to and include all the actual damages capable of exact or approximate measurement which the owner may sustain by reason of such railroad. The expense of moving the stock of lumber in the yard at the time of the condemnation and appropriation is a direct loss to the owner, and an added burden not shared by other members of the public.

In *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463, Mr. Justice Brewer, speaking for the court of the concluding clause of the fifth amendment to the Constitution of the United States, which says: "Nor shall private property be taken for public use without just compensation," holds as follows:

"It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government." And he further says: "When he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him. * * * The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages; the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that, if the adjective 'just' had been omitted and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of these two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken." In that case a private corporation had obtained a charter and franchise from the state of Pennsylvania for the erection of a dam and lock in the Monongahela river for the passage of boats on that stream, with the right to take tolls for the passage of the same. The United States, under this power of eminent domain, condemned and took from the corporation the dam and lock by it constructed, and the trial court held the corporation was entitled to compensation for the dam and lock, but to nothing for the franchise or right to take tolls. In that case, as in this, it was urged that the government was liable for what it obtained, viz., the dam and lock, but for nothing more. To this argument Justice Brewer replied as follows: "It is also suggested that the government does not take this franchise; that it does not need any authority from the state for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, etc. * * * But this franchise goes with the property; and the navigation company, which owned it, is deprived of it. The government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and, when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived."

It may be suggested that in that case the franchise was an inseparable part of the property taken, and therefore was inevitably swept

away by the taking of the tangible property. Likely that is so, but it was no more an inevitable loss to the owner than is the necessary cost of moving the lumber in the case at bar; nor can it be said to be any more capable of ascertainment. A franchise may be valuable in one place, and of no value in another. It may be of value to-day and because of climatic conditions of little or no value to-morrow. In any event, it is at best a matter of computation to be made from the testimony in the case, and not susceptible of that degree of certainty which can reasonably be expected in reference to the expense of moving a given quantity of lumber. The fact that it inheres to or grows out of some right in other property, real or personal, can make little difference to the owner, who is called upon to alone bear the burden of its loss. To him the loss is the same whether it is the questionable value of a franchise, or the direct compulsory taking of the money necessarily expended in removing a stock of lumber. And, as said by Justice Brewer above, the loss to him is measured not by the use the taker may make of it, but by the burden thus cast upon him.

Second. It is next objected that the court erred in its sixth instruction to the jury, which reads as follows: "(6) Several witnesses have been permitted to give their opinions as to the value of the property in question, and the amount of depreciation in value of lot 5. These opinions have been varied and conflicting, and are not controlling on your judgment. They must be considered and given just such weight as the conditions entitle them to. The value of this class of testimony depends upon the intelligence, fairness, and impartiality of the witness, his knowledge and experience in determining values, and whether he is prejudiced, biased, or influenced by like interests. The law does not permit you to fix speculative, boom, or fancy values upon the property in controversy; but the law requires you to determine the reasonable market salable value of the property, if the owner was offering to sell on usual terms and the purchaser desired to buy." The particular objection to this instruction is the use of the word "boom" as used. On a careful reading of this instruction it will be seen that the court made use of the three words "speculative," "fancy," and "boom," as nearly equivalents of each other, and did not intend by the use of the word "boom" to extend the ordinary meaning of the other words made use of. Undoubtedly a railroad company, when it invokes the aid of the power of eminent domain to condemn the property of a private citizen for its use, must be required to make full and just compensation to him, and and it has done so when it has paid the fair market value of the property on the day it was taken, without reference to how or when that market value came into existence. But it must be its market value, as contradistinguished from a purely imagina-

tive or speculative value which does not in fact exist; and this we think is what the court intended to, and did in fact, instruct the jury in the language complained of. The court said: "The law does not permit you to fix speculative, boom, or fancy values upon the property in controversy; but the law requires you to determine the reasonable market salable value of the property, if the owner was offering to sell on the usual terms and the purchaser desired to buy." In this the jury were instructed that under the law they were required to fix the damages at such a sum as the owner, desiring to sell, could at the time secure from a purchaser who desired to buy, and informed them that they could not allow or fix speculative, boom, or fancy value. This is the law as we understand it, and we think the jury could not have been misled by the language used. While in the abstract this court does not approve of the word "boom" as a word descriptive of values which should not be considered by a jury in estimating values arising under the law of eminent domain, yet, as the word was used in the instruction complained of, we are unable to determine that there was error committed justifying a reversal of this case, and especially where, as in this case, other instructions, particularly the second, makes the meaning of the court clear that the fair market value of the property at the time should be made the basis of the jury's consideration of damages, and uses language easily comprehended by them.

Third. The third assignment of error is that the court erred in rejecting the evidence of offers to purchase other property in the neighborhood of the land in question about the time of the condemnation proceedings. We do not think the evidence offered in this case brought it within the rule applicable to that class of evidence. Actual sales of adjoining or abutting property at or about the time of the taking by condemnation is a widely different proposition, and even this class of evidence is received with very great caution. In *Keller v. Paine*, 34 Hun (N. Y.) 177, cited in *Am. & Eng. Enc. of Law*, vol. 10, p. 1154, it is said: "If evidence of offers is to be received, it will be important to know whether the offer was made in good faith, by a man of good judgment, acquainted with the value of the article, and of sufficient ability to pay; also whether the offer was cash or credit, or in exchange, and whether made with reference to the market value of the article or to supply a particular need or fancy." The evidence failed to show the existence of any of these conditions, and we think the evidence was rightfully rejected.

Fourth. It is further contended by the plaintiff in error that the court erred in the fourth instruction, in which said instruction the court permitted the jury to exercise their judgment, based upon their inspection of the premises and the evidence submitted upon the trial. We are unable to agree with coun-

sel in this contention. In instruction No. 4 the court, after adverting to the evidence before the jury, and the elements which entered into a correct determination of the elements of damage in the case, then proceeds: "All these matters are proper for your consideration in determining the reasonable market value of the property, at the time it was taken, and the damages, if any, to the remaining lot; but you are not bound by this evidence alone. You have been permitted to make a view and inspection of the property in question and you have a right to exercise your own judgment, based upon your inspection and observation, together with all the evidence which has been permitted to go to you during the trial. Remember, all this evidence and your own observation is for the purpose of enabling you to form a correct judgment as to the reasonable market value of these lots March 21, 1902, and the depreciation in value, if any, of the remaining lot, caused by the excavation made by the railroad company on the lots that it took from Mr. Blincoe, and in your deliberations you must consider all the evidence that you believe credible, and give it such weight as in your judgment you deem it entitled to." Counsel for both plaintiff and defendant have examined and discussed this subject with commendable energy and zeal, and have collected and presented the conflicting decisions of the courts to such extent that there is little left for this court to do further than to announce the guiding principle which seems to run through the great mass of authority on the subject. Extreme views have been expressed upon both sides, but we think the great weight of authority has adopted the medium ground followed by the court in this case, viz.: Not to permit the jury to view the premises and therefrom determine all the questions involved in the case, to the exclusion of the sworn testimony of all the witnesses in the case; nor, on the other hand, to shut their eyes to, and their consciousness of, all the physical facts plainly before them, but rather that they make use of their vision to more clearly and certainly understand the physical facts testified to by the witnesses, and thus the better be able to weigh and assign to each the measure of truth to which he intended to testify, and thereby, in that respect, assign to the several witnesses the measure of credence which they thus find their evidence entitled to. We have spoken of physical facts because we believe it is only as to physical facts that this view of the jury is permitted. The jurors are generally strangers to both parties and to the premises involved, and, certainly a stranger wholly unacquainted with the value of property in that vicinity, and seeing only the physical effect upon the premises in the way of cuts or fills, could not be permitted to indulge his own arbitrary whim or notion of the value of the premises thus affected, and the measure or amount of damages thus occasioned; but

it does not follow that they may not correct an erroneous impression or false statement of a witness as to a physical fact by their own personal observation. As illustrated by some of the authorities, suppose a witness testified that a certain cut made by a railroad is 18 feet deep, and the jury, viewing the premises and standing in the cut, are yet able to overlook the bank, and thus know that the cut is less than the height of an ordinary person; must the jury in such case disregard the evidence of their eyes and still believe that the cut is 18 feet deep? If such were the law, it is pretty safe to assume that no jury of intelligent American citizens would ever administer the law. It is assumed that the instruction given warrants the jurors in basing their verdict on the knowledge gained at the view, in disregard of the testimony given in court, if they so desire. This assumption is unwarranted by the language employed. The language of the instruction is: "And you have a right to exercise your own judgment, based upon your inspection and observation, together with all the evidence which has been permitted to go to you during the trial." We think the instruction was not erroneous.

In reaching this conclusion it is not necessary to hold or indorse the theory that the jury are not bound by the testimony of the witnesses, but may rest their verdict entirely upon the information obtained at the view; neither are we inclined to go to the other extreme and hold that the jury are not to take into consideration, in any degree, the evidence of their own senses. We incline rather to accept the middle ground adopted by the Supreme Court of Kansas and Wisconsin, and other authorities, in which it is said: "The evident theory and intention of the Legislature was that cases would arise in which it would be necessary and proper that the evidence offered in the court should be supplemented by the knowledge gained by the jury from a view. It would be impracticable and foolish to require a court, after having sent a jury to view the property or place, to direct them not to consider what they had there observed, and what was obvious to all who might look." *City of Topeka v. Martineau* (Kan. Sup.) 22 Pac. 419, 5 L. R. A. 775. And in *Washburn v. Railroad Co.*, 59 Wis. 364, 18 N. W. 328, the Supreme Court of Wisconsin say: "We understand that the object of a view is to acquaint the jury with the physical situation, conditions, and surroundings. What they see, they know absolutely. If a witness testify to anything, which they know by the evidence of their senses, on the view, is false, they are not bound to believe—cannot believe—the witness, and they may disregard his testimony, although no other witness has testified on the stand to the fact as the jury know it to be. For example, if a witness testify that a certain farm is hilly and rugged, when the view has disclosed to the jury and to every juror alike

that it is level and smooth, or if a witness testify that a certain building was burned before the view, and the view discloses that it has not been burned, no contrary testimony of witnesses on the stand is required to authorize the jury to find the fact as it is, in disregard of the testimony given in court." We therefore conclude that the information obtained at the view, as to these mere physical facts, is evidence to be considered in connection with all that is offered in court; but, "the evidence which the jurors acquire at the view is not to be elevated to the character of exclusion or predominating evidence, * * * but simply give it place along with the other evidence in the case in their deliberations." *C., K. & W. Ry. Co. v. Parsons* (Kan. Sup.) 32 Pac. 1083.

For the error in refusing evidence in reference to the expense of moving the lumber, and repeated in instruction No. 10, wherein the jury are told they must not allow the plaintiff in error anything for the expense of removing the lumber from lots 3 and 4, the judgment of the court below must be reversed, and the cause remanded for a new trial therein; the costs of this court to be taxed to defendant in error. All the Justices concurring, except BURFORD, C. J., who tried the case in the court below, not sitting.

CONKLIN v. YATES et al.

(Supreme Court of Oklahoma. Sept. 7, 1905.)

1. WITNESSES — COMPETENCY — TRANSACTIONS WITH DECEDENT.

By the provisions of section 4212, St. 1893, no party shall be allowed to testify in his own behalf to any transaction or communication had personally by such party with a deceased person, when the adverse party is the assignee of such deceased person, where he has acquired title to the cause of action immediately from such deceased person.

2. SAME.

In an action by the grantor to set aside a deed conveying lands in this territory against a person who has acquired title to the land in controversy immediately from the deceased grantee of such grantor, such grantor is not allowed to testify in his own behalf to any transactions or communications had by him individually with his grantee, who is deceased, whether such transactions or communications are oral or in writing.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 633, 654.]

3. SAME.

Facts which constitute fraud on the part of a deceased person necessarily include personal transactions or conversations with such deceased person.

4. TRIAL—OBJECTIONS TO EVIDENCE.

An objection to the introduction of testimony should state the precise grounds of objection. An objection on one ground will not raise other grounds of objection.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 194-196.]

5. WITNESSES — COMPETENCY — TRANSACTIONS WITH DECEDENT.

Section 4212, St. 1893, does not prohibit the proof of transactions and communications had personally between a party to the suit and

the deceased grantee of such person by disinterested witnesses, or other competent evidence other than that of a party to the suit.

6. TRIAL—DEMURRER TO EVIDENCE.

Upon a demurrer to the evidence, the court must consider as true every portion of the evidence tending to prove the case of the party resisting the demurrer, and cannot weigh conflicting evidence.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, 353, 356.]

7. SAME.

In order to sustain a demurrer to the evidence, the court must be able to say, as a matter of law, that the party introducing the evidence has not proved his cause.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 347.]

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice C. F. Irwin.

Action by James Conklin against Annie Yates and others. Judgment for defendants, and plaintiff brings error. Reversed as to certain defendants, and affirmed as to others.

Cottrel and Hornor, for plaintiff in error. John Devereux and U. M. Jones, for defendants in error.

BEAUCHAMP, J. This action was commenced by plaintiff in error against defendants in error in the district court of Logan county. The allegations of the petition, so far as necessary are: That the plaintiff is the owner of 160 acres of land in Logan county, of the value of \$2,000; that two tax deeds had been issued against the land by the county treasurer to M. Yates, which were void; that A. G. Jones was a real estate broker and land agent at Guthrie; that, plaintiff being desirous of clearing his title to his land and canceling these tax deeds and reposing confidence and trust in Jones, and Jones representing to plaintiff that to accomplish this purpose it was proper and beneficial that the plaintiff put the title to the land in Jones' name, plaintiff made a quitclaim deed to the land to Jones, as his agent and trustee, without any consideration, relying upon the statements and representations of Jones; that Jones, instead of faithfully carrying out his trust, and in order to cheat and defraud the plaintiff out of his land, sued in his own name to cancel said tax deeds, and, being successful, did, without plaintiff's knowledge or consent, make a deed to the land to the defendant Annie Yates for a grossly inadequate consideration, so that she might become the reputed owner thereof, and so that Jones might himself obtain the consideration for the transfer, and that the plaintiff might be deprived thereof, except the sum of \$50, which he offered to give to the plaintiff, but which plaintiff refused; that upon obtaining the said conveyance, and pretending to be the owner thereof, the defendant Annie Yates executed a mortgage on the land to and in favor of the defendants Williams & Swinford to secure her note in the sum of \$500; that the defendants, Annie

Yates and Williams & Swinford, had notice and knowledge of the facts and circumstances of the fraud, and of the want of ownership in and title to the land on the part of Jones and Annie Yates, and notice and knowledge of the plaintiff's title thereto. The prayer of the petition is that Annie Yates be decreed to hold the land as mere trustee of the plaintiff, and be required to convey it to the plaintiff, and that the mortgage of Williams & Swinford be canceled. The defendants answered, admitting that Annie Yates is in the possession of the real estate in the petition set out, and the defendants Williams & Swinford admit that they have a mortgage thereon for the sum of \$500, with interest at 12 per cent. per annum, and defendant Annie Yates further admits that she is and claims to be the owner of said land in fee simple, and, except as admitted, the defendants deny generally the allegations in the petition, and deny all participation in or knowledge of the alleged fraud, and pray a dismissal of the suit. The case was tried before the court without a jury, and at the conclusion of the plaintiff's evidence, the defendants separately demurred to the evidence. The demurrers were by the court sustained, and judgment was rendered dismissing the action at the cost of plaintiff. A motion for a new trial was heard and overruled, and exceptions saved. Plaintiff in error brings the case here by petition in error and case-made.

It is agreed by the parties in this case that the plaintiff was the original owner of the land by patent from the government; that two tax deeds were issued by the county treasurer of Logan county to M. Yates; that afterwards a quitclaim deed was made by the plaintiff for the land to A. G. Jones, January 27, 1902, the consideration named in the deed being \$1; that on October 6, 1902, Jones brought suit in his own name in the district court of Logan county against Joe M. Yates, administrator of M. Yates and her heirs, to cancel these tax deeds, and which on December 17, 1902, resulted in a judgment canceling both tax deeds, and vesting the title in Jones; that on the same day Jones made a warranty deed for the land to Annie Yates, the consideration named in the deed being \$100; that Annie Yates executed a mortgage to the defendants Williams & Swinford to secure her note in the sum of \$500; and that subsequent to the commencement of this action Annie Yates conveyed the land by warranty deed to C. H. Scrutchfield. It is also an admitted fact that A. G. Jones died before the trial of this cause. Therefore the real issues to be determined by the court at the trial were: First, did A. G. Jones obtain the deed from the plaintiff without consideration, hold the same as agent and trustee for the plaintiff, and then, without plaintiff's knowledge or consent, fraudulently transfer the land to Annie Yates with intent to cheat the plaintiff out of the land and proceeds thereof? and, second, did Annie

Yates, and the other parties acquiring their interest by and through Jones, have notice of the fraud, so that plaintiff can recover his land as against them?

Complaint was made by plaintiff in error that the trial court "erred in ruling upon evidence offered, and in excluding legal, competent, and proper evidence offered by the plaintiff." We will first consider the rulings of the court upon the admissibility of the evidence, which are complained of, and pointed out by counsel for plaintiff in error in their brief. At the trial the deposition of the plaintiff was offered in evidence, and the defendants objected to the reading of certain letters contained in said deposition in the following form: "Objected to as incompetent, irrelevant, and immaterial, being a communication with a deceased person—By the Court: Let the record show the objection is sustained to all statements in the deposition from Jones to the party in interest, and an exception by the plaintiff." By section 4212, St. 1893, it is provided: "No party shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner or assignee of such deceased person, where they have acquired title to the cause of action immediately from such deceased person. * * *" The testimony objected to was with reference to certain letters written by the plaintiff to Jones, and received by him from Jones in reference to the quitclaim deed and the purposes for which it was made by him to Jones. The record discloses that before the trial Jones died, so that under the plain and express provisions of section 4212 he (plaintiff) could not be allowed to testify in his own behalf in this case. *Cunningham et al. v. Phillips*, 4 Okl. 169, 44 Pac. 221.

Counsel for plaintiff in error argues that the statute forbids only communications had "personally" with the deceased; that is, that the statute only contemplates preventing one party from testifying as to conversations had with the deceased. We do not agree with this contention. The evident purpose of the statute is to prohibit a party testifying in his own behalf in respect to any transaction or communication had with a deceased person individually. To hold otherwise would open the door for the greatest fraud; and this, because the lips of his adversary are closed by death, and he cannot be heard to give his version of the conversation. In this case it was not only attempted to prove by the plaintiff that letters had been received by him from Jones, but as well to prove the contents of letters that had been written by him to Jones, and not now in the possession of the plaintiff; and we think this circumstance alone sufficiently answers the argument of counsel for plaintiff in error, for if the plaintiff was permitted to testify with reference

to the letters that had been written by him to the deceased, and the letters that were received by him in answer thereto, then the plaintiff would be permitted to testify simply as to his version of the transactions, without any possibility of denial from the deceased party. Counsel cites us to but a single authority, the case of *Wills v. Wood*, 28 Kan. 400, where, in the opinion by Mr. Justice Brewer, in speaking of the statute under consideration, he used the following language: "That statute plainly contemplates preventing one party from introducing in evidence conversations had with the ancestor of the adverse party; and this, because the lips of such ancestor, closed by death, cannot be heard to give his version of the conversation." The evidence sought to be introduced in that case was of conversations had between the deceased and the witness personally, and the language used had reference only to the particular facts of that case, and it could not possibly be construed that it was meant in that case to say that the party should be permitted to testify in his own behalf in respect to all transactions and communications had by such party with a deceased person, except mere conversations. We think a fair construction of the statute is to render such party incompetent as a witness to testify to any and all transactions or communications had by such party with a deceased person individually. *A. & E. Ency. of Law* (2d Ed.) vol. 30, pp. 1027-1029, and notes. In the case of *Bryant v. Stalnbrook*, 40 Kan. 356, 19 Pac. 917, it is said: "Where the original payee of a note brings an action thereon against the administratrix of a maker, he is incompetent to testify that he saw the maker sign it, when the execution of the same was a part of the trade between the maker and himself; but, when the execution of the note is established fully by other and competent evidence, the error in permitting plaintiff to testify is not reversible." And in the opinion, after quoting the statute, it is said: "This statute has reference as much to any transaction had with a deceased person as it does to any communication received from him. Surely the execution of this note was a transaction had personally with the deceased, and clearly falls within the prohibition of the statute." *Auchampaugh v. Schmidt*, 72 Iowa, 656, 34 N. W. 460; *Samson v. Samson*, 67 Iowa, 253, 25 N. W. 233; *Holcomb v. Holcomb*, 95 N. Y. 316. The statute makes no exception in a case where fraud is an issue. The facts which constitute fraud on the part of a deceased person necessarily include personal transactions or conversations with him. *Carr v. Fife et al.* (C. C.) 44 Fed. 713.

Again, it is argued by counsel for plaintiff in error that the objection in the form made did not go to the incompetency of the witness, but only to the competency of the testimony itself, and cites numerous authorities to the effect that the precise grounds of objections must be stated, and that the general objection

will not raise the question as to the admissibility of evidence which might be objectionable on some specific ground, and that an objection on one ground will not raise other grounds of objection. The correctness of this position will not be disputed, and, while the objection might have been more specific, there is no question from the record in this case but that it was understood by both counsel and the court as an objection to the competency of the witness. The trial court committed no error in excluding all statements in the desposition by Jones to the plaintiff.

The plaintiff offered in evidence certain letters, which purported to have been written by A. G. Jones, the signature having been identified as the signature of A. G. Jones by the witness U. M. Jones, which letters read as follows:

"Guthrie, Okla., Dec. 17, 1901.

"James Conklin, Esq., Henoelton, N. Y.—
Dear Sir: I make a specialty of looking after the property of nonresidents, and, having been here ever since I located the Land Office acre for the United States before the opening of Oklahoma to settlement, am able to know almost every possible buyer. If the property is rental property, I take special pains to keep the same rented to good tenants. I am often able to benefit owners of property in the payment of their taxes. Owners are often imposed upon by excessive valuations and assessments of taxes, sidewalk and shade tree tax. If property is vacant lots, some kind of light crops should be planted on them, as this keeps down the weeds and improves their appearance. This can be done without cost to the owner. The city sometimes orders weeds cut on vacant lots and charges the expense up to the lots. Write me description and price of your property. You will be satisfied with any business I may be able to do for you. I make no charges for information. Yours respectfully, A. G. Jones."

"Guthrie, Okla., Dec. 17, 1901.

"James Conklin, Esq., Henoelton, N. Y.—
Dear Sir: I wrote you a letter in regard to a tract of land that you once owned in Oklahoma, and, not getting any answer, I thought I would write you again. If this is received by you, kindly answer it, that I may know what you desire in the matter. If anything is to be done, the sooner the better, in which case I can give you the very best reference as to business qualifications and fair dealing. Would be pleased to have you write Ex-Gov. Barnes, now president of Logan County Bank, about me. Kindly write me any information you have. I believe I sent you a blank quitclaim deed to execute. A quitclaim only transfers any interest you may have in anything, nothing more, and with this quitclaim deed a settlement can be made with the party holding the tax deed, and an answer to this may repay you for your trouble. Fraternally yours, A. G. Jones."

"Guthrie, Okla., October 16, 1902.

"James Conklin, Esq., Henoelton, N. Y.—
Dear Sir: In regard to your old claim here, I employed a lawyer at a fee of \$50.00, commenced suit, and was expecting to get case through the next term of court. But the owner of the place under two tax deeds died, and this put a new aspect to the case, as there are some ten heirs, and I don't know when and how I will come out. Now, I have a chance to settle with the administrator so as to give you \$50.00, and, owing to the uncertainty of the case, I inclose you receipt for your signature, which you can sign and send to the Guthrie National Bank, instructing them to deliver to me upon payment of the \$50.00, or, if you send receipt direct to me, I will mail you exchange by return mail for the amt., which will save any collection fee. Hoping the same may be found satisfactory,

"I am fraternally yours, A. G. Jones."

"Henoelton, New York. Oct. —, 1902.

"Received of A. G. Jones fifty dollars in full of all claims and demands for my quitclaim deed to the S. E. ¼ of Sec. 9, Tp. 16, R. 1 W., T. M. "—."

The defendants objected to all and each of the letters being received in evidence, as being incompetent, irrelevant, and immaterial, and being communications from the deceased to the plaintiff, which objections were by the court sustained, to which rulings of the court the plaintiff excepted and now complains. It must be presumed that the trial court sustained the objection, for the reason that the letters were communications from a deceased person, for it cannot be questioned that the evidence was competent, relevant, and material. U. M. Jones, the witness who identified the signature to the letters as that of A. G. Jones, was not a party to the suit, and had no interest in the result of it, as disclosed by the record, other than that of an attorney for the defendants. The statute does not provide that no evidence shall be received of transactions or communications between a party and a deceased person, but only provides that no party shall be allowed to testify in his own behalf in respect to such transactions or communications. It is clearly not the purpose of the statute to prohibit testimony as to transactions and communications between a party and a deceased person, but only that a party with whom the transactions or communications are had should not be a competent witness to testify to such matters. The witness U. M. Jones being a disinterested party, and having identified the signatures to the letters as the signature of A. G. Jones, his testimony could not be excluded for the reason that they were communications between A. G. Jones and the plaintiff. The letters, being identified as those of A. G. Jones, will speak for themselves; and that the transactions and communications may be proven by other

witnesses than the party with whom such transactions or communications were had cannot be questioned. *Wills v. Wood*, supra; *Bryant v. Stalnbrook*, supra; *Muir v. Miller*, 82 Iowa, 700, 47 N. W. 1011, 48 N. W. 1032. To hold otherwise would be to exclude all evidence of transactions with deceased persons, when the adverse party in an action was the representative or assignee of such deceased person. That the letters were mentioned and identified in the deposition of the plaintiff, and referred to as a part of the deposition, can make no difference. The letters were offered separately, after identification by the witness U. M. Jones, and the court erred in excluding them.

Again, the plaintiff offered to prove by the witness John H. Cotteral that just a short time, possibly two or three days, prior to the date of the rendition of the judgment in the district court of Logan county, setting aside the tax deeds held by M. Yates, he had a conversation with A. G. Jones, in which the witness, as attorney for the plaintiff, warned Jones that the title and ownership of the land in controversy was in the plaintiff, and that plaintiff's attorney and Jones then agreed that nothing was to be done in that suit without the consent of Cotteral. Upon objection by the defendants the court also excluded this testimony for the same reason, that it was a conversation with a deceased person. For the reasons before stated, this ruling of the court was erroneous.

It is argued by counsel for defendants in error that, even if the court erred in excluding the testimony complained of, the error was immaterial, "for the reason that no notice of any fraud was proved to have been given to the defendants, or either of them." The record discloses that M. Yates was the mother of Joe M. Yates, and that Joe M. Yates was the husband of the defendant Annie Yates, and that Joe Yates wrote the following letters:

"Guthrie, Okla., Oct. 17, 1902.

"Jas. Conklin or His Heirs: I have had charge of a piece of land owned by a Mr. Jas. Conklin. This land lies $5\frac{1}{2}$ miles east of Guthrie. This land sold several years ago for taxes, and I hold the tax deed and am in possession of the place, and will pay a good price for a good deed to this place. The nos. of the land is S. E. $\frac{1}{4}$ section 9, township 16, range 1 W. Now, if you can give me a good lawful deed, please write me at once what you will take for same. Also, write me if a man in Guthrie by the name of A. G. Jones has a deed of any kind from you people. Jones has commenced suit in district court here for possession of this land, and I am inclined to think he has no authority for doing so. Please write at once in full about the place. I know I can afford to pay more for the land than Mr. Jones can, and would like to hear from you at once. Yours very truly, Joe M. Yates."

"Guthrie, O. T., Oct. 17, '02.

"Geo. E. King, Esq.,— Dear Sir: I am informed that you are a brother-in-law to Mr. James Conklin that at one time lived here and afterwards moved to New York. I am the man who holds a tax title to the 160 acres of land that Jas. Conklin proved up on as a homestead, and would be glad to learn the whereabouts of Mr. Conklin or his heirs. Can you give me any information of them? I am willing to pay a good round price for a good deed from the right party or parties for this land. There is a man by the name of A. G. Jones in Guthrie who claims to represent the owners of the Conklin place, and is going into court about it next month, so, if you can give me any information, please do so at once, and, if I can get the names and post office address of the right and lawful heirs, I will pay a good price for their deed to the land. I do not think Mr. Jones has any legal authority to represent any body, but perhaps you can tell me. An early reply will greatly oblige yours very truly, Joe M. Yates."

The signature to the letters is identified by the witness Goodrich as the signature of Joe M. Yates, and the witness Goodrich testified that shortly prior to the rendition of the judgment by which the tax deeds of M. Yates were canceled he had received letters from the plaintiff, in which were stated the facts with reference to the quitclaim deed by the plaintiff to A. G. Jones, and the purpose for which the deed was made, and that Jones had no authority to sell it. In October or November, 1902, just prior to the date of the judgment canceling the deeds of M. Yates, he had several conversations with Joe M. Yates, in which conversations he showed him the letters that he had received from the plaintiff with reference to the quitclaim deed to Jones, and in which it was stated that the deed was only made for the purpose of clearing the title from the tax deeds, and warning him that, if he attempted to buy the land from A. G. Jones, he would get into trouble. The witness Goodrich further testified as follows: "Witness: Mrs. Annie Yates never told me Joe was her agent until long afterwards. Q. Did you have a talk with her? A. Yes, sir. Q. When was that? A. That was about the time this Mr. Yates left her. Q. He left the country, has he? A. Yes, sir. Q. Can you give any idea of that date? A. This was some time last fall. Q. 1903? A. Yes, sir. Q. What conversation did you have with Annie Yates on the subject? A. Why, she came up to see me, and we were talking about this property here, and she said she was in hopes, when Joe made the arrangements to get that property, that they could save something out of it, and I don't know that she said right then that Joe was her agent. I didn't ask her those technical questions. Q. She didn't make that specific statement, according to your recollection of the conversa-

tion with her. She referred to it on the assumption that he had represented her in these negotiations. Is that correct? A. Yes, sir." Cross-examination: "Q. When was Mrs. Yates in your office? A. Mrs. Yates has been in my office very often since sometime last fall, when Mr. Yates went away. She was there the day he skipped out. Q. At what time did she tell you Joe Yates was acting as her agent? A. She never used the word 'agent.' I told you she said at the time Joe made the arrangements to get this place for her they were in hopes that they could save something out of it. Q. Did she use any language that you would imply agency, at this particular time, that Nelson bought this farm here? A. She said when Joe made the arrangements to get the place in her name— Q. Which place did she refer to? A. The Conklin place, Mr. Jones'. Q. Did you ask her which place she referred to? A. Yes, sir; you know as much about this as I do. * * *

As to the notice of fraud by Annie M. Yates, we have the fact of the relations of the parties; the fact that Joe M. Yates had written letters to the plaintiff, in which he expressed a desire to purchase the land; the conversation of Joe Yates with the witness Goodrich, wherein he admitted having received a letter from the plaintiff, and wherein he was shown letters from the plaintiff to the witness, in which the facts with reference to the title of A. G. Jones were stated, and that Jones had no authority to sell the land, and the subsequent admission of the defendant Annie Yates that her husband made arrangements to get the land for her, and that they were in hopes they could save something out of it; the fact that the consideration expressed in the deed from plaintiff to Jones was \$1; that the information conveyed by the witness Goodrich to Joe Yates was while the suit was pending in the district court to annul the tax deeds held by the mother of Joe Yates; that the consideration as expressed in the deed from A. G. Jones to the defendant Annie Yates was \$100, and that on the same day she received the deed from Jones she made a loan of \$500 on the land; that the loan was negotiated by Jones. In view of all these facts, we are of the opinion that the evidence of notice to the defendant Annie Yates was at least sufficient to withstand the demurrer. Therefore, taking into consideration the evidence admitted, and that which we have held was improperly excluded by the court, to wit, that A. G. Jones wrote a letter to the plaintiff, who was the owner of the land, soliciting his business and stating that he was often able to benefit owners by payment of taxes, and that owners were often imposed upon by excessive taxes, and wrote a second letter offering to give references, and saying that with a quitclaim deed settlement could be made with the party holding the tax deeds; that afterwards plaintiff sent to Jones a quit-

claim deed for the land, the consideration named being \$1; that later, and about one year after the quitclaim deed was executed by the plaintiff, Jones wrote to him that he could get him \$50 in full settlement of all demands and claims for the land, and sent a receipt, to be signed by plaintiff in full for the land; that just about the date on which the judgment was obtained annulling the tax deeds counsel for plaintiff informed Jones of the plaintiff's claims, and it was then agreed that no further steps should be taken, except by and with the consent of counsel for plaintiff; that immediately Jones obtained judgment in his own name, and conveyed it to the defendant Annie Yates for the consideration of \$100, and secured a loan for her in the sum of \$500—taking all this into consideration, we think the evidence sufficient, at least, to show that the deed made by plaintiff to Jones was for the purpose only of aiding to clear the title to the land from the tax deeds of M. Yates. Upon a demurrer to the evidence the court must consider as true every portion of the evidence tending to prove the case of the party resisting the demurrer. *Bequillard v. Bartlett*, 19 Kan. 382, 27 Am. Rep. 120; *Brown, Adm'r, v. A., T. & S. F. Rd. Co.*, 31 Kan. 1, 1 Pac. 605; *Wolf v. Washer*, 32 Kan. 533, 4 Pac. 1036. In order to sustain a demurrer to the evidence, the court must be able to say, as a matter of law, that the party introducing the evidence has not proved his cause. In view of the conclusions here reached, the court erred in sustaining the demurrer of the defendant Annie M. Yates. There was no evidence which would justify the court in finding that the defendants Williams & Swinford had any notice of the transactions between the plaintiff and A. G. Jones, or that they had any notice of the alleged fraud.

The judgment of the district court of Logan county is affirmed as to the defendants Williams & Swinford, and reversed as to the defendant Annie M. Yates, with directions to grant a new trial as to the defendant Annie M. Yates, to overrule the demurrer to the evidence as to her, and to proceed in accordance with this opinion; the costs in this court to be equally divided between plaintiff and defendant Annie M. Yates. All the Justices concurring, except IRWIN, J., who presided in the court below, not sitting.

TONKAWA MILLING CO. v. TOWN OF TONKAWA et al.

(Supreme Court of Oklahoma. Sept. 6, 1905.)

1. MUNICIPAL CORPORATIONS—VACATION OF STREETS.

An ordinance of a town incorporated under the laws of this territory, granting to a railroad corporation the right to use and occupy its streets and alleys, under the provisions of section 1035, St. 1893, does not vacate such streets or alleys, so as to allow the land to revert to the abutting lot owners.

2. SAME—VACATION OF ALLEY.

The ordinance of the town of Tonkawa involved in this case *held* to be an ordinance granting to the Blackwell & Southern Railway Company the right to use and occupy the alley in question under the provisions of section 1035, St. 1893, and not an ordinance vacating such alley, so as to allow the land to revert to the abutting lot owners.

3. ESTOPPEL—PLEADING.

An estoppel must be pleaded in order to enable a party to avail himself of it on the trial, and must be pleaded with particularity in order to constitute either a cause of action or defense.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, §§ 300, 302.]

(Syllabus by the Court.)

Error from District Court, Kay County; before Justice Bayard T. Hainer.

Action by the Tonkawa Milling Company against the town of Tonkawa and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Tetrick & Rose, for plaintiff in error.
James B. Diggs, for defendants in error.

BEAUCHAMP, J. This action was commenced in the district court of Kay county by the plaintiff in error against the defendant in error for an injunction. The petition, so far as necessary for an understanding of the issues, alleges: That the plaintiff is a corporation. That the defendant, the town of Tonkawa, is a municipal corporation, organized and existing under the laws of the territory of Oklahoma. That on the 14th day of September, 1899, the defendant town of Tonkawa, by and through its board of trustees enacted and passed an ordinance granting a right of way to the Blackwell & Southern Railway Company through the town, and for the purpose of such right of way vacated certain streets, avenues, and alleys; a copy of the ordinance is set out and so far as necessary for the purposes of this case is as follows:

"Ordinance No. 26.

"An ordinance granting a right of way to the Blackwell & Southern Railway Company through the town of Tonkawa, Kay county, Oklahoma Territory; and for the purpose of such right of way, vacating certain streets, avenues, and alleys in said town of Tonkawa.

"Be it ordained by the board of trustee of the town of Tonkawa, Oklahoma Territory:

"Section 1. There be and hereby is granted to the Blackwell & Southern Railway Company, its successors and assigns the right to construct, maintain, and operate its railroad, side tracks, and switches in the town of Tonkawa and over and across North avenue, Sixth street * * * In the town of Tonkawa, as the survey for the railway of the said Blackwell & Southern Railway Company is now located through, over and across the same. * * *

"Sec. 11. That for the purpose aforesaid, the following streets, avenues, and alleys of

the said town of Tonkawa be and the same are hereby vacated, viz: * * *

Then follows a list of the streets and alleys vacated for the purposes mentioned, among them being the alley in question in this case.

That under and by virtue of the said ordinance, the alley in question was vacated; that plaintiff for a long time has been the owner of lots 12 and 13 in block 19, abutting on said alley, also lot 10 abutting on said alley, and lateral therewith. That plaintiff had, on lot 10 and other lots owned by it in that block lying immediately north of the said alley, its mill building and elevator, and that lots 12 and 13 were used by plaintiff for its mill office, and driveway leading from the principal or main street of the town along lots 12 and 13, and across said alley to the plaintiff's mill and elevator, and is and has been for a long time the way of access to and from the mill and elevator by plaintiff and its customers and patrons. That after the vacation of said alley, and when the said alley had reverted by virtue of the said vacation to the adjacent lots, the plaintiff, then owning that portion of said alley which lay adjacent to its said lots, constructed therein a dirt driveway for the driving into and over the dump which plaintiff had, and is constructed to and as a part of said elevator standing on said lot 10. That plaintiff's mill and elevator is standing on said lots 5, 6, 7, 8, 9, and 10, and used in connection with said lots 12 and 13, and that portion of the said vacated alley which reverted to said lots adjacent thereto, and that all of said lots were of great value, to wit, \$10,000. That the said defendants unlawfully and wrongfully entered upon the plaintiff's said premises as described herein, and in which plaintiff was in lawful possession, use, and occupancy, and that said defendants, did then and there on the 26th day of June, 1903, interfere with, obstruct, and prevent plaintiff's occupancy and lawful use thereof, and did with teams, plows, and scrapers, unlawfully and wrongfully enter upon plaintiff's said premises, and plow and scrape away the dirt roadway, which plaintiff had built, leading to his said grain elevator dump, and so tear away the same as to prevent the driving of wagons upon said dump, and render the same wholly unfit for the use for which it was made and used by the plaintiff, and rendered it impossible for grain to be hauled by wagon into plaintiff's said grain elevator, or to plaintiff's said flouring mill. That the defendants threaten to continue to obstruct, hinder, retard, molest, and prevent the plaintiff from using and operating its said property, and its part of said alley, and if permitted so to do will permanently injure and damage plaintiff to its great and irreparable loss, injury, and damage. That plaintiff has no adequate remedy at law, and prays an injunction.

The defendants town of Tonkawa, Joseph Freeman, and Will Crawford filed their an-

swers and cross-petitions setting out that no such ordinance as set out in the petition had ever been legally passed; that said ordinance had been repealed; that the defendants were the board of trustees of the town of Tonkawa, and were proceeding to remove said driveway under and by virtue of the authority of said town, and not otherwise; that the maintenance of said driveway across said alley was a public nuisance; and that its further continuance by plaintiff be enjoined. Defendant Brook filed an answer and cross-petition, alleging that said town of Tonkawa had been laid out into lots, blocks, streets, and alleys, and that a map and plat had been filed as required by law, and lots sold in reference to and reliance on said map and plat; that he was the owner of several lots in the block adjoining said alley and abutting thereon; that said lots were purchased by him with the special reference to said alley, and, in reliance thereon, has furnished a means of ingress to and egress from said lots so purchased; that the obstruction across said alley seriously interferes with the proper use and enjoyment of his said lots, and greatly depreciates the value thereof; that said alley had never been condemned, and that no proceedings have ever been had for that purpose, and praying for an injunction against the plaintiff enjoining it from the continuance of said driveway.

To the answers and cross-petitions of defendants plaintiff filed replies in the nature of general denials, and on the issues as thus joined the cause went to trial in the court below. The plaintiff proved that the ordinance set up in its petition was enacted and passed as alleged; that the plaintiff was the owner of the lots mentioned in its petition; that soon after the enactment of said ordinance a mill and elevator was built upon the lots, and a dump or driveway was constructed in said alley to afford ingress and egress for wagons loaded with wheat to and from said elevator; that said driveway was from three to five feet high; that on the 25th day of June, 1903, the defendants plowed and scraped away the driveway constructed in said alley, and rendered the same wholly unfit for use. After the plaintiff had offered its evidence, the defendants demurred thereto, which demurrer was by the court sustained, and a motion for a new trial was filed, heard by the court, and overruled, exceptions duly saved by plaintiff in error, and he brings the case here upon petition in error and case-made for review.

That portion of the alley in dispute was never claimed or used by the railway company as a right of way or for other purposes. While there are several assignments of error presented and argued by plaintiff in error, the record presents but one question necessary for our consideration to a final disposition of this case. If the ordinance

in question wholly vacated that portion of the alley in question, then the plaintiff is right in its contention and the judgment of the district court should be reversed; but if the ordinance did not vacate that portion of the alley but merely granted to the railway company a right of way over the alley, then the judgment of the district court is correct, and should be affirmed.

Section 1035, St. 1893, provided that "If it shall be necessary in the location of any part of a railroad to occupy any road, street, alley, or public way or ground of any kind, or any part thereof it shall be competent for the municipal or other corporation or public officer or public authorities owning or having charge thereof, and the railroad corporation to agree upon the manner and upon the terms and conditions upon which the same may be used and occupied." It seems clear to us that the town trustees were simply exercising the powers and authority vested in them by this section of the statutes, for the ordinance in express and unambiguous terms so provided. It is entitled: "An ordinance granting a right of way to the Blackwell & Southern Railway Company through the town of Tonkawa, Oklahoma Territory, and for the purpose of such right of way vacating certain streets and alleys in the town of Tonkawa." By section 1, the railway company is granted the right to construct, maintain, and operate its railroad, side tracks, and switches upon, over, and across certain streets and alleys and by section 2, it is provided: "That for the purpose aforesaid, the following streets, avenues, and alleys of said town of Tonkawa be and same are vacated, viz.,," naming them, including the portion of the alley in question. By the express terms and provisions of the ordinance it is clear that nothing more was intended or attempted by the town than to grant to the railway company a right of way over and across the streets and alleys named, and the right to the railway company to use and occupy the same for the purposes mentioned. The power of towns to vacate streets and alleys is argued by plaintiff in error, and our attention directed to the statutes, which authorizes municipalities through their proper officers to vacate streets and alleys, but as we view this case it is not a question of power, but what was in fact done or attempted to be done by the municipality. As before stated we think it clear from the terms of the ordinance that the trustees were acting under the statute authorizing them to grant to the railway company the right to use and occupy the streets and alleys, and not under the statutes giving power to vacate streets and alleys, and allowing the land to revert to the abutting lot owners. The alley in question never having been vacated, so as to allow the land to revert to the abutting lot owners, the plaintiff failed to show by its petition, or

to prove title in it; therefore the petition did not state or the evidence prove a cause of action in favor of plaintiff.

It is argued by counsel for plaintiff in error in his brief that the defendants are estopped; no estoppel is pleaded, nor was there any evidence which would raise or tend to raise an estoppel; that the first suggestion of estoppel is in plaintiff's brief; there is nowhere in the pleadings of the plaintiff any suggestion that it relies upon an estoppel. An estoppel must be pleaded in order to enable a party to avail himself of it on the trial, and must be pleaded with particularity in order to constitute either a cause of action or defense. *Nickum v. Burckhardt*, 30 Or. 464, 47 Pac. 788, 48 Pac. 474, 60 Am. St. Rep. 822; *Bear v. Commissioners*, 124 N. C. 204, 32 S. E. 558, 70 Am. St. Rep. 586; *Davis v. Davis*, 26 Cal. 23, 85 Am. Dec. 157; *Dale v. Turner*, 34 Mich. 405; *Hammerslough v. Cheatham*, 84 Mo. 21; *Dwelling House Ins. Co. v. Johnson*, 47 Kan. 5, 27 Pac. 100; *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394; *Independent School Dist. v. Merchants National Bank (Iowa)* 27 N. W. 255; *Gray v. Pingry*, 17 Vt. 419, 44 Am. Dec. 345; *Warder et al. v. Baldwin*, 51 Wis. 450, 8 N. W. 257. The part of the alley in question, not having been vacated, but being a public highway, the plaintiff was not warranted in constructing improvements in, or in any wise obstructing the use thereof by the public; and the town, through its officers, had the right to remove the obstruction complained of.

The judgment of the district court is affirmed, with costs to plaintiff in error. All the Justices concurring, except HAINER, J., who tried the case in the court below, not sitting.

DEMING INV. CO. v. SHAWNEE FIRE INS. CO.

(Supreme Court of Oklahoma. Sept. 6, 1905.)

1. INSURANCE — APPLICATION — ANSWERS OF INSURED — STIPULATIONS.

In an application for fire insurance, made for the purpose of informing the insurance company of the facts with reference to the property sought to be insured and to furnish it information upon which it is to act in accepting or refusing the risk, and wherein the applicant warrants his answers to be true, a stipulation in an application and policy that, if any of the statements made in the application by the applicant are untrue, the policy shall be void, is a reasonable stipulation.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 568.]

2. SAME—WAIVER.

Where a waiver of the stipulations and conditions contained in a policy of fire insurance relied upon is the act and conduct of an agent of the insurance company, it must be shown that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the unauthorized action of the agent.

3. SAME—AUTHORITY OF AGENT.

An agent for a fire insurance company, whose powers are strictly defined and limited by the express terms of the contract of insurance, cannot act so as to bind his company beyond the scope of his authority.

4. EVIDENCE—PAROL TO VARY CONTRACT.

A contract in writing, if its terms are free from doubt and ambiguity, must be permitted to speak for itself, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; and this principle is applicable to contracts of insurance.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1818.]

5. INSURANCE—APPLICATION—MATERIAL REPRESENTATIONS.

Where, by the express terms of the application for and a policy of fire insurance, the application is made a part of the contract of insurance, the representations contained in the application made by the applicant are warranted by him, and that the policy shall be void if any of such representations are not true, the question of the materiality of such representations becomes unimportant; for under such stipulations, in a suit to recover loss occasioned by the destruction by fire of the property insured, the insurance company is relieved from showing, and the insured is estopped from denying, that they were material to the contract.

6. ESTOPPEL—PLEADING.

All acts, representations, and conduct relied on as an estoppel should be specially pleaded before evidence to establish the same can be received.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, § 300.]

(Syllabus by the Court.)

Error from District Court, Cleveland County; before Justice C. F. Irwin.

Action by the Deming Investment Company against the Shawnee Fire Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Snyder & Clark and A. Miller Hammett, for plaintiff in error. Shartel, Keaton & Wells, for defendant in error.

BEAUCHAMP, J. This action was commenced by plaintiff in error against defendant in error in the district court of Cleveland county to recover upon a fire insurance policy, issued by the defendant in error to the plaintiff in error, covering the dwelling house situated upon a farm in Cleveland county, which was totally destroyed by fire. Trial was had in that court, resulting in a judgment for the defendant in error for costs. A motion for a new trial was heard and overruled by the court. Exceptions saved, and plaintiff in error brings the case here by petition in error and case-made for review.

At the trial of the case the parties stipulated relative to certain facts, which stipulation is as follows: "It is hereby stipulated and agreed by and between the plaintiff and defendant that at the time of the making of the application in writing for the insurance involved in this action, and at the time of the writing of the policy, that the Deming Investment Company, plaintiff herein had

been the defendant in an action commenced by Lulu Davidson, as the next friend of the minor heirs of John Davidson, deceased, involving the land upon which the buildings insured by the policy involved in this case is situated, in Cleveland county, Okl.; that in said action the Deming Investment Company as one of the defendants, filed its answer by way of cross-petition for the foreclosure of a second real estate mortgage, upon said premises, executed by John D. Davidson and Lulu Davidson, husband and wife, in which said case Jane Lyons was one of the defendants and by answer discloses that she was the owner of a mortgage on said real estate described in said policy of insurance, by an assignment from the Deming Investment Company, plaintiff herein, for the sum of \$1,000; that in said action the Deming Investment Company recovered a judgment for the amount claimed by way of foreclosure of said second mortgage, and that said judgment was subject to a first mortgage of which Jane Lyons was the owner, and assigned from the Deming Investment Company; that thereafter execution was issued on the said judgment, the property was advertised by the sheriff of Cleveland county, and sold subject to the mortgage of Jane Lyons, the Deming Investment Company becoming the purchaser at said sale, and that thereafter on motion of the purchaser the Deming Investment Company, the sale was confirmed in the Deming Investment Company, and approved by the district court of Cleveland county; that thereafter an appeal was prosecuted in said cause to the Supreme Court of the territory of Oklahoma, which said appeal was pending in the Supreme Court of the territory of Oklahoma at the time the insurance was applied for in this action, to wit, the 22d day of November, 1901, and at the time said policy involved in this action was issued, on, to wit, the same date; that thereafter the Supreme Court of the territory of Oklahoma by a proper mandate dismissed the said appeal prosecuted by the said heirs of John Davidson, for the reason that the case-made was not made and served within the time allowed by the court, and as prescribed by law therefor, affirming the judgment of the confirmation of the district court appealed from, which said mandate was spread upon the records of the district court of Cleveland county after the policy of insurance was issued the plaintiff herein, and thereafter the district court of Cleveland county directed the then sheriff, by proper order, to make and execute to the Deming Investment Company a deed for said premises, said order being made on the 2d day of December, 1901, as shown in Journal 6, pp. 541, 542, which order is here referred to, and the recitals therein are agreed to, and which order is as follows, to wit:" [Here follows the order of the district court of De-

cember 2, 1901, directing the sheriff to execute a deed to defendant in error.]

November 26, 1901, the plaintiff in error entered into a written contract with Samuel F. Sewell, in consideration of the sum of \$3,800, to sell and convey to him the land upon which the house covered by the insurance policy was situated, which contract recited the court proceedings mentioned in the stipulation hereinbefore set out, and provides that as soon as a proper judgment could be obtained in the district court in conformity to the mandate of the Supreme Court that would enable the plaintiff in error to procure a sheriff's deed to the land, and the court should hold that another suit then pending did not create a cloud upon its title, the plaintiff in error would immediately thereafter make and execute a warranty deed to Sewell upon payment to it within 20 days thereafter of \$3,800, less \$250 paid; the receipt of which is acknowledged. And it is further provided that if the plaintiff in error did not acquire and furnish to Sewell a good title to the land on or before February 1, 1902, it would upon demand, return to Sewell the \$250, with interest thereon at the rate of 6 per cent. per annum. The house was totally destroyed by fire on the evening of December 4, or morning of December 5, 1901. The deed was executed by the sheriff to plaintiff in error December 7 or 8, 1901, after the fire. A deed to Sewell was executed by plaintiff in error before the fire, but not delivered until December 30th, after the fire, at which time Sewell made a further cash payment, and executed a mortgage for deferred payments.

The petition in error contains five assignments of error under which the questions involved herein and argued by counsel in their briefs are as to whether the insurance policy was invalidated:

First. By reason of certain misstatements in the written application, signed by the insured. The insurance policy involved was written by A. Kinkaid, who was at the time local agent for defendant at Norman, with power to solicit insurance and to receive applications therefor, and with power to write and countersign policies of insurance as such agent, subject to the approval of the defendant. That before writing the policy he was requested to get insurance on the building by Mr. Rule of Oklahoma City, agent for plaintiff. Kinkaid was at the time of writing the policy acquainted with the property to be insured, and familiar with all the conditions of the title of the plaintiff in the land; that at the time he wrote and signed the policy he prepared and wrote an application on the form used by defendant, from his personal knowledge of the facts with reference to the property, and forwarded by mail to Mr. Rule at Oklahoma City, to be signed by him as agent for plaintiff if found correct, which, when received, was signed by Mr. Rule, and

returned to Mr. Kinkaid. Contained in the application is the following:

"(18) Is the title in your own name? If other than fee simple title, what kind of a title have you? Explain fully. A. Property was sold under foreclosure. Court has ordered sheriff to make deed to this Company. Plaintiff made appeal to Supreme Court which causes delay in issuing deed.

"(20) Is it encumbered in any way? If so how much and when due? A. The entire incumbrance is None. No.

"It is understood by the applicant that the company will not be bound by any representation of the applicant, or promises of the agent not contained herein, and any subsequent incumbrance, insurance, change of ownership, occupancy, or premises becoming vacant without consent of the company, will render the policy void. Having read the foregoing application and fully understanding its contents, I warrant it to contain a full and true description and statement of the condition, situation, value, occupancy, and title of the property hereby proposed to be insured, and I warrant the answer to each of the foregoing questions to be true; and I agree that this insurance shall not be binding on said company until approved by its secretary."

That the application misstated the facts is not disputed, but it is argued by plaintiff that in view of the facts that the agent of the defendant, who wrote the policy, wrote the application, and was at the time informed as to the true condition of the title of plaintiff, that the defendant cannot now be heard to deny the validity of the policy for reason of such misstatements; Mr. Kinkaid testified that he knew of the Lyon mortgage and the condition of plaintiff's title at the time that he wrote the policy and application. It is not shown or claimed that the knowledge of Kinkaid was ever communicated to the defendant, or that it had any actual knowledge of the condition of plaintiff's title before the building was destroyed by fire, other than that contained in the application. The policy contains the following provision: "If an application, survey, plan, or description of property is taken, it shall be a part of this contract and warranty by the insured." And it further provides: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein." Under the express provisions and conditions of the application and policy, the application is made a part of the contract of insurance, and the defendant warranted its answers to the questions in the application to be true, and it cannot now be permitted to say that it was ignorant of its contents, in the absence of fraud or mistake, so that unless the conduct and knowledge of defendant's agent as to the condition of the title of the plaintiff

would be held to be a waiver of the stipulated warranty, then the contract of insurance is invalidated, and the plaintiff cannot recover, for it will not be disputed that a misrepresentation by an applicant for a policy of fire insurance, in his application as to his title to the property insured, avoids the contract of insurance as to the property covered by the policy.

The case of *American Insurance Co. v. Gilbert*, 27 Mich. 429, was a case in which there was a misrepresentation in the application as to the value of the property insured. When the insurance was applied for the agent of the insurance company personally inspected the property and knew its true value but wrote into the application, which was signed by the applicant, the valuation in excess of the true value, and which was known by the applicant not to be a true statement of its value. We quote from the syllabus: "An applicant for insurance cannot escape responsibility for the statement of facts which he inserts himself in the application, or permits an agent of the insurer to insert as his, upon which he is just as well informed as the agent himself, such as the condition, situation, and value of his own property to be insured, by showing that he was induced by such agent, knowingly and against his own judgment, to state them falsely."

The case of *New York Life Insurance Company v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, was a case wherein a person applied in St. Louis to an agent of a New York insurance company for insurance on his life. The agent, under general instructions, questioned him on subjects material to the risk. He made answers which, if correctly written down and transmitted to the company, would have probably caused it to decline the risk. The agent, without the knowledge of the applicant, wrote down false answers, concealing the truth, which were signed by the applicant without reading and by the agent transmitted to the company, and the company thereupon assumed the risk. It was conditioned in the policy that the answers were part of it, and that no statement to the agent not thus transmitted should be binding on his principal. Held, that the policy was void. The opinion of the court was delivered by Mr. Justice Field, and we quote from a portion of the opinion: "It is conceded that the statements and representation contained in the answers, as written, of the assured to the questions propounded to him in his application, respecting his past and present health, were material to the risk to be assumed by the company, and that the insurance was made upon the faith of them, and upon his agreement accompanying them that, if they were false in any respect, the policy to be issued upon them should be void. It is sought to meet and overcome the force of this conceded fact by proof that he never made the statements

and representations to which his name is signed; that he truthfully answered those questions; that false answers written by an agent of the company were inserted in place of those actually given, and were forwarded with the application to the home office; and it is contended that, such proof being made, the plaintiff is not estopped from recovery. But on the assumption that the fact as to the answers was as stated, and that no further obligation rested upon the assured in connection with the policy, it is not easy to perceive how the company can be precluded from setting up their falsity, or how any rights upon the policy ever accrued to him. It is, of course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent conduct of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract, which, upon a truthful report of his condition, could not have been obtained. By them the company was imposed upon, and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned. As the present action is not for such cancellation, the only recovery which the plaintiff could properly have upon the facts he asserts, taken in connection with the limitation upon the powers of the agent, is for the amount of the premiums paid, and to that only would be entitled to by virtue of the statutes of the state of Missouri. But the case presented by the record is by no means as favorable to him as we have assumed. It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions if the party making written proposals for a contract, with representations to induce its execution, should be allowed to show after it had been obtained, that he did not know the contents of his proposal and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove, not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it stipulated that the right of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the

same were reduced to writing and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed. In *Globe Insurance Co. v. Wolff*, 95 U. S. 327, 24 L. Ed. 387, the policy declared that the agents of the company were not authorized to waive forfeitures, and this court held that effect must be given to the provision except so far as the subsequent acts of the company permitted it to be disregarded. In *Insurance Co. v. Norton*, 96 U. S. 240, 24 L. Ed. 689, the policy contained an express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts or waive forfeitures, and this court held, that the company could have insisted upon those terms had it so chosen. * * * The present case is very different from *Insurance Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617, and from *Insurance Co. v. Mahone*, 21 Wall. 152, 22 L. Ed. 593. In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. Reference was made to the interested and officious zeal of insurance agents to procure contracts, and to the fact that the parties who were induced to take out policies rarely knew anything concerning the company or its officers, but relied upon the agent who had persuaded them to effect the insurance, 'as the full and complete representative of the company in all that is said or done in making the contract'; and the court held that the powers of the agent are *prima facie* co-extensive with the business intrusted to his care, and would not be narrowed down by limitations not communicated to the person with whom he dealt. Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may be well that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is therefore bound by its statements."

In the case of the *Northern Assurance Company v. Grand View Building Association*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, Mr. Justice Shiras delivered the opinion of the court, and, after citing from a number of New York cases, uses the following language: "It is doubtless true that in several later cases the New York Court of Appeals seems to have departed from the principles

of the previous cases, and to have held that the restrictions inserted in the contract upon the power of an agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract when it appears that the agent delivered it and received the premiums *with full knowledge of the actual situation*. To take the benefit of a contract *with full knowledge of all the facts*, and attempt afterwards to defeat it, when called upon to perform by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other parties. *Robbins v. Springfield Fire Ins. Co.*, 149 N. Y. 484, 44 N. E. 159; *Wood v. American Fire Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733. But see *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 63, 20 Am. Rep. 451, and *Owens v. Holland Ins. Co.*, 56 N. Y. 565, which are irreconcilable. The fallacy of this view is disclosed in the phrases we have italicized. It was thereby assumed that the agent had full knowledge of all the facts, that such knowledge must be deemed to have been disclosed by the agent to his principal, and that, consequently, it would operate as a fraud upon the assured to plead a breach of the conditions. This mode of reasoning overlooks both the general principle that a written contract cannot be varied or defeated by parol evidence, and the express provision that no waiver shall be made by the agent except in writing on the policy. As we shall hereafter show when we come to consider the meaning and legal purport of the contract in suit, such express provision was intended to protect both parties from the dangers involved in disregarding the rule of evidence. The mischief is the same whether the condition turned upon facts existing at and before the time when the contract was made, or upon facts subsequently taking place."

There is no evidence in the record to show that Kinkaid, the local agent, either before or after he had delivered the policy and received the premium, communicated with the insurance company the true condition of the title of the plaintiff to the property insured, or that he at any time informed the company that the property insured was incumbered by mortgage in the sum of \$1,000, or any other sum, or that the company, previous to the destruction of the property by fire, had any knowledge whatever of such incumbrance. The purpose of the application was to inform the insurance company of the facts with reference to the property sought to be insured, and to furnish it information upon which it was to act in accepting or refusing the risk; and the stipulation in the application and policy, that if any of the statements made in the application were untrue, the policy should be void, was a reasonable stipulation, and if the plaintiff had referred to the policy issued and delivered to it, it would

have found by the provisions thereof that the same was void if it concealed or misrepresented any fact or circumstance concerning the insurance or subject thereof, or if it had not stated truly its interest in the property insured, and that the policy was made and accepted subject to the stipulations and conditions therein contained, and that no agent or officer of the insurance company had power or should be deemed to have waived any of the provisions or conditions of the policy, unless such waiver should be in writing and attached to the policy. The application after being filled out by the agent of the insurance company was forwarded to the agent of the plaintiff to be signed as such agent, if found correct. The mere fact that the answers to the questions contained in the application were written out by the agent of the insurance company did not relieve plaintiff's agent from the duty or necessity of examining the same, and to seeing to it that the statements in the application were true. In the case of *Liverpool & L. & G. Ins. Co. v. Richardson Lumber Co.*, 11 Okl. 585, 69 Pac. 938, the rule is stated: "Where the waiver relied upon is the act of an agent of the insurance company, it must be shown that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the unauthorized action of the agent."

There is no evidence to show, nor is it claimed by the plaintiff, that defendant had any knowledge of the Jane Lyons mortgage, or that the statement in the application for insurance, that the property was not incumbered, was false. Kinkaid was an agent, with powers strictly defined and limited by the express terms of the contract of insurance, and could not act so as to bind the defendant beyond the scope of his authority. The question here presented is not as to whether the insurance company by either its officers or agents could waive the conditions and stipulations in its policy, but is a question as to the competency of the evidence to prove such waiver. The contract of insurance is fully set forth in the policy, and it is expressly provided by its terms that no waiver or stipulation shall be considered except the same be in writing, and attached thereto, and that no representation of any agent shall be binding unless set forth in writing. As we understand, it is not pretended that by any language or declaration of Kinkaid, the agent at the time the policy was delivered and the premiums paid, claimed to have power to waive any provisions or conditions of the policy. The contract was in writing, and in clear and unambiguous terms provided that the answers of the plaintiff contained in its application were warranted to be true, and that the entire policy should be void, if the interest of the insured in the property were not truly stated, and that no officer, agent, or other representative

of the company, had power to waive the provisions and conditions of the policy, except in writing, and attached to the policy; so that to hold that the conditions and stipulations in the policy had been waived by the knowledge and conduct of its agent would be to violate the well-settled principles declared by the former decision of this court in the case of *Liverpool & L. & G. Ins. Co. v. Richardson Lumber Co.*, supra, wherein it is held: "A contract in writing if its terms are free from doubt and ambiguity, must be permitted to speak for itself, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts, and this principle is applicable to contracts of insurance."

But it is insisted by counsel for plaintiff in error that the statements in the application for insurance in this case are not warranties, but only misrepresentations of facts which did not affect the insurance company in its action; and that the written application is not made a part of the policy, or referred to therein. By the express terms of the policy the application is made a part of the contract of insurance, and by the terms of both the application and policy the statements contained in the application are stipulated warranties. The parties had a right to make their own contract upon terms and conditions in this respect as they saw fit, and, if the plaintiff chose to make his representations warranties, the question of their materiality becomes unimportant; for under such stipulation the defendant was relieved from showing, and the plaintiff was estopped from denying, that they were material to the contract, and we are not permitted to say that the defendant did not deem them material to the risk, or that it would have made the contract upon other terms than it did. The secretary of the insurance company testified that the matter of incumbrance was material; and, had the company have had any knowledge of the incumbrance, it would not have issued the policy. And it may be that from experience he may be satisfied that the matter of incumbrance upon property sought to be insured is material to the risk, and, while this materiality he may not be able to prove to the satisfaction of the court or jury, he has a right to refuse to insure property incumbered, and to insist that the statements of the applicant in his application as to such matters shall be a warranty by the insured to be true; and when, as in this case so made, it was an agreement on the part of the plaintiff not only to warrant the truth of such matters, but that they are material to the contract, and that if false, the contract shall be void, therefore all the statements, representations contained in the application, must be treated as warranties, and must be true to authorize a recovery upon the policy. *American Ins. Co. v. Gilbert*, Supra; *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183-189, 7 Sup. Ct. 500, 30

L. Ed. 644; *Northern Ins. Co. v. Grand View Building Ass'n*, supra.

Again the pleadings in this case contain not a word in reference to the knowledge, acts or conduct of Kinkaid, which it is contended estops the defendant from denying the validity of this policy. The petition simply declares upon the policy of insurance, the loss by fire, and the refusal of payment. The answer of the defendant alleges that a material condition of the contract had been broken; that the policy of insurance was issued by the defendant in the belief, and upon the plaintiff's special warranty that the answers to all of said questions were true; that at the time that the application was issued and the policy written, the answers were false, and that the rights of the assured under the policy had been forfeited. The plaintiff replied by a general and special denial of the matters contained in the answer, and alleged that the loss set out in plaintiff's petition is a total loss, and that, under the laws of the territory, defendant was required to pay plaintiff by reason of said policy and said loss, the face of the policy. Under our Code, the facts relied upon as a ground of action or of defense must be clearly and concisely stated, and a definite issue presented, so that the opposite party may be fairly notified of what he is required to meet. Under the pleadings as they exist, evidence could not be received to establish the acts, conduct, or knowledge of Kinkaid relied on as an estoppel. All acts, representations, and conduct, relied on as an estoppel, should be specially pleaded before evidence to establish the same can be received. *Tonkawa Milling Co. v. Town of Tonkawa et al.*, 83 Pac. 915 opinion handed down at this sitting, and cases therein cited; *Dwelling House Ins. Co. v. Johnson et al.*, 47 Kan. 1, 27 Pac. 100, and other cases cited.

Having reached the conclusion that under the provisions and terms of the contract of insurance sued upon, and under the pleadings, that the plaintiff cannot recover for the reasons stated, it will not be necessary to consider the other questions raised.

The judgment of the district court of Cleveland county is affirmed, with costs to plaintiff in error. All the Justices concurring, except IRWIN, J., who tried the case in the court below, not sitting, and PANCOAST, J., as to section 5 of the syllabus.

RODGERS v. NICHOLS et al.

(Supreme Court of Oklahoma. Sept. 6, 1905.)

1. DIVORCE—FRAUD—ANNULMENT OF DECREE.

A decree of divorce will be annulled upon the ground of fraud and imposition practiced upon the court or adverse party.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 536.]

2. SAME—NOTICE BY PUBLICATION.

The Code, authorizing constructive notice

by publication in divorce cases, should be strictly construed.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 248.]

3. SAME—DEATH OF PARTY.

Where a decree of divorce is void for want of jurisdiction, it will be set aside after the death of the party who procured the decree by fraud and imposition.

4. SAME—FAILURE TO SERVE DEFENDANT.

In a direct proceeding to set aside a decree of divorce, where the evidence clearly and conclusively establishes the fact that no service, actual or constructive, was had upon the defendant, the decree of divorce will be held to be void, and will be set aside.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 535.]

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice Jno. H. Burford.

Action by Annie E. Rodgers against Alemeda Nichols and Llewellyn J. Nichols to annul a decree of divorce which was granted on April 1, 1895, to her husband, William E. Rodgers, plaintiff alleging that said decree was obtained upon service by publication, and that she never had any notice or knowledge of the proceedings, although her place of residence and post-office address were well known to her husband; that he had failed and neglected to mail to her address a copy of the petition in said divorce proceedings, with a copy of the publication notice attached thereto, as required by law; that said decree was obtained by fraud and imposition practiced upon her and upon the court; and that she had no notice or knowledge of the decree of divorce until a short time after the death of her husband, William E. Rodgers, which occurred on April 13, 1898; that said William E. Rodgers died seised of the following real estate in Logan county, Okl., to wit: the N. E. $\frac{1}{4}$ of section 30, township 15 N., range 1 E.; and that the defendants Alemeda Nichols and Llewellyn Nichols are husband and wife, and that the said Alemeda Nichols is a sister of the said William E. Rodgers, deceased, and that said defendants claim to have some right, title, or interest in and to an undivided one-half of the above real estate. The defendants filed an answer in which they admitted that William E. Rodgers had obtained a decree of divorce from the plaintiff in the district court of Logan county on the 1st day of April, 1895, and that the defendant Alemeda Nichols is a sister of William E. Rodgers, deceased, and claims an interest in said real estate, as alleged in the plaintiff's petition. The defendants denied all other material allegations contained in the plaintiff's petition. The cause was tried to the court, and the court found the issues in favor of the defendants, and that the plaintiff had failed to prove the material allegations of her petition, and rendered judgment accordingly. From this judgment, the plaintiff brings error. Reversed.

W. K. Snyder and C. G. Hornor, for plaintiff in error. Lawrence & Huston, for defendants in error.

HAINER, J. It appears from the record that the decree of divorce in this case was obtained upon publication service, the notice being published in a local newspaper, based upon the affidavit of the plaintiff that the defendant was a nonresident of the territory of Oklahoma. Upon the trial of the cause in the court below the plaintiff in error testified that some time in the summer of 1889 her husband, William E. Rodgers, left their home, in West Virginia, for the purpose of coming to Oklahoma to secure a homestead under the government laws; that he remained in Oklahoma until some time in the summer of 1895, at which time he came to the home of the plaintiff in error at Allegheny City, Pa., to which place she had removed since his departure for Oklahoma; that during all of his absence they maintained a regular correspondence; that after his return from Oklahoma they lived together as husband and wife at Allegheny City for several months; that together they visited at the home of the plaintiff in error in West Virginia, and at the home of a sister of the plaintiff in error, and at the home of an aunt of the said William E. Rodgers; that after his return from the west he treated her better than he had ever done before; that after he had been back from the west two or three months, he left the home of the plaintiff in error at Allegheny City, and went over into West Virginia in search of employment; that from that time until his death they carried on a regular correspondence; that at no time, either at or before his departure from West Virginia for Oklahoma, or at any time thereafter did he ever intimate to the plaintiff in error that he either intended or desired to procure a divorce from her; that she at no time received a copy of the petition in said divorce proceeding, with a copy of the publication notice attached thereto, although her husband was well aware of her place of residence, and was at that time maintaining a regular correspondence with her, and that she had no notice or knowledge whatever of said divorce proceedings; that she had no notice or knowledge whatever of such decree of divorce having been granted until a short time after the death of the said William E. Rodgers, on April 13, 1898; that soon after being informed of said divorce proceedings she instituted this action to annul the decree.

Upon all the material points of her testimony the plaintiff was corroborated by a number of witnesses. It was shown by a number of witnesses, and we think conclusively, that after his return from Oklahoma Rodgers and the plaintiff in error lived together in Allegheny City as husband and wife, entertaining at the home of the plain-

tiff in error their friends and neighbors, at all times appearing to be a loving and affectionate husband and wife, and that at no time during this period was there any intimation by Rodgers to any one that he had been divorced from the plaintiff in error. We think this is a circumstance very strongly tending to corroborate the statement of the plaintiff in error that she had never had any notice or knowledge of the divorce proceedings. Upon the other hand, we have been unable to find anything in the testimony submitted on behalf of the defendants in error (which is of a purely negative character) that tends, even in the remotest degree, to contradict the material points in the testimony of the plaintiff in error, the substance of which is above set forth. Neither was there any attempt upon the part of the defendants to show that a copy of the petition in the divorce case, with a copy of the publication notice thereto attached, was ever mailed to the plaintiff in error, or that she ever received the same.

Section 636 of our Code of Civil Procedure (Wilson's Rev. & Ann. St. 1903), in relation to divorce and alimony, provides as follows: "When service by publication is proper, a copy of the petition, with a copy of the publication notice attached thereto, shall, within three days after the first publication is made, be inclosed in an envelope addressed to the defendant, at his or her place of residence, postage paid and deposited in the nearest postoffice, unless the plaintiff shall make and file an affidavit that such residence is unknown to the plaintiff, and cannot be ascertained by any means within the control of the plaintiff." This provision of our statute requiring the plaintiff to mail to the defendant a copy of the petition, with a copy of the publication notice attached thereto, where the address of the defendant is known, is clear and mandatory in its terms. It is a condition precedent to the granting of a valid decree.

The construction of this identical statute was before the Supreme Court of Kansas as early as 1875, and that court, in the case of *Lewis v. Lewis*, 15 Kan. 193, speaking by Mr. Justice Brewer, uses the following language: "Now this [is] a part of the service. Without it no decree can properly be entered. It is a precaution ordered by the Legislature to guard against the danger of decreeing a divorce without the knowledge and presence of both parties. It may be very inadequate, but it is worth something. It is a step in the right direction. But whether adequate or not, it is the legislative direction, and as such may not be disregarded. It may be said that, as in this case, the copy of the petition may fail to reach the defendant in time for the trial, and that, then, there is no other notice than by the publication, and section 77 should be held applicable. True the mailed petition and notice may give no actual notice, nei-

ther may the publication. But each is an effort toward actual notice, and the two combined are requisite for legal service. Service by copy at the usual place of residence is actual service. The copy may fail to reach the defendant. Actual notice may not be received by him. But the service is complete, and a judgment rendered cannot be opened because rendered without notice. Service is not always equivalent to actual notice, and does not always result in actual knowledge. It is not the actual result of any particular step which determines whether it is or is not a part of the service. It is enough that the Legislature has constituted it a part. And where the Legislature has not in terms declared it a part, if the obvious scope and purpose of the step required is to secure notice of the pendency of the suit, it may fairly be considered a part of the service." In *Larimer v. Knoyle*, 43 Kan. 338, 23 Pac. 491, Mr. Justice Valentine, in discussing this question, said: "In addition to the affidavit for service by publication and the publication itself, it is also necessary either to send to the defendant a copy of the petition, with a copy of the publication notice, or else to make and file an affidavit that the residence of the defendant is unknown, and that the plaintiff cannot ascertain the defendant's residence by any means within the plaintiff's control. The sending of the copy of the petition and the publication notice to the defendant, when that is done, is, according to the decision of this court in the case of *Lewis v. Lewis*, 15 Kan. 181, a part of the service."

The case of *Morton v. Morton*, 16 Colo. 358, 27 Pac. 718, was a case where the wife sought to have set aside a decree of divorce obtained by the husband, for the reason that the decree was obtained without service of process upon the defendant, either actual or constructive. It appeared that at the time the action was commenced, and for a number of years prior thereto, the defendant resided in a house in Scranton, Pa., and although she received her mail with uniform regularity, and although her place of residence was well known to the plaintiff, no copy of the summons in the cause ever reached her, and no notice of the action was received by her until long after the entry of final judgment in the cause. However, it appeared from an affidavit that a copy of the summons was mailed to her proper address, but it did not appear that the postage had been paid thereon, as required by the statute. In discussing this subject, the court uses the following language: "In view of the failure on the part of the appellee to show, when called upon, that the postage was prepaid upon the copy of the summons mailed, and of the fraud shown to have been practiced upon both the defendant and the court in procuring the decree of divorce, it cannot be allowed to stand. It is apparent from the record that but one result can be

obtained upon a retrial of the case. The judgment is therefore reversed, and the cause remanded, with directions to the county court to enter a judgment annulling the decree of divorce." In volume 7, p. 112, Enc. P. & F., the rule is thus stated: "Where the statute requires a copy of the summons and petition to be mailed to the defendant, unless it appears to the court that defendant's address is unknown and cannot be ascertained with reasonable diligence, the record must show either that the copy of the summons and petition was mailed or a showing must be made, at some time before a decree is granted, that such address cannot be ascertained. If the residence of the defendant was known to plaintiff, and he avers that he cannot ascertain it, or if the plaintiff stated the address in the petition and no notice was mailed to the defendant, the decree is void and will be set aside or will be declared void in a collateral attack in another state." In *Smith v. Smith*, 4 G. Greene (Iowa) 266, it was held that: "The Code, in reference to divorce, should be strictly enforced, and the requirements fully observed." In *Israel v. Arthur* (Colo. Sup.) 1 Pac. 438, the Supreme Court of Colorado held that the statute authorizing constructive notice by publication in divorce cases must be strictly complied with. Judgments by default in divorce cases are not favored. 14 Cyc. 714.

It is true that in the decree granting the divorce in this case there is a finding "that the defendant was duly summoned by publication, and by sending copies of the petition to her two last-known addresses, as required by law"; but this case is a direct attack upon that judgment, and while the presumptions are in favor of the judgment, yet in the case of a direct attack this finding is not conclusive, but merely *prima facie*. And when the defendant in that case (plaintiff in this case) testified positively that no service, actual or constructive, was had upon her, and that she had no notice or knowledge whatever of the divorce proceedings until after the death of her husband, and a short time previous to the commencement of this suit to vacate the judgment, and in view of the fact that all the other evidence and circumstances tend strongly to corroborate the testimony of the plaintiff, we think the presumption in favor of the finding of the court in the divorce proceeding was overthrown, and it was then incumbent upon the defendants in this action to show that the statute, in respect to the service upon the defendant, had been complied with. The evidence in this case clearly discloses that no evidence was adduced by the defendants to show that the statute was, in any respect, complied with. Hence there is no evidence in this case to support the finding of the trial court in respect to service, either by publication or otherwise, upon the defendant. On the contrary, the evidence in this case clearly and conclusively establishes the

fact that no service, actual or constructive, was had upon the defendant, and that a gross fraud and imposition was not only practiced upon the court, but upon the plaintiff in error, and therefore the decree of divorce should not be permitted to stand. The doctrine that, subsequent to the death of the party who obtained a decree of divorce by fraud, an action will lie to annul the same, is sustained by all the authorities. 14 Cyc. 719; Cent. Dig. vol. 17, § 535; *Bishop, Marriage & Divorce*, § 1554; *Johnson v. Coleman*, 23 Wis. 452, 99 Am. Dec. 193; *Brown v. Grove*, 116 Ind. 84, 18 N. E. 387, 9 Am. St. Rep. 823; *Boyd's Appeal*, 38 Pa. 241; *Bomsta v. Johnson*, 38 Minn. 230, 36 N. W. 341.

The judgment of the district court is therefore reversed, and the cause remanded, with directions to vacate and annul the decree of divorce in accordance with the prayer of the petition.

BURFORD, C. J., having presided in the court below, not sitting. All the other Justices concurring.

HANOVER STATE BANK v. HENKE et al.
(Supreme Court of Oklahoma. Sept. 6, 1905.)

1. APPEAL—RECORD—ERROR ARISING UPON EVIDENCE.

Where a record in this court in a case on appeal does not show that it contains all the evidence presented at the hearing below, it presents no error that can be reviewed by this court arising upon a question of evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2916, 2917.]

2. SAME—CERTIFICATE OF CLERK.

A statement, in a certificate of the clerk of the court in which the case was tried, that the record contains all the evidence presented at the trial, is not sufficient to show that the record does contain all of the evidence.

(Syllabus by the Court.)

Error from District Court, Garfield County; before Justice James K. Beauchamp.

Action by the Hanover State Bank against Herman E. Henke and Mary D. Henke. Judgment for defendants and plaintiff brings error. Affirmed.

Houston & Buckner, for plaintiff in error. Anderson & Stratford, for defendants in error.

PANCOAST, J. This was an action upon a promissory note, brought originally before a justice of the peace and appealed to the district court. Trial was by jury, resulting in each instance in a verdict for defendants; and, from an order overruling a motion for new trial, plaintiff in error has appealed.

The only assignments of error to which our attention is directed are such that a consideration thereof necessarily involves an examination of the evidence taken on

the trial below. The rule is so well established in this territory as to need no citation of authorities that, where the record in this court in a case on appeal does not show that it contains all the evidence presented at the hearing below, it presents no error that can be reviewed by this court arising upon a question of evidence. *Exendine v. Goldstine*, 14 Okl. 100, 77 Pac. 45. There must be a recitation in a case-made to the effect that all of the evidence taken upon the trial is included therein, and unless such a statement is included in the case-made this court will not consider any assignment of error which necessitates a review or consideration of such evidence. *Frame v. Ryel*, 14 Okl. 586, 79 Pac. 97. That is the defect we find in the record under consideration. It is true there is a recital in a certificate by the clerk of the court in which the action was tried to the effect that the case-made contains all the evidence introduced upon the trial. Our statute, however, does not authorize a clerk of the court to make such a certificate to a case-made, nor will such a certificate, when made, supply omissions in the record itself.

The record in this case containing no such statement, and the assignments of error being such that a consideration thereof necessitates a consideration of the evidence, the judgment will be affirmed.

BEAUCHAMP, J., who tried the case below, not sitting. All the other Justices concurring.

(11 Idaho, 689)

BRADLEY et al. v. JOHNSON.

(Supreme Court of Idaho. Jan. 18, 1906.)

1. MINES AND MINERALS—QUIETING TITLE—LACHES.

Where it is shown that J. executed his promissory note, due one year after date, to B., and secured the note by mortgage on unpatented mining property, and before the note was due J. notified B. that he was unable to pay the note, and soon thereafter left the state, the note and the mining deed having been placed in escrow on the day of their execution, with the condition that, if J. paid the note, it, with the deed, should be returned to him, otherwise the deed was to be surrendered to B., J. not demanding the deed or offering to pay the note until 12 years after B. had done the annual assessment work on the property, and, with his codefendant, a large amount of development work, held, that he is bound by his laches, and a cross-complaint in an action to remove a cloud attempted to be cast upon the title of B. by J. should be dismissed.

2. SAME—LIMITATIONS.

Where B. has been in adverse, open, and notorious possession of unpatented mining property, claiming the right of possession under a deed purporting to convey the title to the property for more than five years, an action to recover such possession from B. is barred by the provisions of section 4036, Rev. St. Idaho 1887.

3. SAME—ADVERSE POSSESSION.

Under the provisions of section 4036, Rev. St. Idaho 1887, which provides that "no action for the recovery of real property, or for the

recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question within five years before the commencement of the action; and this section includes possessory rights to lands and mining claims," open, notorious, adverse possession of an unpatented mining claim for a period of more than five years brings it under the provisions of the above section.

(Syllabus by the Court.)

Appeal from District Court, Blaine County; Littleton Price, Judge.

Action by Fred C. Bradley and R. F. Buller against Andrew M. Johnson, alias Andrew M. Glahn. Judgment for plaintiffs, and defendant appeals. Affirmed.

N. M. Ruick and Sullivan & Sullivan, for appellant. R. F. Buller, for respondents.

STOCKSLAGER, C. J. Respondents, as plaintiffs, commenced their action in the district court of Blaine county against appellant, as defendant, to quiet the title to a certain unpatented mining claim in the Muldoon district, known as the "Snowslide." Defendant answered, denying title in plaintiffs, and in a cross-complaint alleged title in himself. Plaintiffs answered this cross-complaint, putting in issue all the material allegations thereof. Defendant demurred to the first paragraph of plaintiffs' answer to the cross-complaint, but the record does not disclose the ruling of the court, if any, on this demurrer. Contemporaneous with the filing of the demurrer, it is shown that counsel for appellant filed a motion termed "motion to strike out." It is as follows: "Comes now the defendant by his counsel and moves the court to strike out of the plaintiffs' answer to defendant's cross-complaint on the matters and things set up in the first paragraph of said answer to defendant's cross-complaint, beginning with the words 'the plaintiffs' in the first line thereof, and ending with the word 'thereon' at the end of the first line of page 2 of said original answer to defendant's cross-complaint. Said motion is based upon the ground that the facts stated in said paragraph are not responsive to any issue tendered by the answer or cross-complaint of defendant; (2) that the facts stated in said answer to defendant's cross-complaint do not state a defense to the cause of action set up in defendant's cross-complaint; (3) that the allegations contained in the first paragraph of said answer to said cross-complaint are sham, irrelevant, and frivolous." The language of the answer sought to be stricken out is as follows: "Plaintiffs, for answer to the cross-complaint of the defendant, deny that on the 10th day of September, 1891, the defendant made and delivered to plaintiff R. F. Buller a deed to the property described in the complaint, and deny that the plaintiff R. F. Buller required and demanded such deed as additional security for the payment of the promissory note mentioned in the defendant's cross-complaint, and deny that the

plaintiff Bradley had notice of the execution of the said deed as part of the security for the payment of said promissory note, and aver the fact to be that defendant deposited a deed in escrow with the First National Bank of Hailey, to be delivered upon his failure to pay to said R. F. Buller the sum of \$250 and interest thereon." This motion was overruled. Counsel for defendant excepted, a trial was had, and the court made and filed findings of fact and conclusions of law.

The first finding of fact relates to the execution and delivery of the note and mortgage on the 10th day of September, 1891, and the agreement entered into whereby a deed to the property in controversy was placed in escrow in the First National Bank of Hailey, conditioned that, if defendant failed to pay the note at maturity, the deed was to be delivered to said Buller by said bank in payment of said debt, and the debt canceled; that defendant failed to pay said note, and said escrow deed was taken up by plaintiff Buller shortly after the expiration of the said year, and the said debt was thereby fully paid and discharged, and the said mortgage extinguished; that in the fall of the year 1892 plaintiff took possession of the property, claiming it as his own by virtue of said deed, and remained in undisturbed, open, notorious, adverse possession of the same until the year 1899, when he bargained and sold a one-third interest therein to his coplaintiff, Bradley, and he and the said Bradley have ever since been in exclusive, open, and notorious adverse possession of said property, and were in such possession at the time of the commencement of this suit. The second finding is that on the 16th day of September, 1904, Buller conveyed to Bradley a one-third interest in said property, who was an innocent, bona fide purchaser, without notice of any equity or supposed equity of defendant therein. The third finding is that said property was an unpatented mining claim, upon which it was necessary to do \$100 worth of work annually, in order to protect the title; and said Buller has had such assessment work done every year since and including the year 1892 until the year 1898, and he and his coplaintiff have done said work and much more every year from the year 1899 until the year 1904, and have been at great expense improving and developing said property, the value of which greatly exceeds the value of all the ores extracted by them therefrom. The fourth finding is that, during all the time from the fall of the year 1892 until the summer of 1904, the defendant abandoned said property and made no claim thereto, nor did any work thereon, until a short time before the commencement of this suit, some time in the summer of the year 1904, when he began to assert a claim of title to the said property adverse to the title of plaintiffs, and to threaten legal and other proceedings against plaintiffs in disparagement of their title, to their great damage

and injury. Finding No. 5 is that the defendant is estopped by his laches in not setting up nor asserting any title to the said premises for 12 years, and acquiescing for this long period of time in the plaintiffs' claims and operations therein and thereon, from now asserting his alleged or any equities that he may have had thereon. Finding No. 6 is that the plaintiffs have been in the actual, open, notorious, and continuous adverse possession of the said premises for more than five years next before the commencement of this suit and after default in payment of the debt secured by the mortgage mentioned in defendant's cross-complaint.

The conclusions of law are that the defendant's claims are barred by his laches and by the statute of limitation; that defendant's cross-complaint should be dismissed; that plaintiffs are entitled to a decree quieting their title to the said premises as against the defendant, and perpetually enjoining him from setting up or asserting any claim to the said property. Judgment was entered in harmony with the findings and conclusions. The appeal is from the judgment, and from an order overruling motion for a new trial.

Counsel for appellant insists: (1) That the execution of the note, mortgage, and deed of September 10, 1901, constituted one transaction; that the deed was given as additional security for the loan, which fact constituted it a mortgage. (2) That, as a mortgage, the deed could not convey the legal title, but it was necessary that the same should be foreclosed before title could pass. (3) That plaintiffs are estopped from pleading the statute of limitation by reason of failure to foreclose, and that to permit plaintiffs to plead such statutes would be contrary to equity, and would permit plaintiff Buller to take advantage of his own wrong. (4) The evidence fails to show that the possession of the premises by plaintiffs, or either of them, was adverse to defendant. (5) The plaintiff Bradley was put on notice of the nature of the transaction, and cannot successfully claim as an innocent purchaser. (6) The defendant is entitled to an accounting and to a reconveyance of the property upon the payment of such sum as shall be found by the court to be due from defendant to plaintiffs. It may be well to state here that there is no dispute as to the time, manner, and circumstances accompanying the execution and delivery of the note, mortgage, and deed. It is also conceded—at least, not disputed—that after the execution and delivery of the instrument above indicated, in the month of July, 1892, defendant notified plaintiff Buller that "he was not going to pay the mortgage off." This was about a month before the note was due. It is shown that defendant left the Muldoon country about that time, and did not return until the summer of 1904, when he asserted his right to redeem the property. It is also conceded

that Mr. Buller, from 1892 until 1899, did the assessment work each and every year, and thereby saved the claim from forfeiture. Thereafter the assessment work, and much more, each year, was done by Mr. Buller and his correspondent, Mr. Bradley, in an effort to develop the mine. This continued until the time of the commencement of this suit. During all this time appellant was absent from that mining district—at least never informed Mr. Buller that he was ready and willing to pay the amount due on the note and reimburse him for all trouble and expense incurred in preserving the property from forfeiture. If appellant showed the least interest in the property from July, 1892, when he informed Mr. Buller that he "did not intend to pay the mortgage off," until the year 1904, when he returned to the Muldoon country and asserted his claim to the property, the record fails to disclose it. In other words, the appellant gets \$300 of Buller's money in 1891, permits Buller and his co-respondent to do the assessment work continuously until 1904, and, in addition to the assessment work, a large amount of development work on the property, and then, 12 years after, he notifies Buller he does not intend to pay the mortgage, and after the expense and labor of Buller and Bradley have resulted in developing the mine to such an extent that he thinks the ore extracted will be sufficient to liquidate the note, with its interest and expense incurred in development, comes into a court of equity by way of cross-complaint, and asks that "plaintiffs and each of them be required to account to this defendant for the value of all the ores extracted from said property, and by them, or either of them, converted to their own use; that upon payment or tender by this defendant to the plaintiffs of such sum, if any, as shall be found by the court to be due and owing by this defendant to the plaintiffs or either of them, after crediting the proceeds and value of ore so extracted by them and converted to their own use, the plaintiffs may be decreed, ordered, and required to execute to this defendant a good and sufficient deed to the said property, and in the event of their failure to do so said deed may be executed by a commissioner to be appointed by the court." If equity will support such a decree, it will be a new, and, we think, novel, way of prospecting. He first seeks the aid of capital from Buller, then the labor of his fellow miner, Bradley, to develop the mine, and after 12 years' use of Buller's money in doing the assessment work for six or seven years at \$100 per year, and five years of Bradley's labor in an effort to develop the mine to a paying basis, he comes into court and modestly asks that they be required to account to him for all ores extracted, and by a proffer to pay any balance found to be due plaintiffs on such accounting they be required to execute and

deliver to him a good and sufficient deed to the property.

This demand is based upon the following facts: In 1890 the appellant was the undisputed owner of the property in controversy, with no one questioning his right of possession and ownership save the government, wherein the title rested. All he had to do was to comply with the requirements prescribed for obtaining mining lands by patent. In September, 1891, he made a contract with respondent Buller to borrow a certain sum of money, and, as security for the loan, he executed and delivered his promissory note, due in one year thereafter, and secured the note with a mortgage on the property in controversy, together with some other unpatented claims in the same vicinity. On the same day he executed and delivered a mining deed to Buller for the same property. This deed and note above referred to were placed in escrow in the First National Bank of Halley, with the following conditions: "To the First National Bank, Halley, Idaho: The enclosed note and mining deed are deposited with you in escrow; if Andrew M. Johnson shall, on or before September 10, 1892, pay or cause to be paid to or deposited with you for R. F. Buller three hundred (\$300.00) dollars, then deliver the note and deed enclosed to Andrew M. Johnson; if not so paid or deposited on or before said date, the enclosed deed to be delivered to R. F. Buller and note to Johnson. Dated September 10th, 1891. Andrew M. Johnson, R. F. Buller." Buller testified that some time after the note became due appellant left the country, but not until after he had notified him that he was not able to pay the mortgage. He further testifies that in the year 1893 he sent the note to Chehalis, Wash., with instructions to collect, if Johnson would pay; that he sent it to some lawyer or lawyers, and he does not think it was ever returned; that at the time of the trial he was unable to find it; "that, in order to avoid expense of foreclosure, it was agreed that Mr. Johnson was to make an absolute deed to the mine, and deposit it in the bank in escrow to be delivered if, at the expiration of a year, he did not pay off the mortgage"; that he never knew definitely where to locate Mr. Johnson from the time he received the notice from him in July, 1892; that he was unable to pay the mortgage until the summer of 1904. It is further shown that Mr. Buller did not have the deed recorded until the 24th day of September, 1898. In explanation he says: "I just overlooked it. The deed was in a package of papers, and I forgot the recording of it." With reference to the note he says: "I don't recall whether I requested the return of the note by the parties to whom I sent it in Washington. I came to the conclusion that the note was worthless, and didn't pay any more attention to it." On cross-examination

Mr. Buller says: "I forgot when it was that I sent it out there—might have been in 1893. I was willing up to that time to have the note paid and give him the property, if he wanted it. But I had to do the assessment work to save the property anyway."

If we accept every contention of the appellant as true, in what condition do we find him when he comes into a court of equity asking for relief, as is shown in this case? It matters not whether he is voluntarily in court, or whether he is brought in and required to disclose his title and right to recovery; the facts remain the same. Mr. Buller says he has dealt with the property and treated it as his ever since the fall of 1892. Why not when he was informed by appellant that he was unable to pay the note? In case Mr. Buller had not assumed charge of the property, and did the annual assessment work each year from 1891 up to the time of the institution of this suit, there would have been no necessity for it. The property would have long since been subject to relocation. Mr. Buller, or anyone else possessing the necessary qualifications, might have located it, and the result would have been Buller would have lost all he had loaned, with interest, and Johnson would certainly have no claim that the government would recognize. If this is true, and we do not think it can be questioned, in order to grant the appellant the relief he asks, we must hold that Buller was required to protect the property from forfeiture for an indefinite time by doing the assessment work, and after a lapse of 12 years, when possibly, by his money and his correspondent's labor, they have developed the property to such an extent that the net earnings will cancel the note, with interest, and such other expense as they have incurred, and, if so, appellant is willing to take the property with such overplus as may be due him. He also says he is ready and willing to pay any deficiency that may be found after respondents have accounted to him for all ore sold after paying the expense of extracting and marketing it. This money, he says, he tenders into court. In case there was an accounting, and it was found, as stated by Mr. Buller, that the ore sold has paid but a small part of the expenses of production, appellant could pay the balance into court or not. If not, where is the remedy? It occurs to me that, if equity will uphold the contention of appellant, prospecting may become an easy and profitable business in this state. Possibly it might be difficult to find many men of means as "easy" to work, and as charitable after he was worked, as respondent Buller seems to have been in this case.

Appellant insists that Buller should have foreclosed his deed as a mortgage, in order to pass title. This, under ordinary conditions, might, and doubtless would, be true. Had appellant appeared and demanded a settlement of the note within a reasonable time, tendering respondent Buller all that was

found to be due on the note, equity would decree that Buller neglected to avail himself of his remedy to procure title to the property, and he would have to suffer the consequences of his negligence. If Buller did the assessment work after the note was due, without procuring title to the property in the manner prescribed by law, he would doubtless be without a remedy to recover it back from appellant. The question here arises: What is a reasonable time? Can it be said that appellant may absent himself from the state for a period of 12 years without an effort to liquidate a debt for which he had given his note, secured by a mortgage on the property, and in addition thereto a deed conveying all the right, title, and interest in the property to respondent Buller? Can he permit Buller to do the assessment work for a period of seven years, and Buller and Bradley for a period of five years, without ever complaining of their possession, without being guilty of laches? If it may run 12 years, how long may it not run? When does the statute of limitations begin to run? When may appellant be said to be guilty of laches? These are the questions in this case to be determined by this court. The learned trial judge said by his findings that appellant was guilty of laches, and that the statute of limitations barred the defense shown by the cross-complaint of appellant. If correct, either is sufficient to justify an affirmance of the judgment.

Appellant's counsel urge that *Brown v. Bryan* (Idaho) 51 Pac. 995, is decisive of this case. An examination of this case will disclose that the question there before the court was to the effect: "A trust deed executed to secure a given debt, payable at a specified time, upon real estate [mining property], is, under the statutes of Idaho, a mortgage, and cannot be foreclosed by notice and sale, under a power of sale in such trust deed; and such trust deed can only be foreclosed by judicial sale, pursuant to decree rendered by judicial sale, pursuant to decree rendered in an action brought therefor in the proper court." This quotation is from the syllabus on rehearing. The syllabus in the original hearing fairly states the questions of fact in that case as they were understood by this court at the time of the hearing upon which the original opinion was based. It says: "One member of a mining partnership uses the money of the partners to purchase an outstanding trust deed upon the mining property, given by his copartner, taking the transfer in the name of a third person, who had no interest in the transaction, causes the property to be sold and bid in by said third party as his agent, and afterward procures a transfer to be made of the property to himself and another partner. Held, that such transfer was void, and the property should be decreed to belong to the maker of the trust deed or his grantee." In order to determine whether the judgment in the case at bar should be

affirmed or reversed, it is unnecessary to reaffirm that judgment. It is sufficient to say it stands as the construction of the law of this state relative to the class of deeds that was before the court for determination in that case, and under the facts disclosed and considered as disclosed by the syllabus. There is a very distinctive difference in the facts pertaining to the deeds in the two cases, and, were it necessary to a determination of this case, we would discuss them. The trial court found that the cross-complaint of appellant should be dismissed for the reason that his claims are barred by his laches and by the statute of limitations. If either is true, the judgment must be affirmed.

In Story's Equity Jurisprudence (10th Ed.) vol. 2, § 1537, in discussing the equitable rule as to the effect of persons lying by and allowing another to expend money on his property, the text says: "But where a partner in a joint-stock company, after his shares were declared forfeit, lay by for seven years, while the affairs of the concern were greatly depressed, until they began to be more prosperous, and then filed his bill to be let into a share of the profits, it was held that he must be considered as having acquiesced in the action of the directors in declaring his shares forfeited, and that he was not entitled to the relief sought." The author cites with approval *Prendergast v. Turton*, 1 Younge & C. New R. 98, 110-112, wherein it is said: "The point which has struck me from the beginning (and upon which everything that could be said has been said by counsel), is the time at which the suit has been instituted, having regard to the peculiar nature of the property and the circumstances of the case. This is a mineral property, a property, therefore, of a mercantile nature, exposed to hazard, fluctuations, and contingencies of various kinds, requiring a large outlay, and producing, perhaps, a considerable amount of profit in one year and losing it the next. It requires, and of all properties, perhaps, the most requires, the parties interested in it to be vigilant and active in asserting their rights. This rule, frequently asserted by Lord Eldon, is consonant with reason and justice. Lord Eldon always acted upon it, and has been followed by subsequent judges of great knowledge, experience, and eminence." In 16 Cyc. p. 150, under the head of "Laches and Stale Demands," the author says: "Negligence bars relief in equity," and, further, "courts of equity, while sometimes bound by, and at other times following, the analogy of statutes of limitations, also act independently of such statutes, refusing relief to parties who have slept upon their rights or have been negligent in asserting them." He cites a large number of authorities supporting this text.

Cent. Dig. vol. 19, § 193, under the head of "Laches and Stale Demands," furnishes valuable information on the subject. A number of decisions from numerous states are here digested by the author. The one most ap-

plicable to the case under consideration is *Landrum v. Union Bank*, 63 Mo. 48. It is said: "What length of delay to sue will bar, on the ground of laches, the right of parties whose property has been irregularly or improperly sold under color of a trust deed from claiming equitable relief, must depend on the circumstances of each case; eight years held enough in this case." It is hard to conceive of a case where the above rule would apply with more force than the case at bar. Not one effort in shown on the part of appellant to assert any right or claim to the property that he had notified one of the respondents he was unable to redeem from the mortgage until 12 years had expired, and then only after suit was instituted to remove the cloud from the title he was then threatening to cast upon it. A very learned and interesting discussion of this question will be found in *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328, by Mr. Justice Miller. The property involved in this action was oil lands in West Virginia. Discussing the question of laches applicable to property of that character, he says: "The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil and wells. Property worth thousands today is worth nothing tomorrow, and that which would today sell for \$1,000 as its fair value may, by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit. While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent, and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option, whether they will share its risks or stand clear of them. * * * With full knowledge of these facts, the appellant took no action until this suit was brought, nearly four years after the sale; and not until all the hazard was over, and the defendant's skill, energy, and money had made his purchase profitable, was any claim or assertion made by the corporation or by the stockholders. We think, both on authority and principle—a principle necessary to protect those who invest their capital and their labor in enterprises useful, but hazardous—that we should hold that plaintiff has delayed too long." Many authorities are cited in support of this contention.

The case applies with much force to the case at bar. It is exceedingly questionable

whether the mining or boring for oil in West Virginia is more hazardous, or requires more skill, energy, and money, that the development of mineral in Idaho. It is unnecessary to further discuss this question or cite additional authorities.

We think the findings of the court, conclusions of law, and judgment are amply supported by the record, and the judgment is affirmed. Costs to respondents.

AILSHIE and SULLIVAN, JJ., concur.

MILLS NOVELTY CO. v. DUNBAR.

(Supreme Court of Idaho. Jan. 8, 1906.)

1. REPLEVIN—GAMBLING DEVICES—SLOT MACHINES—ALLEGATIONS OF COMPLAINT—DEFENSES BY ANSWER.

Answer examined, and held sufficient to put in issue the material allegations of the complaint.

2. PLEADINGS—JUDGMENT ON PLEADINGS.

Where the plaintiff moves for judgment on the pleadings, if the answer puts in issue the material allegations of the complaint, it is not error to deny such motion.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1056.]

3. TRIAL—DISMISSAL—WHEN GRANTED.

Where the answer puts in issue the material allegations of the complaint, and the plaintiff refuses or declines to introduce any evidence on the trial in support of the allegations of the complaint, it is not error for the court to enter a judgment of dismissal, where no affirmative relief is sought by the answer.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 360.]

4. SAME—FAILURE TO INTRODUCE EVIDENCE.

Where the answer puts in issue the material allegations of the complaint, on the trial it is incumbent on the plaintiff to establish the material allegations of the complaint by a preponderance of the evidence, and where he declines to introduce any evidence whatever it is not error for the court to enter judgment of dismissal.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 360.]

5. CONSTITUTIONAL LAW—DETERMINATION OF CONSTITUTIONAL QUESTIONS—NECESSITY.

The rule is well established in this court that the constitutionality of a law will not be passed upon unless it is absolutely necessary to do so in order to decide the case.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 43.]

(Syllabus by the Court.)

Appeal from District Court, Ada County; George H. Stewart, Judge.

Action by the Mills Novelty Company against W. C. Dunbar. Judgment for defendant, and plaintiff appeals. Affirmed.

Hawley, Puckett & Hawley, for appellant. Quarles & Pritchard, for respondent.

SULLIVAN, J. This is an action in replevin to recover nine slot machines, alleged to be of the value of \$325. The plaintiff is an Illinois corporation, and alleges in its complaint that the defendant, on the 22d day of October, 1904, at Boise City, and without

plaintiff's consent, and wrongfully, took said slot machines from the possession of the plaintiff; that upon demand the defendant refused to deliver the same to the plaintiff. Judgment is demanded for the recovery of said chattels, or for their value in case delivery cannot be had, together with \$25 damages and costs of suit.

The amended answer sets up three separate defenses. In the first the incorporation of the plaintiff is admitted; but it avers that the plaintiff has not filed a copy of its articles, certified or otherwise, in the office of the Secretary of State of the State of Idaho, and has not in writing or otherwise designated any person residing within the state as its agent upon whom legal process may be served, and denies that the plaintiff was, on the 22d day of October, 1904, or at any other time, at the city of Boise, or any other place within the state of Idaho, lawfully possessed of said slot machines, or that the plaintiff was, at the commencement of this action or at any time since, entitled to the possession of said slot machines. It denies that said slot machines are of the value of \$325 or any other sum; denies that said slot machines, or any part thereof, was on said date or at any time the property of the plaintiff; denies that the plaintiff, at any time before the commencement of this action, demanded the possession of said slot machines; denies that he still unjustly detains the same or ever at any time unjustly detained the same to the damage of the plaintiff in any sum whatever. For a second defense the defendant alleges that he is a duly appointed, qualified, and acting justice of the peace in and for Boise precinct No. 2 of Ada county, Idaho; that on the 22d day of October, 1904, information was presented to him as such justice of the peace, by which as such justice of the peace he was informed and satisfied that gambling devices, to wit, said nine slot machines, were then within said city and then in operation as such gambling devices in said city; that said information was derived from an affidavit of the prosecuting attorney of said county; that thereupon defendant, acting as such justice of the peace, forthwith issued warrants to "the sheriff or any deputy sheriff or constable of said county," commanding that said slot machines be brought before him at his office in said city; and that thereupon said slot machines were under and by virtue of said warrants, which warrants were placed in the hands of A. Anderson, a constable of said county, and under and by virtue of which said constable brought before the defendant as justice of the peace, said slot machines to be dealt with according to law and the statutes in such cases made and provided, and that such slot machines were in the custody of the law and in the possession and under control of said A. Anderson, as constable, subject to the order of said justice's court at the time of the commencement of this action, all of which facts were well known to plain-

tiff and its agents and attorneys at the time of the institution of this action. It also avers that said slot machines, and each and every of them, were adopted, designed, and designated for the purpose of being used solely in gambling; that they were being used for the sole purpose of gambling at the time the same were seized; and that each of the said slot machines had been designed, devised, and used for gambling purposes at the time of the seizure of the same and for some days prior thereto, and all of said machines were being used in said Boise City for gambling and playing games, at which money was bet and won or lost; that each and all of said slot machines were gambling devices, and were not adapted to, nor could they or either of them, be used for any useful purpose, and that the same and all of them are outlawed property, without value or ownership, at the time of the commencement of this action and at all times since said date; and that said machines, nor any of them, are susceptible of any legitimate use, are instruments of crime designed and devised for the purpose of violating the statutes of this state prohibiting gambling, and are incapable of ownership; that such slot machines were, at the time of the commencement of this action and at the times mentioned in the complaint, in the possession of said constable under the facts averred. The third defense alleges that the plaintiff is a foreign corporation, and has not filed its articles of incorporation, in the office of the Secretary of State, and has not designated any person upon whom service of process may be served as required by law.

Plaintiff demurred to said amended answer and each of said separate defenses, which demurrer was overruled by the court, and plaintiff thereupon moved for judgment on the pleadings, which motion was denied by the court. The cause coming on for trial, the plaintiff decided to stand on its demurrer to the answer and its motion for judgment on the pleadings, and declined to introduce any proof, and the court thereupon dismissed the action at plaintiff's cost.

The notice of appeal states (1) that the appeal is from said order granting the defendant leave to amend his answer and the order overruling plaintiff's motion for judgment on the pleadings; (2) to the order overruling plaintiff's demurrer to defendant's amended answer; (3) from the judgment dismissing the action at plaintiff's costs. Counsel for plaintiff has assigned three errors, the first of which is that the court erred in overruling plaintiff's motion for a judgment on the pleadings.

Counsel contends that the material allegations of the complaint are not denied, and that the attempted denial of ownership of the property in the plaintiff is in the language of the complaint itself, which is no denial. We have above set forth the denials and averments of the three separate defenses, and it is clear to us that they are sufficient to put in issue

all of the material allegations of the complaint, except the allegation that the plaintiff is a corporation organized and existing under the laws of the state of Illinois, which fact is admitted. That being true, it devolved upon the plaintiff to introduce evidence sufficient to establish his case by a preponderance of evidence, which it did not do. Therefore the court did not err in entering judgment of dismissal. In *Walling v. Bown*, 72 Pac. 900, this court, in discussing a motion for judgment on the pleadings, said: "When the plaintiff moved for judgment on the pleadings, he not only, for the purposes of his motion, admitted the truth of all the allegations of the answer, but he must also be deemed to have admitted the untruth of all his own allegations which defendants had denied." We think that is the correct rule, as it is incumbent on the plaintiff to prove his controverted allegations by a preponderance of evidence, and where the court has before it nothing but the allegations of the complaint and denials of such allegations by the answer there is no preponderance in favor of the plaintiff, and the court must enter judgment for the defendant. See opinion on petition for rehearing in *Inland Lumber Co. v. Thompson*, *infra*.

The question of the constitutionality of the antigambling laws of the state has been raised, but under the well-established rule in this court the constitutionality of a law will not be passed upon unless it is absolutely necessary for the determination of the case. We decline to pass upon that question, as it is not necessary to do so in the decision of this case. *State v. Ridenbaugh*, 5 Idaho, 710, 51 Pac. 750; *State v. Mulkey*, 6 Idaho, 617, 59 Pac. 17; *In Re Inman*, 8 Idaho, 398, 69 Pac. 120.

The judgment of the trial court is affirmed, with costs in favor of respondent.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

INLAND LUMBER & TIMBER CO. v. THOMPSON, Assessor, et al.

(Supreme Court of Idaho, Nov. 30, 1905. On Rehearing, Dec. 30, 1905.)

1. TAXATION—ASSESSMENT—ESTOPPEL.

Where a taxpayer has furnished the assessor with a statement of his property, and the assessor, relying thereon, has assessed the property therein described against the person furnishing the list, such person will thereafter be estopped from denying the ownership of the property in an action to enjoin the collection of the tax.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 144, 562.]

2. SAME—BOARD OF EQUALIZATION—HEARING.

Under the revenue act of 1901 (Sess. Laws 1901, p. 233), it is made the duty of the board of equalization to order the assessor to assess any property which has escaped assessment, and where such assessment is made before the final adjournment of the session of the board

convened on the fourth Monday in July, the taxpayer has his opportunity of being heard, and such assessment is not void for want of notice or opportunity to be heard in relation thereto.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 603-606, 850-854.]

3. SAME—NOTICE OF MEETING.

The statutes (sections 53, 65, pp. 250, 254, Acts 1901) and published notice by the clerk of the board of commissioners (section 92, p. 269) constitute notice to the taxpayer of the meeting of the board of equalization and of his right to appear at either or both of such meetings and protest against any assessment or action of the board in relation to assessments.

Stockslager, C. J., dissenting.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; R. T. Morgan, Judge.

Action by the Inland Lumber & Timber Company against Robert C. Thompson, assessor, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Hamblin, Lund & Gilbert, for appellant.
Ezra R. Whitla, for respondents.

AILSHIE, J. This action was commenced by the plaintiff, a Washington corporation, for the purpose of having an assessment against certain timber lands owned by plaintiff and situated in Kootenai county vacated and set aside, and to restrain and enjoin the collector from collecting a tax under such assessment. The plaintiff's first cause of action alleges that under the act of Congress approved June 4, 1897, the plaintiff had located forest reserve lieu land scrip on a body of government lands situated in Kootenai county, and that the location and selection had not been approved by the Commissioner of the General Land Office up to January 12, 1903, and that on January 12th the title to all such lands was still in the United States, and that the same was not taxable by or under the authority of the state of Idaho. The second cause of action alleges that prior to January 1, 1903, the plaintiff made soldiers' additional homestead applications under the act of Congress as embodied in sections 2306 and 2307 of the Revised Statutes of the United States [U. S. Comp. St. 1901, pp. 1415, 1417] for certain lands situated in Kootenai county, but that none of said applications were approved or allowed by the Commissioner of the General Land Office up to and including January 12, 1903, and that on January 12th the title to such lands still remained in the United States government, and that the same was not taxable by the state of Idaho. It is further alleged in each of the foregoing causes of action that the assessor and the board of commissioners, acting as a board of equalization, proceeded to and did assess all of the lands embraced under these script applications and locations for the year 1903. The third cause of action includes all the lands contained in both the first and second causes of action, and also lands which the

plaintiff admits that it did own and were taxable for the year 1903. Plaintiff alleges, however, under the third cause of action, that the assessment was made after the board of equalization had met and without notice to the plaintiff, and that the assessment so made was "far higher than the assessment of other lands in the county of Kootenai of precisely the same class, character, and value, and are in excess of the fair values of said lands. Said assessments are unequal as compared with the assessments of lands in other parts of the county of Kootenai of the same class and character, and are unjust." The defendant demurred to the plaintiff's complaint, and the demurrer was overruled as to the first cause of action, and was sustained as to the second and third causes of action. Plaintiff refused to further plead, and the court entered judgment of dismissal as to the second and third causes of action, and the defendant answered the first cause of action. The plaintiff thereupon demurred to the answer, and the demurrer was overruled by the court, and the plaintiff elected to stand on its demurrer. Judgment was thereupon entered in favor of the defendant. It is from these judgments that this appeal has been prosecuted.

The first proposition argued by the appellant is that the state had no right or authority to tax lands the legal and equitable title to which was still in the United States. That neither the forest reserve lieu land scrip location nor the soldiers' additional homestead location had been accepted or allowed or approved by the Commissioner of the General Land Office prior to the date on which the tax lien attached for the year 1903. The respondent contends that such question does not arise in this case, and that, if it should be resolved in favor of the appellant, still appellant could not succeed in this case. Respondent insists that the appellant is estopped to deny that it was the owner of these lands and that they were taxable within Kootenai county for the year 1903, for the reason that appellant, on July 16, 1903, through its legal and authorized agent, furnished the assessor with a statement of its taxable property for the year 1903, which statement contained a description of the identical lands from the payment of taxes on which the appellant is seeking to be relieved in this action. There appears to be some diversity of opinion among courts as to how far the doctrine of estoppel will be carried in its application to the taxpayer who is required by statute similar to ours to furnish the assessor a statement of all of his property. It seems to us, upon an examination of the authorities, that the general trend thereof is to hold the taxpayer estopped from denying his ownership of the property listed in his statement, unless he shows that the same was done through fraud, accident, or mistake.

In *People v. S. & C. R. R. Co.*, 49 Cal. 414,

the railroad company sought to avoid paying taxes on a tract of land which had been included in a statement furnished by its agent, but which in fact belonged to one Jackson. In considering this question the Supreme Court of California said: "It appears from the evidence that the list so furnished by the superintendent included, with other described property, the lots now claimed to have been owned by Jackson. We think the defendant should not be heard, against the admission of the pleadings, to disturb the authority of its agent, and that the list given by him to the assessor is binding upon the corporation, and justified the assessor in adopting it as a correct statement of its property." In *San Francisco v. Flood*, 64 Cal. 504, 2 Pac. 264, the court, in discussing the duty of a taxpayer to furnish the assessor with a list of his property and the effect of his failure to do so, said: "Whether the description was furnished by the taxpayer, or was made by the assessor, the taxpayer having failed to furnish a list, the complaint of the taxpayer in regard to it should not be regarded. In our opinion it is the duty of the taxpayer to furnish a true and correct list of his taxables to the assessor, and if he fails to do so, and any loss should result to him in consequence of such failure, his complaints on such score should meet with no favor in a court of justice." In *People v. Atkinson*, 103 Ill. 45, it is said: "Where a person makes out and delivers to the assessor of the town in which he keeps his business office the schedule of the amount, quantity, and quality of all his personal property required to be listed for taxation, he will be bound by such return, though a portion of the property is required to be returned by him to the assessor of a different town, where it is also assessed." This last case was cited with approval and followed in *Re Bank of Marlon* (Ill. Sup.) 39 N. E. 118; the syllabus to which case follows: "In absence of any evidence of fraud, accident, or mistake, a property owner is bound by a schedule of his taxable personal property given by him to the assessor." In *Hamacker v. Commercial Bank*, 95 Wis. 359, 70 N. W. 295, the cashier of the bank had furnished the assessor with a statement of the property of the bank, which contained \$20,000 worth of personal property which did not in fact belong to the bank and was not assessable to the bank. The Supreme Court, however, held that the bank and its officers and receiver were estopped to deny that the bank was the owner of such property. On this branch of the case the court said: "Upon the tax roll the bank was assessed directly as the owner of personal property valued at \$20,000, and the various items of taxes were carried out. Although this was an improper mode of taxation, we do not perceive how the bank could escape from paying the tax, which was based upon a personal property return made by its own cashier. In such cases the principle of estoppel has been frequently ap-

plied, and certainly with justice. 25 Am. & Eng. Ency. of Law, 209; *Ives v. North Canaan*, 33 Conn. 402; *Republic L. Ins. Co. v. Pollak*, 75 Ill. 293; *People v. S. & C. R. Co.*, 49 Cal. 414. If the bank could not question or resist the tax, no ground is perceived upon which the receiver could resist it." To the same effect see: *Kirkwood v. Ford* (Or.) 56 Pac. 411; *Phelps Mortg. Co. v. Board of Equalization* (Iowa) 51 N. W. 50; *Lake County v. Min. Co.*, 68 Cal. 14, 8 Pac. 593; 27 Am. & Eng. Ency. of Law (2d Ed.) 671. It must be conceded, we think, that the estoppel which has been applied against the taxpayer in the foregoing cases does not rest upon the usual principles, nor contain the elements necessary or usually required in courts of equity in the application of that doctrine. It seems to be applied rather upon the principle that it is the duty of the taxpayer to see that a list of his property is furnished to the proper officers for taxation, and, although that fact might not be misleading to the officers, nevertheless, when they have once acted upon it, he shall not be allowed to thereafter question its correctness, and thereby disturb the usual and ordinary procedure pursued in the collection of taxes. The public at large have an interest in the collection of the just proportion of taxation from every property owner, and the reasons, therefore, become much stronger for holding the individual to a strict accountability when he seeks to avoid payment than in cases where the controversy arises between citizen and citizen.

In opposition to the application of this principle of estoppel, counsel for appellant have cited: *Charlestown v. Middlesex County Com'rs*, 109 Mass. 270; *State ex rel. Flentge v. Burrough*, 174 Mo. 700, 74 S. W. 610; *Chicago, etc., Ry. Co. v. Cass Co.*, 51 Neb. 369, 70 N. W. 955; *Centennial Eureka M. Co. v. Juab Co.*, 22 Utah, 395, 62 Pac. 1024; *State v. Bellew*, 86 Wis. 189, 56 N. W. 782; *State v. Baker* (Mo. Sup.) 31 S. W. 924; *People v. Central Ry. Co. (Cal.)* 38 Pac. 905; *Central Pac. Ry. Co. v. People*, 162 U. S. 91, 16 Sup. Ct. 766, 40 L. Ed. 903. From an examination of these cases, it will be seen that in the *Missouri*, *Nebraska*, and both of the *Wisconsin* cases the courts declined to apply this principle of estoppel for the reason that the property which had been assessed was outside of and beyond the jurisdiction of the taxing officer, and situated within the jurisdiction of another county. These courts held that inasmuch as property included in the statements made by the taxpayers was situated, as shown by those statements, beyond the limits of the county, and subject to taxation within another county, the taxing officers therefore had no jurisdiction over the property, and that the assessment was for that reason void. The *Missouri* court, however, in *State v. Burrough*, supra, observed that the defendants might be estopped from deny-

ing the ownership of the land described in the tax bill by reason of the fact that they furnished a list of their property, including the land in question therein. *Centennial Eureka M. Company v. Juab County*, supra, seems to rest for its authority upon two propositions—first, the peculiarity of the Utah statutes with reference to furnishing a statement by the taxpayer and the recovery of a tax which has been unlawfully collected; and, second, on the broad principle that the furnishing of a statement by the taxpayer does not constitute such a fraud upon the taxing officer or the public, nor does it constitute such misrepresentation as to constitute an estoppel within the general meaning of that term as defined by the text-writers and authorities on that question. On the general statement of the doctrine the Utah court is undoubtedly correct, but when we come to consider the respective duties and obligations imposed by law and public policy on the taxpayer on the one hand, and the tax assessing and collecting officer on the other hand, we at once see the necessity of a more liberal application of that principle in favor of upholding and enforcing an assessment against the taxpayer. We are of the opinion that in the case at bar, the appellant having furnished a statement which included these lands as its property, and the board of equalization and the assessor having acted on the faith of such statement, appellant should not now be heard to say that it did not own them. If these taxes are not paid and the property should be sold, such a sale cannot affect the government, but only such right and title as the appellant has. The government is not here complaining, and it is difficult to see what injury can result to appellant on account of the assessment of those lands, if, indeed, they belong to the government.

Passing, now, to a consideration of the question of notice, we will first observe the provisions of the revenue act of March 22, 1901. Sections 28-35 of the act (Sess. Laws 1901, pp. 245-248) make it the duty of every person owning property to furnish the assessor of his county a statement under oath setting forth specifically all of the real and personal property owned by such person or under his control at 12 m. on the second Monday in January of that year, and any person failing or neglecting to furnish such statement under oath, after demand made therefor, is subject to the penalty of having his property listed and assessed by the assessor, which assessment cannot thereafter be reduced by the board of equalization. Section 35, p. 248. By section 91 (page 268) of the act it is made the duty of the assessor to complete his assessment roll on or before the 1st day of July in each year, and he and his deputies must take and subscribe the oath provided therein. By section 92 (page 269), the assessor is required, as soon as the assessment roll is completed, to deliver the

same, together with the statements furnished him by the taxpayers, to the clerk of the board of county commissioners, who is required to immediately give notice thereof of the time of the meeting of the board of equalization by publication in a newspaper printed and published in the county. By section 53 (page 250) of the act it is made the duty of the board of county commissioners to meet on the second Monday in July of each year as a board of equalization. At this meeting it is the duty of the board to examine the assessment roll name by name, together with the valuation of property of each taxpayer assessed, and raise, or cause to be raised, any assessment of property which in the judgment of the board has not been assessed at its fair cash value. By section 60 (page 252) it is provided that at such meeting the board "may direct and require the assessor to assess any taxable property that has escaped assessment, increase any valuation or add to the amount, number, quantity or value of any property, when a false, inaccurate, or incomplete list has been furnished or rendered." By the same section it is provided that "all persons whose assessment is altered, modified, or affected in the amount of valuation of property charged to them, shall be notified by the clerk of said board by letter deposited in the United States mail, post-paid and addressed to such person interested, at least ten days before the final action is taken in fixing and equalizing such assessment, of the day fixed when he may be heard upon the matters affecting the assessment of his property for taxation, which shall be on the fourth Monday in July of each year, or as soon thereafter as he can be heard or his matter be reached." By the provisions of section 53 above referred to it is made the duty of the board to continue in session for the purpose of equalizing assessments "until the business of equalization is disposed of." Section 65 (page 254) provides that the board shall meet on the fourth Monday in July, "and continue in session until all the parties appearing have been heard, and until all the proposed additional assessment, changes and corrections have been acted upon, * * * and the clerk of the board must keep a record of their proceedings, and as auditor he may receive from the tax collector the original assessment book, and may retain the same for the time necessary to enter the additional assessments, changes and corrections ordered by the board."

Appellant complains that it had no notice that its property had been assessed, and no opportunity to appear before the board of equalization. We find the following state of facts as contained in the record: The board of commissioners met as a board of equalization on July 13, 1903, and continued in session until July 16th, when they adjourned until July 20th. On July 20th they convened and continued in session during

that day, and thereupon adjourned until July 27th. On July 27th, which was the fourth Monday, they met and continued in session until the 28th, when they adjourned sine die. The assessor alleges that he completed the assessment roll for the year 1903 on the 11th day of July, and delivered the same to the clerk of the board of commissioners, and that prior to that time he had no knowledge or information concerning the property described in plaintiff's complaint, and for that reason the same had not been by him assessed up to the time he completed the roll and delivered it to the clerk of the board; that prior to the 16th day of July, 1903, the plaintiff had failed and neglected to furnish the assessor with a statement of its property, and that on the 16th day of July he made a request that it furnish such list; and that thereupon the plaintiff furnished a statement as required by law which contained a description of the property described in plaintiff's complaint, and concerning the assessment of which the plaintiff is complaining in this action. The assessor further alleges that thereafter, and on about the 28th day of July, 1903, the board of commissioners, while sitting as a board of equalization, and knowing of the list and statement which had been furnished to the assessor by the plaintiff, ordered and directed the assessor to assess the property contained in said statement as property that had escaped taxation, and that he as assessor thereupon, in compliance with the order of the board, placed the property on the assessment roll and made the assessment as exhibited in plaintiff's complaint, and that after such assessment was made the board of equalization did not alter, change, or modify such assessment in any manner. It therefore appears that the assessment complained of in this action was a new and additional assessment made under the provisions of sections 60 and 65 of the revenue act, supra. Under the provisions of that act it is the duty of the board to convene on the second Monday of July and examine the assessment roll, and order any raises or changes that it may deem necessary, and to require notice thereof given to the taxpayer by the clerk, and that at their second meeting, convened on the fourth Monday, they hear any complaints made against any proposed raises or changes, and at the latter meeting they finally determine and pass upon such matters. At the first meeting they are also required to direct the assessor to make any new or additional assessments where property has escaped assessment. The times of both of these meetings are fixed by statute, and in addition thereto it is made the duty of the clerk of the board to publish notice of the time and place that the board of equalization will meet. These statutes and the publishing of such notice give ample opportunity to every taxpayer to appear before the board in relation to any matter of assessment concerning which he desires to be heard. In this

case the appellant furnished the assessor with a list of its property between the second and fourth Mondays of July (July 16th), and it must have known as a matter of fact the purpose of this statement, and the use to which it would be put by the assessor and the board of equalization. In addition to this actual notice, the appellant had notice by statute that the board would convene on the fourth Monday and finally pass upon all new and additional assessments. As a matter of fact the board did convene in conformity with law, and at such meeting it directed this property assessed, and after it was placed upon the assessment roll and assessed by the assessor it appears that such assessment was satisfactory to the board of equalization, and they thereafter made no alteration or change therein. It is true that plaintiff alleged that the assessment was made after the adjournment of the board; but, as the case comes here on demurrer to the answer, we must concede all the allegations of the answer. If appellant had been present during this last session of the board, it would have had its opportunity to be heard concerning the assessment and valuation placed upon its property, and if it failed to do so it was its own fault, and it should not be heard to complain at this time.

Section 60 only requires notice to be mailed to persons who have already been assessed and whose assessments are "altered, modified, or affected in the amount of valuation of property charged to them." There is no requirement that a notice be mailed to a person who has never been assessed, and whose assessment is ordered by the board. Every person who has not been assessed prior to the date on which the assessor delivers the assessment roll to the clerk of the board has notice that the board will order his property assessed if they discover it. Therefore, if any person whose property has not been assessed wants to know the amount for which his property is assessed or to be heard in relation thereto, he should appear during the session convened on the fourth Monday in July and present his grievances. *Ore. & C. R. Co. v. Lane County* (Or.) 31 Pac. 964; *Ramp v. Marion County*, supra; *Kirkwood v. Ford* (Or.) 56 Pac. 411; *Albany Mutual Bldg. Ass'n v. City of Laramie* (Wyo.) 65 Pac. 1011; *Aggers v. People* (Colo. Sup.) 38 Pac. 386; *U. S. Trust Company v. Territory* (N. M.) 62 Pac. 987; *Orr v. State Board of Equalization*, 3 Idaho (Hsb.) 190, 28 Pac. 416.

The judgments appealed from are affirmed. Costs awarded to respondents.

SULLIVAN, J., concur.

STOCKSLAGER, C. J. It must be conceded that lands belonging to the government are not assessable to any one so long as the title remains in the United States. The homestead or entryman under any of the provisions of the land laws can only be as-

sessed for the improvements he may have on the land. It is true, in this case, that the land in controversy was returned by an agent or officer of the corporation as part of the assets of the company or corporation. It is possibly true that after such return they should not be heard to complain of the assessment, as the defendant assessor was in no way responsible for the error, if such it was, in the return of the property. Entertaining these views, I express no opinion as to the rights of recovery in this action.

On Rehearing.

SULLIVAN, J. A petition for rehearing has been filed in this case, and it is stated therein that "It is apparent from a reading of the opinion relating to the third cause of action that the court assumed that the respondent filed an answer to this cause of action, where as the fact is, as stated in the first part of the opinion, that the respondents demurred to this cause of action and the demurrer was sustained. This being true, it seems to us that an entirely different aspect is put upon this part of the case." And in support of that contention counsel quotes from the opinion as follows: "It is true that the plaintiff alleged that the assessment was made after the adjournment of the board; but, as the case comes here on demurrer to answer, we must concede all the allegations of the answer." The facts are as follows: The complaint purports to state three causes of action. A demurrer was sustained to the second and third, and overruled as to the first. That left the complaint standing with one cause of action. To that cause plaintiff answered, and to no other. The court does not intimate in the opinion that the respondents answered either cause of action but the first. On the trial the issues were made up by the first cause of action in the complaint and the answer thereto; the second and third causes of action having been stricken out on demurrer. No evidence whatever was introduced on the trial, and it is stated in the judgment as follows: "By agreement of counsel, the first cause of action of the plaintiff's amended complaint and the defendant's answer thereto were submitted to the court for decision; the respective counsel agreeing that the facts set forth in the plaintiff's first cause of action and the defendant's answer thereto correctly set forth the issues." Upon that state of facts the court in its decision must find all of the material allegations of the complaint denied by the answer in favor of the defendant. Upon all issues denied by the answer, the plaintiff must produce a preponderance of evidence to recover, and the lower court we think rightly concluded that on the complaint and the answer thereto the plaintiff was not entitled to a judgment. *Walling v. Bown* (Idaho) 72 Pac. 960; *Mills Novelty Co. v. Dunbar* (Idaho) 83 Pac. 932.

It is further contended by petitioner that

it is not pretended that the list of taxable property furnished the assessor was the official statement which the assessor had a right to exact and which the law provides must be sworn to, and for that reason the doctrine of estoppel will not apply. We cannot agree with that contention. The appellant furnished a list, and under the facts of this case, whether it be sworn to or not, whether it be the official list or not, he is estopped at this time from denying that it is correct.

The petition for rehearing is denied.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

(11 Idaho, 603)

STONEBURNER v. STONEBURNER.

(Supreme Court of Idaho, Dec. 27, 1905. On Rehearing, Jan. 23, 1906.)

1. DIVORCE—WHEN GRANTED.

Divorce is a remedy for the innocent, and will not be granted to one who is shown to be guilty of a similar offense against the marital contract as that of which he or she complains.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 188-197.]

2. SAME—RECRIMINATION.

The defense of recrimination in divorce suits is recognized and adopted by sections 2464 and 2466 of the Revised Statutes of 1887, and constitutes a complete bar to a recovery, where the defendant shows a valid existing cause of action against the plaintiff.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 197.]

3. SAME—DESERTION—CHANGE OF DOMICILE.

As to whether or not a husband can, while himself a deserter of his wife, change the domicile to a foreign jurisdiction, and, after causing the wife to go to such jurisdiction in defending an action prosecuted by him, there solicit her to come and live with him in the new home, and thereby convert her into a deserter of her husband, considered.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 129.]

4. SAME—OFFER OF RECONCILIATION.

In cases of desertion the offending party may at any time return and offer reconciliation, and the injured spouse cannot reject such offer, if made prior to the expiration of the one-year period during which time the desertion ripens into a cause of action; but, if made after the right of action has accrued, the injured spouse may reject such offer without thereby assuming the attitude of an offender against the marital contract.

5. SAME—EVIDENCE.

Evidence examined and considered, and held insufficient to warrant a decree of divorce in favor of the plaintiff.

(Syllabus by the Court.)

Appeal from District Court, Nez Perce County; E. C. Steele, Judge.

Bill by Joseph W. Stoneburner against Abbie E. Stoneburner. Judgment for plaintiff, and defendant appeals. Reversed.

Eugene O'Neill, for appellant. Geo. W. Tannahill, for respondent.

AILSHIE, J. This action was instituted by the respondent in the district court Febru-

ary 16, 1903, praying for a decree of divorce. The defendant, who is appellant in this court, answered, denying the charge of desertion and as a separate defense alleged and charged the plaintiff with a violation of the marital contract in that he, without just or any cause therefor, deserted and abandoned her on the 8th day of June, 1896, at Berne, in the state of Indiana. After the issues were made up, the district court referred the case to a referee to take the testimony and report the same to the court. After the evidence was reported and the case was argued and submitted, the court made findings of fact and thereupon entered judgment in favor of the plaintiff and against the defendant. The trial court found upon all the material issues of the plaintiff's complaint, but failed to find on the issues raised by the separate defense interposed by the defendant, wherein the plaintiff was charged with desertion.

This failure to make findings on the issues presented by defendant's separate defense which was pleaded under sections 2464 and 2466, Rev. St. 1887, if true, would have constituted a complete defense to the plaintiff's cause of action, and is one of the errors assigned on this appeal. It was clearly the duty of the court to make findings on this issue the same as on the issue presented by the plaintiff's complaint. Section 2464, *supra*, provides that "divorces must be denied upon showing * * * recrimination." Section 2466, *supra*, provides that "Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce." The general finding, therefore, "that all the material allegations and denials of defendant's answer in conflict with the foregoing findings are found to be unsupported by the evidence and untrue," is not a sufficiently specific finding upon the issues raised by a recriminatory defense.

The appellant places her chief contention, however, in this court, upon the fact that the evidence was insufficient to support findings and a decree in favor of the plaintiff, and that the uncontradicted evidence in the case supports the allegations of appellant's separate defense. In this case no witnesses were produced in the district court, and the district judge did not see or hear any of the witnesses testify in the case. In this condition of the case, under the rule heretofore established in this court, it becomes our duty, where the question of sufficiency of the evidence is raised, to make an original examination of the entire evidence in the case and determine the weight and preponderance thereof the same as if the case had never before been heard. *Roby v. Roby* (Idaho) 77 Pac. 215. The plaintiff and defendant intermarried in the state of Indiana on the 2d day of April, 1888. After a number of removals to different points in the state of Indiana, they went to Cincinnati, where the plaintiff attended a medical college, while his

wife, the defendant, kept boarders to defray the expense of obtaining his medical education. After completing his medical course they located at Berne, Ind., where the appellant engaged in the practice of medicine. Their married life appears to have been fairly agreeable and happy until about the year 1896. On June 8th of that year, along toward midnight, the plaintiff, without notice or warning to his wife, left the home, boarded the train, and disappeared. On June 18th of that year he wrote to her from Mound City, Kan., discussing at considerable length his reasons for leaving her, and, among other things, said: "As this is the third attempt of my leaving, I am determined that this shall be the last. I will never live with you again. You say that you are going to follow me. This will do you no good, for I will not take up with you any more. This will be the third time, and I will not attempt it, so you may just as well stay there and save the money and worry of the trip." Later he returned to Indiana, but did not go to his home, nor return to his wife, and on August 1, 1896, he commenced an action in the circuit court of Adams county, Ind., for a divorce, upon the grounds of cruel and inhuman treatment inflicted by his spouse. The defendant answered the complaint, denying its allegations, and also charged the plaintiff with deserting and abandoning her on the 8th day of June previous. The appellant thereupon filed his affidavit for a change of venue from Adams county, upon the grounds that he could not have a fair and impartial trial in that county, and thereupon the case was transferred to the Jay county circuit court. The case was thereafter tried and determined, and judgment was entered in favor of the defendant and against the plaintiff. The plaintiff did not return to his wife or resume the marital relations with her, but thereafter came West, and located at Leland, in Nez Perce county, Idaho, on about January 30, 1899. In the meanwhile his wife was living and residing at the old home at Berne, Ind.

On January 22, 1900, the plaintiff commenced an action against the defendant in the district court in and for Nez Perce county, charging against her the same acts of cruelty alleged in his complaint in the Indiana court in 1896. In response to the service of process in this latter case, the defendant came to Idaho and employed counsel and defended against plaintiff's cause of action, and on October 14, 1901, a decree was entered denying the plaintiff any relief, upon the ground that the matter was *res adjudicata*, having been previously passed upon by a court of competent jurisdiction in the state of Indiana. After the entry of this latter decree, the defendant remained at Lewiston, and she and the plaintiff soon thereafter began to confer with each other apparently with a view to a reconciliation and again living and residing together. Several notes were exchanged making engagements, at which times

and places they would confer with each other with reference to a settlement of their differences. These notes were in evidence, and in them each professes a willingness to live with the other, but, when we come to reading the testimony of the respective parties with reference to the conversations which took place between them at these meetings, we find an utter failure on their part to agree as to the character and import of their conversations and interviews or what was said at such times. The wife testifies that she requested her husband to go for a walk on one or two occasions in order that they might discuss matters, but it stands admitted by the plaintiff that he always refused and declined to have any conversation with her in reference to their differences at any time or place other than at his room in the hotel or at his attorney's office. At each of these conversations there seems to have been a witness near who was able to hear part of the conversations, especially what was said by the plaintiff. In one instance the witness admits that he was requested by the plaintiff to be at such place as he could overhear the conversation. The plaintiff testified that at these various conversations he requested the defendant to go with him to his home and place of residence at Leland, and to live with him, and that he promised to care and provide for her if she would do so, and that she would from time to time tell him that she did not know what she would do. It is admitted, however, that she did not go with him, and has at no time lived or resided with him in Idaho. The witnesses who overheard the conversations all testified that the plaintiff requested his wife to go with him to his home and resume the marital relations. It is well enough to here observe that no witness claims to have heard all that was said or much of anything that was said by the defendant. The defendant testifies that at some of these interviews the plaintiff insisted on her entering into an agreement and arrangement with him whereby he should have a divorce, and that when she would decline to do so he would become excited and abusive and on several occasions shook his fist in her face. She also testifies that she told him she would go with him, and that he agreed to call for her at her boarding place at a certain hour in the afternoon, but that he never called. Things went along in this manner until February 16, 1903, when the plaintiff commenced this action in the district court of Nez Perce county, praying for a divorce on the grounds of desertion. The plaintiff in his complaint alleges that in the month of December, 1901, the defendant deserted and abandoned him without any just cause and against his will and consent. The evidence introduced upon the trial of the cause was to the effect hereinbefore cited.

It is unnecessary to go into detail as to the evidence produced by the respective parties, and we shall content ourselves by stating the

ultimate facts we gather from the entire evidence in the case. As said above, the evidence was before the trial court on paper the same as it is here, and we are therefore in the same position as the trial court with reference to judging of the credibility of witnesses and their bias and prejudice, if any, in the case. It satisfactorily appears to us that the fundamental cause of the respondent deserting his wife on June 8, 1890, is more largely due to his infatuation with another woman than to any cruel or inhuman treatment received by him at the hands of his wife. It is probably true that his attentions to another woman called down on his own head some well-merited chastisement from his wife. It stands admitted that he first deserted his wife, and that a court of competent jurisdiction refused to grant him a divorce. It must therefore follow that he deserted her without cause. He thereafter left the state and took up his domicile in a foreign jurisdiction, where he again sought to obtain a legal release from the obligations of his marital contract. In order to defend herself against his charges, the wife was compelled to leave her home in Indiana and come to this state, where she successfully resisted his efforts to obtain a divorce. The circumstances surrounding the plaintiff's subsequent conduct toward her led to the irresistible conclusion that he was seeking grounds for a divorce rather than a sincere and bona fide reconciliation with his wife. If he had engaged in these meetings and interviews with his wife inspired and prompted with a desire to win her favor and discharge the obligations of his marriage vows toward her, it is difficult to understand why he should have deemed it necessary to have those meetings and conversations where he could have witnesses overhear him, and should also select a witness to be in reach where he could hear.

But, putting all this aside, and conceding all the plaintiff says is true, and that he did faithfully and sincerely seek to be reconciled to his wife and again discharge his marital duties and obligations, there is another and even more serious reason why he should not have been granted a decree. The plaintiff was the first to commit a statutory breach of the marital contract. He deserted his wife and admits that for more than five years he did not return, and when, after repeated failures to obtain a divorce, he does seek reconciliation, it is not at the home he deserted, but in a foreign state, to which she has come in answer to process issued on his application. In this state the husband has a legal right to select the domicile, and the wife must follow him (*Roby v. Roby*, supra), but it is exceedingly doubtful if, while he is still a deserter of his wife, he can change the domicile and then, as soon as she declines to take up her residence with him at the new domicile thus selected, thereupon convert her into a deserter of her husband. He did not request his wife to go with him to his new

home and take up her residence with him until long after his desertion of her had ripened into a right of action in her favor under the statute, both of Indiana (Rev. St. Ind. 1881, § 1032) and Idaho (Rev. St. 1887, § 2463). After her right of action had accrued, she had a legal right to refuse to live with him, if she saw fit to do so, and could still have maintained her action against him. *Benkert v. Benkert*, 32 Cal. 468; *Coe v. Coe* (N. J. Ch.) 59 Atl. 1030; *Howard v. Howard* (Cal.) 66 Pac. 367; *Ogilvie v. Ogilvie* (Or.) 61 Pac. 627. In this case the defendant showed a much clearer case of desertion against the plaintiff than he was able to show against her, accepting his own story of the occurrences. She made a good case against the plaintiff on the charge of desertion. Now then, if it be concluded that the wife was also guilty of a breach of the marital contract, we are still confronted with the proposition that one party to that contract is seeking a release from its further duties and obligations on the grounds of a breach by the other, while he himself is also guilty of a like breach. Divorce is a remedy for the innocent only, and not for the guilty. Here the plaintiff was the first to violate the marital contract. Two wrongs never make a right, and he who invokes relief in a court of equity ought not to be himself guilty of the same offense against his adversary as that on account of which he seeks relief. The doctrine of recriminatory defenses is of ancient origin and is as old as the rules of equity. 2 *Bishop's Marriage, Divorce & Sep.* § 342; *Nelson on Divorce & Sep.* § 426. It has been specifically enacted into sections 2464 and 2466 of our Revised Statutes, of 1887, and has been recognized and approved by all the American courts. *Bishop on M., D. & Sep.* § 431; 14 *Cyc.* 648; *Day v. Day*, (Kan. Sup.) 80 Pac. 975; *Wheeler v. Wheeler* (Or.) 24 Pac. 900; *Tracey v. Tracey* (N. J. Ch.) 43 Atl. 713; *Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717; *Brenot v. Brenot*, 102 Cal. 294, 36 Pac. 672.

We conclude that the trial court erred in not finding in favor of the defendant on her defense of recrimination. With such a finding the judgment should have been a denial of the divorce. These parties must be left where the court found them, and, if the plaintiff so conducts himself as to hereafter bring himself within the purview of the law in such cases, and the defendant should refuse to be reconciled to him, he may then have a standing in court, but not until he does so.

The order denying a new trial is reversed, and the cause is remanded, with directions to the trial court to dismiss the action and enter judgment in favor of the defendant and against the plaintiff for all costs incurred, and for a reasonable attorney's fee for the prosecution of this appeal.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

On Rehearing.

SULLIVAN, J. A petition for a rehearing has been filed in this case, in which the petitioner asks for a rehearing in regard to costs and attorney's fees. On this appeal the judgment of the court below was reversed, and the cause remanded, with instructions to the trial court to dismiss the action "and enter judgment in favor of the defendant and against the plaintiff for all costs incurred, and for a reasonable attorney's fee for the prosecution of this appeal." Under that direction the trial court is directed to enter judgment in favor of the defendant for all taxable costs incurred in the trial of the said case, which would include, among others, the expenses of all witnesses procured on the trial of the cause and the expense of taking all depositions used on the trial, and, as this court did not require a printed transcript to be filed herein, will allow \$50 as a reasonable fee to pay for the typewriting of said transcript, which must be taxed as a part of the costs on appeal, and an attorney's fee of \$200 is allowed for the preparation of this appeal, and for all services of the attorney in presenting the case to this court. Also such other costs as are allowed by law and the rules of this court may be taxed against respondent.

The application for rehearing is denied.

STOCKSLAGER, C. J., and AILSHIE, J., concur.

HUMBIRD LUMBER CO. Limited, v. THOMPSON, County Assessor and Tax Collector, et al.

(Supreme Court of Idaho, Dec. 28, 1905.)

1. TAXATION—SALE—INJUNCTION.

A demurrer will be sustained to a complaint in equity to enjoin the assessor and tax collector from selling lands of complainant to satisfy taxes assessed, where all the requirements of the statute have not been complied with.

2. SAME—COMPLAINT—SUFFICIENCY.

A complaint to enjoin the assessor and tax collector from selling property to satisfy a tax levy regular in form must allege the full cash value of the property, if the injunction is prayed for on the ground that the levy is excessive.

3. SAME.

A complaint that only alleges the "cash value," "fair value," or "true value," is not a compliance with section 10 of the revenue act (*Sess. Laws* 1901, p. 238).

4. SAME—GROUNDS.

An allegation that other property of similar character and value in the vicinity or county has been assessed at a less valuation than complainants is not sufficient to warrant a court of equity to grant relief.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; R. T. Morgan, Judge.

Action by the Humbird Lumber Company, Limited, against Robert C. Thompson, assessor and tax collector of the county of Kootenai, and Kootenai county. Judgment

for defendants, and plaintiff appeals. Affirmed.

Chas. L. Heitman, for appellant. Ezra R. Whitla and C. W. Beale, for respondents.

STOCKSLAGER, C. J. This is an action to enjoin the respondent, Robert C. Thompson, as assessor and tax collector of Kootenai county, from selling the lands of appellant to pay the taxes of appellant for the year 1903. Plaintiff alleges: That it is a corporation created under the laws of the state of Washington, and authorized to do business in the state of Idaho. That plaintiff is the owner of large tracts of land in Kootenai County. That in the year 1903 Robert C. Thompson, as assessor of Kootenai county, assessed to the plaintiff the lands described in Exhibit A and fixed the assessment and valuation thereon as follows: The lands described in that part of Exhibit A entitled "Pack River District" were assessed at \$7 per acre, in "Priest River District" at \$3 per acre, and in the "Hoodoo Yellow Pine District" at \$2 per acre. That they were extended on the assessment roll of Kootenai county by said Thompson as such assessor. That said defendant Thompson, as such assessor in assessing said lands assessed said lands at much more than their cash value, and that said assessments as so made were and are far greater and higher than the assessment by said Thompson of other lands in the same county of the same class, character, and value, and are in excess of the fair value of said lands, and are unequal as compared with the assessment of lands in the same locality and in other localities in the county of Kootenai of the same class, character, and value, and are unequal and unjust, and that said assessments are not uniform as compared with the assessments of other lands. * * * That the true value of the lands described in that part of Exhibit A entitled "Pack River District," and which were assessed at \$7 per acre, is and was \$3.50 per acre; that the true value of the lands in the "Priest River District" is and was \$3 per acre; that the true value of the lands in the "Hoodoo Yellow Pine District" is and was \$2 per acre, except the lands described as "Cut and Burnt Lands," the true value of which was and is \$1 per acre.

It is then alleged that on or about the 13th day of July, 1903, said Humbird Lumber Company filed with the board of county commissioners for the county of Kootenai, sitting as a board of equalization, its application for a reduction of valuation of property, which application is annexed to this second amended complaint, marked "Exhibit A"; that said application came on for hearing before said board of county commissioners on the 13th day of July, 1903, and witnesses were sworn and testified in support of said petition, and the hearing thereof was continued until the 20th day of July, 1903, and on said day additional evidence, documentary

and oral, was introduced in support of said petition, and the matter was taken under advisement by said board, sitting as a board of equalization, until the 27th day of July, 1903; that on the 27th day of July, 1903, the said board, sitting as a board of equalization made an order, entered upon the minutes of the court, granting a limited part of the relief sought by said Humbird Lumber Company in said proceedings. Copies of the minute entries and of the order made by said board are annexed to this amended complaint, marked "Exhibit B."

The next allegation, being 8, sets out that, being dissatisfied with the action of the board in refusing to grant the reduction sought, it did on the 2d day of September, and within 20 days after the first publication of the proceedings of the board, file and cause to be served its notice of appeal from said order of the board made on the 27th day of July, 1903, and on the 2d day of September filed its undertaking on appeal in the sum of \$300; that on the 5th day of October, 1903, Thos. H. Wilson, county attorney in behalf of defendant, Kootenai county, caused to be filed and served a notice to dismiss the appeal, and thereafter, on same date, he filed a notice of motion to dismiss the appeal; that thereafter, and on the 7th day of October, 1903, said motion to dismiss the appeal was heard and taken under advisement; that on the 20th day of October, 1903, the motion was denied; that on the 3d day of November, 1903, said appeal came on to be heard upon its merits, at which hearing witnesses were sworn and examined and documentary evidence introduced in behalf of said Humbird Lumber Company, and after said Humbird Lumber Company had introduced its evidence in support of its claim the county of Kootenai and said members of the board of county commissioners requested and obtained an extension of time in which to introduce evidence in opposition to the claim of said Humbird Lumber Company for a reduction of the assessed valuation of its said lands; that the proceedings came on for hearing before the honorable judge of said district court on the 29th day of December, 1903, and defendants introduced evidence, both documentary and oral, and the matter was taken under advisement by said judge, and on the 2d day of January, 1904, the said district judge notified the attorney for the Humbird Lumber Company that the application of said Humbird Lumber Company for a reduction of the assessed valuation of the said lands would be granted to the extent that the lands which had been assessed at \$7 per acre would be reduced to \$3.15 per acre, and that the lands which had been assessed at \$3 per acre would be reduced to \$2 per acre, and that said judge, at the time he notified said attorney of his decision, requested said attorney to prepare the necessary judgment or order to be signed, which instructions were complied with; that

said judge thereafter delayed signing any order or judgment or findings in the premises to carry out his said decision, although requested so to do by the attorney for said Humbird Lumber Company, as appears by a letter written by said judge to the attorney for plaintiff, a copy of which is marked "Exhibit C" and attached to this complaint.

The ninth allegation is that on the 4th day of February, the judge of said court, upon application of the attorneys for Kootenai county, allowed said defendant to file and serve another motion to dismiss said appeal, which motion was argued, taken under advisement, and on the 18th day of March, 1904, sustained, and the appeal dismissed; that subsequent to the dismissal of said appeal the Supreme Court of Idaho had decided in a similar case that the right of appeal does not lie from an order made by the board of county commissioners sitting as a board of equalization. Plaintiff further avers that the said appeal of the plaintiff herein is still pending and undetermined in the Supreme Court of Idaho.

The tenth allegation is that the total amount of taxes assessed against the Humbird Lumber Company upon its lands for the year 1903 amounted to \$18,185.56; that the reduction, according to the decision of the district judge upon the merits of plaintiff's appeal from the action of the board of equalization, so made on the 2d day of January, 1904, would have amounted to about the sum of \$6,000, leaving the amount of \$11,877.06 due from plaintiff to said Kootenai county as its taxes for 1903; that on the 2d day of January, 1904, plaintiff tendered to defendant Thompson, as such assessor and tax collector, the sum of \$11,877.06, being the amount due said county for the year 1903, after the same had been reduced by the decision of said district judge, but that said Thompson, as such assessor and tax collector, declined and refused to accept said sum in payment of plaintiff's said taxes, and ever since has declined and refused, and still refuses, to accept the same in payment of said taxes.

The eleventh allegation is that, as part of the total sum of \$18,185.56 assessed against the lands of the plaintiff in 1903, about \$1,440 was and is a special property road tax levied by order of the county commissioners, and that plaintiff appealed from the levy so made to the district court in and for the county of Kootenai, and that said appeal was heard in said court about the 20th day of October, 1903, and thereafter, to wit, on or about the 19th of January, 1904, the honorable judge of said district court rendered a judgment against the plaintiff, and that plaintiff did, on or about the 25th day of January, 1904, appeal from said judgment to the Supreme Court, and that said appeal is still pending and undetermined; that, as plaintiff is advised and believes, the statute authorizing said special property road tax is unconstitutional, and therefore null and void.

Twelfth allegation alleges that it should not be held liable for, and its lands should not be subjected to, the payment of the penalty of \$18,185.56, which is claimed by defendant Thompson, as assessor and tax collector, and for the payment of which in part the lands of plaintiff are advertised to be sold, for the reason that the honorable judge of the district court, in his letter of January 3, 1904, which is made a part of this amended complaint, marked "Exhibit C," notified the attorney for the plaintiff herein that the assessor was aware of the decision in favor of plaintiff and reducing the assessed valuation of its lands as hereinbefore set forth, and that the taxes so claimed to be due by said defendant assessor and tax collector from plaintiff should not be placed upon the delinquent list, and that no penalty should attach.

It is alleged in the thirteenth paragraph that said Thompson, as assessor and tax collector, has advertised the lands of plaintiff for sale in order to realize therefrom the sum of \$18,185.56, including said sum of about \$1,440 so levied by said board of county commissioners as a special road tax, the amount assessed against plaintiff's lands for the year 1903, together with the sum of \$18,185.56 as penalty claimed by said Thompson for the alleged delinquency by plaintiff in payment of its said taxes, and the further sum of \$81.75 for publication of said property of plaintiff in the list of delinquent property subject to taxation, and that, unless restrained and enjoined by an order of this court, said defendant Thompson as such assessor and tax collector, will sell said lands of plaintiff, and thereby cast a cloud upon the title of plaintiff to its said property, and thereby cause a great damage and injury to plaintiff.

The fourteenth allegation is that the plaintiff has no adequate remedy at law. Then follows a prayer that defendant Thompson, as assessor and tax collector, be restrained and enjoined by this court from selling the said lands of the plaintiff, or any part thereof, to pay and satisfy the said taxes so assessed against the lands of plaintiff; that the court take jurisdiction of the case, and hear evidence upon the merits of the controversy, and grant plaintiff such reduction upon the assessment so made upon its property by the assessor for the year 1903 as will be equal, uniform, and just; and that plaintiff may have such other and further relief as to the court may seem just and equitable.

To the complaint is appended the application to the board of county commissioners for a reduction of valuation of property, and the exhibits referred to in the complaint. Exhibit C is as follows: "Chas. L. Heltman, Rathdrum, Idaho—My Dear Sir: Mr. Wilson has requested that I wait the receipt some findings which he desires to submit, and I will so do. The assessor is aware of the decision, and therefore cannot place these taxes upon the delinquent list. If necessary

I will communicate with him in order that no penalty attach. I am informed that there is an additional five per cent. increase in valuation made by the state board which is not covered by the decision in this case. Please confer with Wilson relative to this matter, also the lands described in Exhibit C. I will be in Wallace tomorrow afternoon. Yours very truly, R. T. Morgan."

To the complaint a demurrer was filed by defendant Thompson, as assessor and tax collector of Kootenai county: (1) That said second amended complaint does not state facts sufficient to constitute a cause of action. (2) That there is a misjoinder of parties defendant in said second amended complaint in this, to wit: that said action is brought to enjoin the said defendant Thompson from selling certain property mentioned in said second amended complaint and for the reduction of a certain assessment made upon said plaintiff's property by said Thompson for the year 1903, and with which and concerning which said defendant the county of Kootenai, state of Idaho, a corporation, has nothing to do whatever, either with said assessment or with the threatened sale, and that plaintiffs fail absolutely to show any connection that the said defendant the county of Kootenai, state of Idaho, a corporation, has with the acts or threatened acts or conduct of said defendant Thompson, or that it has done or threatened to do, anything whatever to the injury or damage of said plaintiff, or is in any manner connected with the acts or conduct of the defendant Thompson complained of in said second amended complaint. (3) That said amended complaint is uncertain in this: (a) That it does not appear therefrom what was the cash value or the full cash value of the lands mentioned in said second amended complaint at the time of the assessment of the same by said defendant Thompson, or at any time, or at all. (b) Nor does it appear therefrom how much greater or higher the assessment placed upon said lands by said Thompson was than the assessment placed by him upon other lands of the same class, character, and value in said county of Kootenai, as the lands of the plaintiff assessed by said Thompson at a lower valuation than the lands of the plaintiff, or in what amount the assessment placed upon plaintiff's land was in excess of the fair value or full cash value of said lands, or in what measure or amount the assessment of said plaintiff's lands by said defendant Thompson was unequal as compared with assessments of land in the same locality, or in other localities in the county of Kootenai of the same class, character, and value, or was not uniform as compared with assessments of other lands of the same kind, character, and value situated in the same or other localities in the county of Kootenai. Nor does it appear therefrom that, after the reduction of the assessed valuation of said lands by

the said board of equalization, the valuation thereof exceeded the actual cash value or the full cash value of the same, or was a valuation in excess of the assessed valuation made by said defendant Thompson upon other lands in the said county of Kootenai of the same class, character, and value, or was in excess of the fair or full cash value of said lands, or was an unequal value compared with the assessments of lands in the same and in other localities in the county of Kootenai of the same class, character, and value, or was an unequal or unjust valuation, or not uniform, as compared with the assessed values of other lands of the same kind, character, and value, situated in the same and in other localities in the said county of Kootenai. (d) Nor does it appear therefrom when the said defendant Thompson threatens to or will sell said property unless restrained by the order of this court. (e) Nor does it appear therefrom that said plaintiff ever furnished the said defendant Thompson with any statement under oath relative to the amount and value of its assessable property, as required by the laws of the state of Idaho or otherwise. (f) Nor does there appear therefrom the amount of alleged tender mentioned therein, nor whether the same represents the amount which is justly and equitably due as taxes upon the said property of said plaintiff for the year 1903, nor whether said alleged tender was made conditionally or unconditionally. (g) Nor does it appear therefrom what was the amount of the taxes levied and assessed against the said plaintiff upon its said lands for the year 1903. (h) Nor does it appear therefrom what is meant by the expression, "true value of the lands," mentioned in paragraph 7 thereof. (4) That said amended complaint is ambiguous in this: (a) That it does not appear therefrom how the relief granted by the board of equalization mentioned therein was but a limited relief, when at the same time Exhibit B attached to said second amended complaint shows that the said board of equalization reduced the valuation of 48,751 acres from \$7 to \$3 per acre, and the valuation of 2,784 acres from \$7 to \$1 per acre. (b) Nor does it appear therefrom how the court, on plaintiff's pretended appeal from the order of the board of equalization, could or would reduce the valuation of lands from \$7 to \$3.15 per acre, when the board of equalization had already reduced the valuation of said lands from \$7 to \$3 per acre. This demurrer was argued, submitted to the court, and sustained on the 3d day of May, 1905, and judgment of dismissal ordered. On the 22d day of May, 1905, judgment was entered against plaintiff in favor of defendant Thompson for his costs. In order that the exact situation of this case may be understood, we have felt justified in including almost a verbatim copy of the complaint, with the exception of Exhibits A and C, and the demurrer in the opinion.

Counsel for appellant insists that this complaint is sufficient to entitle him to a hearing on the merits of his complaint. Under the provision of article 7, § 2, of the Constitution it says: "The Legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his or her or its property." Again, article 7, § 5, of the Constitution, provides: "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal." If the plaintiff has shown by its complaint that its property has been unfairly assessed by defendant Thompson, as assessor of Kootenai county, in any manner whatever, or that it has been assessed in excess of its actual cash value, then it certainly has a remedy, and, as this court has said in *Humbird Lumber Co. v. Morgan*, 77 Pac. 433, there is no appeal from the action of the board of county commissioners sitting as a board of equalization, it perhaps has sought a remedy to reach the evil of which it complains. Our entire revenue law is based on the theory that all property owners in the state shall pay equal, just, and fair taxation. It may at times and under conditions be difficult for the county assessor, as well as the board of equalization, to reach all property for taxation on a just and equal basis; but, as the law presumes that all officers faithfully discharge their duties under their oaths and bonds, this presumption must be overcome before their official acts will be disregarded and held for naught by the courts. It is not sufficient to allege an illegal or wrongful act on the part of some officer whom the people have trusted by his selection to discharge the duty of office, but facts must be stated, not uncertain or equivocal, as a reason for the allegation. We do not think there is any serious difficulty in arriving at a correct solution of the law in this case. Indeed, we do not understand that learned counsel who represent the respective parties to the litigation materially disagree on the legal questions involved. In 1891, about one year after the adoption of our Constitution, which provides a very complete revenue system, in the case of *Orr v. State Board of Equalization*, 3 Idaho (Hasb.) 190, 28 Pac. 416, in speaking for the court, Mr. Justice Morgan said: "Every citizen and taxpayer of the state has a right to bring a proper suit to determine whether any board or officer having any authority connected with the levy and assessment of taxes has performed his duty as the law requires."

Counsel for respondent very earnestly insists that the complaint is defective in that it does not comply with section 10, p. 238, Sess. Laws 1901, which provides: "All tax-

able property must be assessed at its full cash value, land and improvements thereon must be assessed separately." He also calls attention to subdivision 5, § 3, p. 235, Sess. Laws 1901. This subdivision provides: "The term 'value' and 'full cash value' means the amount at which the property would be taken in payment of a just debt due from a solvent debtor." He then urges that such terms used in the complaint as, "cash value," "true value," or "fair value" do not bring him within the above provisions of the law. Again he insists that appellant, in his complaint before us in any proceedings enumerated in said complaint, neglects to advise the board of equalization, the lower court, or this court as to what was the actual, full cash value of any of its said property. "Cash value," "fair value," "true value," means nothing for the purposes of taxation, and would be a complete defense against a prosecution for perjury upon the proposition as to the actual full cash value of appellant's land. So says counsel for respondent. Again he says the respondent may have assessed the premises of appellant at more than the "cash," "fair," or "true value" of its property as understood and interpreted by it and its counsel, but that the assessor assessed this property at more than its actual full cash value, or at a higher or greater valuation than the actual full cash value placed by him upon the property of the other taxpayers in the county of Kootenai, being property of the same class, character, and value as appellants. We have never been advised in any of the numerous proceedings involving the question of the collection of appellant's taxes.

An examination of the application for a reduction of valuation shows that, after stating that it is a corporation and that it is the owner of the lands in Exhibit A, it states in paragraph 3 that all of said lands, with the exception of the lands marked "burnt and cut" lands, have been assessed at \$7 per acre; that said assessment is excessive, and, furthermore, that "said assessment is not uniform with the assessed valuation placed upon other lands of equal value, situated in the same locality as the lands of the Humbird Lumber Company, as your applicant is prepared to show; * * * that, as your applicant is informed and believes, said lands were in the year 1902 assessed for a valuation at from 50 cents to \$3.75 per acre; that the assessed valuation in 1902 was a fair valuation, and that the said lands, and no part thereof, have increased in valuation since 1902 to such an extent as to justify the increased valuation which has been placed upon them by the assessment of 1903." This is the only reference to the value of the land referred to in the petition. It is sworn to by A. E. Rickerd, state agent of appellant. Counsel for respondent contends that under this showing the board of equalization was without authority to act on the petition, under the provisions of section 35,

p. 248, Sess. Laws 1901. This section is as follows: "If any person, after demand made by the assessor, neglects or refuses to give under oath, the statement therein provided for, or to comply with the other requirements of this act, the assessor must note the refusal on the assessment book opposite his name, and must make an estimate of the value of the property of such person, and the value so fixed by the assessor must not be reduced by the board of commissioners." It would seem that the whole theory of the revenue law is that the actual cash value of property is the basis for assessment, and this being true, if a taxpayer desires to attack the assessment for the reason that it is too high in proportion to other property in the same vicinity, or if for any reason he desires to question the assessment before the board of equalization, he must under oath state the full cash value of the property alleged to be erroneously assessed. A careful reading of the complaint, together with all the exhibits, fails to disclose at any time or place such a statement from appellant. The fact that the property of appellant was assessed at a less figure in 1902 than it is shown it was assessed in 1903 furnishes no estimate of its full cash value for 1903, and the statement of the agent of appellant, who verifies the petition to the board of equalization for a reduction in the assessment, "that the assessed valuation in 1902 was a fair valuation," does not meet the requirements of the law. We are unable to find where this court has ever been called upon to pass upon the question before us.

In *Board of Commissioners of Arapahoe County v. Denver Union Water Co.* (Colo. Sup.) 76 Pac. 1060, the second clause of the syllabus says: "Under Sess. Laws 1889, p. 24, providing that, where an owner of assessable property has been erroneously assessed thereon, he may petition the board of county commissioners for its correction, setting forth in his petition the description of the property, the time at which it is assessed, its true cash value, and what is a just assessment thereof, compared with similar property, a petition failing to allege the true cash value of the property, or what a just assessment thereon would be, is insufficient to entitle the petitioner to a hearing." In the opinion it is said: "The statute under consideration is the source and measure of the power and jurisdiction both of the board of commissioners and the district court to offer relief to a complaining taxpayer. The remedy thereby given is purely statutory, and exists only because the statute gives it." We are in harmony with this conclusion. It would seem unnecessary to cite authorities other than our statute, and the construction of courts on similar statutes. It will be observed that there is no averment in the complaint that the assessment was fraudulent or purposely oppressive, or an intimation of any kind or character that

the assessor did not act in the utmost good faith in assessing appellant's property. In *Wagoner v. Loomis*, 37 Ohio St. 571, the third clause of the syllabus says: "Inequalities in the valuations, made under a valid law, of property for taxation, do not constitute grounds for enjoining the tax, in the absence of fraudulent discriminations by the agents and officers charged by the law with the duty of making such valuations." In the opinion it is held that averments that the assessments were unequal and partial are not sufficient. This was an application for an injunction, and was denied. In *Woodman v. Ely* (C. C.) 2 Fed. 839, this significant language is used: "The bill alleges a fraudulently excessive levy and inequality in the valuations on the roll. Mere excessive valuation does not justify an injunction or restraining the collection of a tax, and there is an entire failure to prove fraud on the part of the assessor." It is true this was an action to enjoin the collection of a certain tax; but we can see no reason why the same rule should not apply in an application to the board of equalization for a reduction of the assessment, or a complaint in the district court for injunctive relief. In *National Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469, it is said in the opinion: "The allegations are pretty full that the assessments are partial, unequal, and unjust, and do not result in the uniformity of taxation which the Constitution of Illinois requires. * * * We think the Circuit Court did not err in dismissing such a bill."

In the *Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663, an opinion by Mr. Justice Miller, we find this language in the first syllabus: "While this court does not lay down any absolute rule limiting the powers of a court of equity in restraining the collection of taxes, it declares that it is essential that every case be brought within some of the recognized rules of equitable jurisdiction, and that neither illegality or irregularity in the proceedings, nor error or excess in the valuation, nor the hardships or injustice of the law, provided it be constitutional, nor any grievance which can be remedied by a suit at law, either before or after the payment of the tax, will authorize an injunction against its collection." The second clause says: "This rule is founded on the principle that the levy of taxes is a legislative and not a judicial function, and the court can neither make, nor cause to be made, a new assessment, if the one complained of be erroneous, and also in the necessity that the taxes, without which the state could not exist, should be regularly and promptly paid into the treasury." Mr. Justice Brewer, speaking for the court in *Albuquerque Bank v. Perea*, 147 U. S. 87, 13 Sup. Ct. 194, 37 L. Ed. 91, uses this strong and pertinent language: "The decree discussing the original and supplemental bills must be sustained. As to the tax of 1888, the case stands upon

the allegation that plaintiff's property was originally assessed at its full value, while other property was assessed 70 per cent. thereof; that it appealed to the board of equalization for a reduction, and that such tribunal reduced the valuation, but only to 85, instead of 70, per cent. It would seem that the mere statement of this was sufficient. The law of New Mexico requires property to be assessed at its cash value. Confessedly, this plaintiff's property was assessed at 15 per cent. below that value. Surely upon the mere fact that other property happened to be assessed at 30 per cent. below the value, when this did not come from any design or systematic effort on the part of the county officials, and when plaintiff has had a hearing as to the correct valuation and appeal before the board of equalization, the proper tribunal for review, it cannot be that it can come into a court of equity for an injunction or have that decision of the board of equalization reviewed in this collateral way." Mr. Cooley, in his very excellent work on Taxation (page 753, 3d Ed.), in his text on "Values for Assessment," has this to say: "One whose property has not been assessed above its true value, or its cash value, or whatever may be the statutory specification as to value, cannot claim that his assessment is invalidated because the property of other persons is assessed at less than such value; for the presumption is that those who made the assessment acted, not arbitrarily, but according to the best of their information and belief."

It is urged by counsel for respondent that as a matter of fact the board of equalization actually reduced appellant's assessment to less than \$1.10 per acre. We do not feel called upon to enter into a long mathematical calculation to ascertain the facts as to this statement. In our view of the case it is wholly unnecessary to a determination of the question before us. Counsel for appellant complains of the action of the lower court in writing him the letter marked "Exhibit C" to his complaint, and thereafter refusing to grant him the relief promised. The statement of a judge, when not in session as a court, or his letter, is not a judgment. After writing the letter, and before he signed or ordered the clerk to enter up a judgment, the learned judge may have, and doubtless did, become convinced that it would be error to render the judgment suggested by his letter. Of course it was unfortunate, and may have misled counsel for appellant; but, if the statement of counsel for respondent be true that the board of equalization reduced the assessment to less than \$1.10 per acre, it was a much greater reduction than the letter of the judge promised, and appellant did not suffer thereby. Counsel for respondent made the bold assertion in his oral argument that he had had an expert go over the entire figures of the lands and assessment of the appellant, and they showed a reduction to

less than \$1.10 per acre. He convinces us that he would not make this statement unless he felt entirely satisfied of its truth, but he does not sufficiently arouse our curiosity to indulge in this long and intricate mathematical calculation to vindicate his expert, especially when we do not deem it essential to a determination of this case.

Our conclusion is that the order of the court and the judgment thereon sustaining the demurrer to the complaint must be sustained, and it is so ordered, with costs to respondent.

AILSHIE and SULLIVAN, JJ., concur.

PALMER v. NORTHERN PAC. RY. CO.

(Supreme Court of Idaho. Dec. 21, 1905.)

1. APPEAL—INSUFFICIENCY OF EVIDENCE—SPECIFICATIONS.

Where the issue was whether a road was a private road or a public highway, and the appellant, in his specifications of the insufficiency of the evidence to sustain the verdict, specifies that "the evidence is undisputed that the road in question was a private road," such specification is sufficient.

2. SAME.

Where the specification is sufficient to inform opposing counsel of the grounds of the alleged insufficiency of the evidence to support the finding or verdict, it is sufficient.

3. SAME.

Where the specification designates some particular issue in the case, and avers that it is not sustained or justified by the evidence, such specification is sufficient.

4. HIGHWAYS—WHAT CONSTITUTE.

Under the provisions of section 850, Rev. St. 1887, highways are declared to be roads, streets, alleys, and bridges laid out or erected by the public, or, if laid out or erected by others, dedicated or abandoned to the public.

5. SAME—PRESCRIPTION.

Under the provisions of section 851, Rev. St. 1887, as amended (Sess. Laws 1893, p. 12), all roads used as highways for a period of five years, provided they shall have been worked and kept up at the expense of the public, are highways by prescription, but a road constructed by private parties as a logging road, and kept in repair by such private persons, across which a gate is maintained, as shown by the facts of this case, is not a public highway.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; R. T. Morgan, Judge.

Action by Richard Palmer against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

John M. Bunn and James E. Babb, for appellant. Chas L. Heltman, for respondent.

SULLIVAN, J. This action was brought by the respondent against the appellant corporation to recover \$2,000 damages alleged to have been sustained because of the appellant's acts in temporarily blockading a certain logging road which crossed the appellant's railroad track in Kootenai county, and over which railroad track and crossing

the respondent was hauling logs. The answer put in issue the main allegations of the complaint. The cause was tried by the court with a jury, and a verdict and judgment was rendered and entered in favor of the respondent for \$1,500. This appeal is from the order denying a new trial.

It is first contended by counsel for respondent that this court cannot consider the sufficiency of the evidence to support the verdict. It is contended that the specifications of the particulars in which the evidence is alleged to be insufficient to sustain the verdict are not sufficient specifications, and for that reason the evidence cannot be considered on this appeal. The specifications are as follows: "And assigns and specifies the following particulars in which said evidence was and is insufficient: (1) The evidence is undisputed that the road in question was a private road. (2) The evidence is undisputed that this road has not been built or used longer than the period of four years prior to the commencement of this action. (3) The evidence is undisputed that the crossing in question was not on the land of the plaintiff in this case." There are many of the early decisions in California that are very technical upon the point under consideration, but the more recent decisions are more liberal and have overruled some of the earlier cases. The case of *De Molera v. Martin*, 120 Cal. 548, 52 Pac. 825, is cited in support of respondent's contention, but that case is expressly overruled in *Drathman v. Cohen* (Cal.) 73 Pac. 181, decided June 25, 1903. Referring to the former case, the court said: "If the decision in that case were followed, perhaps the specifications here in question would be declared insufficient; but experience has proven that the rule as there laid down was too strict, and that it has been productive of evil and not good; * * * but latterly the court has been more liberal in such matters, and the rule now followed is stated in *American, etc., Co. v. Packer*, 130 Cal. 459, 62 Pac. 744, as follows: 'Whenever there is a reasonably successful effort to state the particulars, and they are such as may have been sufficient to inform the opposing counsel and the court of the grounds, and the trial court has entertained and passed upon the motion, * * * this court ought not to refuse to consider the case on appeal, and especially where, as in this case, the transcript shows that all the evidence has been brought up.' See *Swift v. Occidental M. & P. Co.*, 141 Cal. 168, 74 Pac. 700. In that case the court said: 'The substance of all these decisions is that the object of the rule requiring these specifications is, first, to shorten the statement of the evidence by excluding everything irrelevant to the specified fact; and, second, to notify the opposite party of the particular finding called in question, in order that he may see that the statement fairly and fully presents

the evidence bearing upon that particular matter. This object accomplished, the statute is satisfied, and the more recent decisions of the court have shown a disposition to construe specifications liberally in favor, rather than strictly against, the right of the moving party to be heard.' See *Stuart v. Lord* (Cal.) 72 Pac. 142. This court in *Berrier v. Anderson*, 70 Pac. 1027, said: "If the specifications designate some particular fact, and aver that it is not justified by, or not sustained by, or contrary to, the evidence, they are sufficient." In the case at bar the main point in question was whether the road in controversy was a public highway or a private road, and whether it had been traveled by the public for a period of five years, and whether the crossing in question was on the land of the plaintiff. The specifications of the insufficiency of the evidence on those points are clear and specific, and could not mislead any one. The specifications were sufficient.

It appears from the record that the appellant corporation owned and operated a transcontinental railway line with a right of way 400 feet wide, 200 feet on each side of the center of the track, which railway crossed Kootenai county. It appears that the respondent had contracted with the Humboldt Lumber Company for cutting and hauling saw logs and other timber at \$4.50 per thousand feet, and that he constructed a logging road for the purpose of hauling said timber to Lake Pend O' Reille. This logging road crossed over the line of appellant's railroad within the confines of the N. W. $\frac{1}{4}$ of section 4, township 7 N., range 1 E., Kootenai county. The railroad, at a point where said logging road crossed it, was on a fill or embankment about $1\frac{1}{2}$ or 2 feet high. During the summer of 1903 the appellant corporation found it necessary to make a change in the location of its line of railroad. This change of line extended over a distance of several miles and across said logging road. The new and the old lines of railroad, where the logging road crosses them, are about 65 feet apart, and both are within the confines of a tract of land owned by the son of respondent, through which tract of land the appellant's right of way extends 400 feet wide. The new line of railroad, where the logging road crosses it, was on a fill nine or ten feet high, whereas the old line of road was on an embankment not more than two feet high. It is alleged in the complaint that the greater part of the road in question had been used by the public generally for logging purposes for about six years. It is then alleged that said logging road ran entirely across the N. W. $\frac{1}{4}$ of said section 4, which land was owned by respondent's son, and that said son had permitted him (respondent) to use said logging road in his said operations; that on or about August 11, 1903, when he was engaged in hauling logs, the appel-

lant railway company changed the route of its roadbed and track; that at a point where said logging road crosses the same an obstruction, consisting of an embankment, was erected and maintained across his said logging road, whereby he was prevented from hauling his timber products for a period extending from about the 11th of August to about the 1st of December, 1903. The evidence clearly shows that the change in said railway roadbed was wholly within the company's right of way, and the main question for determination is whether the said logging road was a public highway. While the respondent and some of his witnesses testified that the public generally had a right to travel that logging road, it is clear from all of the evidence that it was not a public highway or road. The evidence shows that the respondent himself did not consider it; he having placed a gate across said road where it approaches the railway from the south side. And it also appears from the testimony that the road in question had never been used for any other purpose except that of logging; that that part of it north of the railway was built in the spring of 1900, and that that part south of it down to the residence of the respondent was built in the summer of 1898, and that portion from the house down to the lake was built in the spring of 1900. Palmer himself stated to others that, if they wanted to use the road, they must pay something for its use, as it cost quite a good deal to keep up a logging road. The road overseer of the district in which this road is situated testified in the case that as road overseer he had never done any work of any kind or description on this road, that it was not a county road, and that he did not call it one of the roads within his district, and that he had never known a road overseer or other county officer to do any work on that road, and testified that, if the road had gotten out of shape, he would not have gone to fix it as road overseer. He further testified that every one used it that wanted to for hauling logs. One witness testified that the respondent kept this logging road in good shape. "He hired men to keep it in shape. It was built for hauling logs over." Another witness of the plaintiff testified that there is a gate across this road between the respondent's place and the railroad track. This gate has been there at all times, and was maintained there by the respondent. The respondent himself testified that the northern extension of this road was not a county road. The evidence shows that a record of the public roads is kept in Kootenai county, and no record of the road in question is found therein. Another witness testified that that part of this road north of the railroad was built for logging purposes and none other, and was built in 1900, and that that part of it south of the railroad was built in the summer of 1898,

and had been used by Mr. Palmer and his neighbors for that purpose, and that there is a fence between respondent's place and the railroad track, and a gate in the fence where this road enters his land. While it is shown that that part of the road south of the railroad had been used by the respondent in getting from his residence to the county road, the evidence does not show that it was a public road, although it was used to some extent by the neighbors of the respondent. In fact, taking the evidence altogether, it is clear that said road was not a public highway or a county road. That being true, it is decisive of this case. It therefore is not necessary for us in this opinion to pass upon the several objections to the instructions given by the court. The railroad company had the right to change its roadbed and track within its right of way, and simply because the respondent had been hauling logs across the railroad track at a certain point where there was no public highway the railroad company could not be held in damages for raising its track or roadbed at the point in question.

It is contended that the road in question was acquired by prescription, having been used by the public for more than five years. Section 850, Rev. St. Idaho 1887, is as follows: "Highways are roads, streets, alleys and bridges laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public." While it may be true that the respondent dedicated the road from his residence to the railroad right of way to the public, the evidence does not justify us in arriving at that conclusion. Conceding that he did so, he had no power to dedicate any portion of the railroad right of way to the public, and he himself testified that the extension of this road north of the railroad right of way was a private logging road. Section 851, Rev. St. 1887, as amended by Sess. Laws 1893, p. 12, provides that roads laid out and recorded as highways by order of the board of commissioners, and all roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expense of the public, or located and recorded by order of the board of commissioners, are highways. The evidence clearly shows that the road in question has not been used by the general public for five years, and it is nowhere shown that it was worked and kept up at the expense of the public, or that it was located and recorded by order of the board of commissioners or dedicated to the public. The evidence shows that it was constructed and kept in repair by the respondent, and that he maintained a gate across the same against the positive prohibition of the law if it was a public road. It is clear to us from the entire record that the road in question was not a public highway, and for that reason

the respondent is not entitled to recover in this action.

The judgment is reversed, and the cause remanded, with instructions to enter judgment of dismissal. Costs are awarded to appellant.

STOCKSLAGER, C. J., and AILSHIE, J. concur.

BROWN et al. v. BRACKING et al.

(Supreme Court of Idaho. Jan. 13, 1906.)

1. INJUNCTION—AGREEMENTS OF PROMOTERS—VIOLATION.

Where it is shown that B. and C. agree to incorporate a mining company, they to pay all the expenses of incorporation and use their efforts and influence in the sale of treasury stock, the proceeds of which are to be used in the development of the mines, and it is further shown that after such incorporation is perfected and the stock issued to the respective parties B. sold 17,500 of his 174,000 shares, and C. his entire holding of 174,000 shares, a very small portion of the proceeds of which was used in the development of the mines, and there was no money in the treasury for development work, an injunction should issue restraining the further sale of individual stock in the corporation until the treasury stock as agreed upon is sold.

2. SAME—EVIDENCE—SUFFICIENCY.

Where the evidence shows a disregard of the contract entered into prior to the organization by the promoters of a mining corporation and the owners of the mining claims forming the basis for such corporation, and the preponderance of the evidence shows that treasury stock should first be sold to further develop the property, and instead of disposing of treasury stock, large holdings of the individual stock are sold and the proceeds not applied to the development of the property, it is evidence of bad faith, and a judgment in favor of the promoters, based upon such evidence, should be reversed.

(Syllabus by the Court.)

Appeal from District Court, Shoshone County; Ralph T. Morgan, Judge.

Action by Otto Brown and another against Walter J. Bracking and others. From a judgment for defendants, plaintiffs appeal. Reversed.

W. W. Woods, for appellants. W. B. Heyburn, Wm. H. Batting, and John P. Gray, for respondents.

STOCKSLAGER, C. J. From the record in this case we gather the following facts: In October, 1903, Otto Brown and Emil Tomsche were the owners of the Montana, Irene, Tacoma, and Tacoma Fraction lode mining claims in Lulande and Placer Center mining districts, Shoshone county, Idaho. That Walter J. Bracking and L. J. Columbus were engaged in the mining brokerage business in Wallace, Shoshone county, at the time above mentioned. That about said time an agreement was entered into between plaintiffs, Brown and Tomsche, and defendants Bracking and Columbus, by the terms of which plaintiffs were to deed all of said property to a corporation to be organized under the laws of Idaho by defendants at

their own expense, such corporation to be capitalized at 1,000,000 shares of the par value of \$1 per share. Defendants were to promote the sale and sell treasury stock of said company at a price thereafter to be agreed upon for sufficient money to keep development work progressing upon the mining claims. That by reason of their influence in promoting the sale of mines they would have no difficulty in disposing of treasury stock sufficient to develop said mining properties, so that plaintiffs would never be assessed, and by their efforts and influence they would, within a few months after the organization of said company, make the shares of stock to be given plaintiffs worth 25 cents per share. They also agreed to use their diligent efforts and ability to promote the sale of treasury stock, and represented that it would be but fair, in the organization of the company, for money to be by them expended and for their labor in organizing said company and promoting the sale of treasury stock, to apportion to each of them out of the capital stock of the company 174,000 shares each, and that the apportionment should stand, to plaintiffs Otto Brown 550,000, Emil Tomsche 100,000, and to the said defendants 174,000, to A. C. Olson 2,000—out of which Brown was to donate 350,000 shares and Tomsche 50,000, to be known as treasury stock, and to be sold for the purpose of developing the property. That, relying on the good faith and promises of defendants, plaintiffs agreed to such terms, and pursuant thereto the Laclede Mining Company was incorporated and stock apportioned according to said agreement. All the parties to whom stock was issued under the terms of the agreement were directors for the first year. Brown and Tomsche made and delivered deed to said corporation for the four mining claims. The main consideration for the conveyance was the promises of Bracking and Columbus to sell the treasury stock of the company and keep up development work on the claims, so as to render stock of plaintiffs of market value. It is alleged by the agreement that neither party could sell any undivided stock, and at request of defendants an option was granted to the Shoshone Abstract Company to sell 100,000 shares of treasury stock at 3 cents per share, which option was for one year; that plaintiffs kept all their agreements, and defendants disregarded the material portions of their agreement in that they did not sell a share of the treasury stock, nor did either of them contribute anything of value in work or money or anything to keep development work in progress in either of said claims, nor did either or both expend in labor or money in the incorporation of said company, procuring books, stock certificates, and seal, to exceed \$125. That said Bracking did, about the ——— day of ———, 1904, sell 15,500 shares of his individual stock, and Columbus, prior to August 1, 1904, sold all of

his 174,000 shares of stock, and by such sale each of them more than reimbursed themselves for all labor or money expended. That the consideration for which plaintiffs donated 175,000 shares of stock to defendants, each has wholly failed. That each of said parties is insolvent and unable to respond in damages; that plaintiffs have been damaged in the sum of \$20,000; that Bracking has given an option to one Barnard on 75,000 shares of his stock at the rate of 4 cents per share, and deposited said stock in the State Bank of Commerce, to be kept until July 1, 1905, unless sooner paid for at the rate of 4 cents a share, and any block of said stock in the amount of — shares or over may be taken out of said bank at any time upon the payment of 4 cents a share, and 83,500 shares have been pooled by said Bracking with defendant Laclede Mining Company, Limited, to remain in the custody of said company until July 1, 1905. That said stock is pooled under an agreement with plaintiffs by said Bracking, made in 1904, that all their individual stock should be pooled to enable the mining company to sell treasury stock, yet defendant Bracking, in violation of the spirit of said agreement, is selling his written promises to deliver certain blocks of the stock so pooled when the pool expires, and has thus broken the price of treasury stock to the damage of plaintiff; that the only available property of said defendant Bracking is said 158,500 shares of Laclede Company stock, and, if the option of said Barnard should be exercised, said Bracking would be at liberty to withdraw 4 cents a share for the stock so taken up from the State Bank of Commerce; and said Bracking threatens to, and, unless restrained, will, dispose of all his interests in the 83,500 shares of stock now in pool with said company.

The prayer is that plaintiffs have judgment against defendants for the sum of \$20,000; that all the stock standing in the name of defendant Bracking be decreed to belong to plaintiffs; that a preliminary injunction issue to restrain Bracking from in any wise selling or incumbering any of the stock now in pool with defendant mining company, restraining said defendant Bracking or said State Bank of Commerce from paying Bracking any of the purchase price of said stock upon which said Barnard has an option; that the Laclede Mining Company be temporarily enjoined from delivering any of said stock to defendant Bracking, or making any transfer of said stock on its books. The separate answer of defendant Bracking admits plaintiffs' ownership of the mining claims as alleged; that he was a mining broker as alleged. Denies that he represented to plaintiffs that he would organize a corporation at his expense, etc., as alleged, but avers that about October 19, 1903, plaintiffs solicited his services in the promotion of a corporation, plaintiffs to deed said claims

to said corporation, and that it was only at plaintiff's solicitation that he agreed to form such mining company; that pursuant to such request he and defendant Columbus agreed to organize such corporation as alleged, procure proper books, certificates of stock and seal, at the expense of defendant, promote the sale and sell treasury stock at a price thereafter to be agreed upon at a sufficient sum to keep development work progressing upon said claims. Admits the allegations referring to his representation that by means of his influence he would have no difficulty in disposing of said treasury stock sufficient to develop such property, so that plaintiffs should never be assessed; that at the time of the agreement it was understood that none of them were in a position to bear the expense of development of such property. Denies that he ever represented that within a few months he would make their stock worth 25 cents a share, or any fixed sum. Admits that he agreed to use his diligent efforts and ability to promote the sale of treasury stock, and admits the division of the stock alleged was at his suggestion as to the shares he and Columbus should have for the organization of the company, sale of treasury stock, and money to be by them expended, etc. Denies that there was any agreement prohibiting the sale of individual stock, or to pool stock. Alleges it was three months after the formation of the company when defendant Bracking proposed pooling individual stock and Columbus refused so to do, and on that account no pool was formed. Admits the option granted to the Shoshone Abstract Company alleged, and avers that it was surrendered before the expiration of the year at request of plaintiffs. Alleges that all parties have at all times been at liberty to dispose of their individual stock. Denies all the other allegations of the complaint, and avers that by and through his efforts the assessment work has been kept up, that there is \$2,000 in the treasury, that he has only sold 16,500 shares of his stock, that he has exerted every effort in the interest of the corporation, and all his acts have been with full knowledge of plaintiffs, and for the best interests of the plaintiffs in the corporation; that this action is brought to harass defendant and wrongfully procure his stock, and is the result of a conspiracy between plaintiffs and unknown persons.

This case was tried without a jury; findings and conclusions filed in favor of respondent; and judgment rendered and entered in his favor for costs. The appeal is from the judgment.

Specifications of particulars in which the evidence is insufficient to sustain the decision and judgment herein are as follows: (1) It is admitted in the pleadings that plaintiffs were the owners of all the property which formed the basis of the Laclede Mining Company. (2) That, through the relations of defendants Bracking and Columbus, they ob-

tained 350,000 shares of the stock of said company, while plaintiffs retained only 250,000. (3) That the properties conveyed to the corporation were valuable. There is no dispute of Brown's testimony that the property was of the value of \$25,000. (4) That the bargain is unconscionable and against equity. The allegations in the complaint that defendants Bracking and Columbus did not, either or both of them, expend more than \$120 in money and work or anything, or keep their part of the contract, and that both had been more than reimbursed by sale of stock, is not denied by either in the answer or by Bracking's testimony, and it was shown by the testimony of Barnard that the stock was worth to the treasury after he took his option, 3 cents a share, and that many shares had been sold at an average price of 12½ cents a share. (5) It was shown by the pleadings and evidence as to part of the consideration by which each of defendants Bracking and Columbus procured the large block of stock apportioned him, so as to make the stock of the plaintiffs of some value, that this consideration wholly failed. (6) The evidence shows that Bracking was in the office of the Shoshone Abstract Company when the corporation was formed. Columbus testified that Bracking and said company were in partnership in the mining brokerage business, and that at the first meeting of the Laclede Mining Company, at the instance of Columbus and Bracking, an option was given the Shoshone Abstract Company for 200,000 shares of treasury stock, 100,000 shares at 2 cents and balance at 3 cents a share, which, if consummated, would have given these parties 550,000 shares (more than half of the stock) for \$5,120—property of an undisputed value of \$25,000 and \$5,000 of which would have gone into the treasury of the company for mining development purposes, not benefiting the plaintiffs, except incidentally as development would benefit all the parties. (7) The preponderance of the evidence shows that all the parties to the promotion and incorporation agreed to pool all their individual stock until sufficient treasury stock had been sold to develop the mines, and that this agreement was violated from the beginning by both Bracking and Columbus. Bracking does not deny his interest in the sale by Columbus of all Columbus' holdings. He testified in fact: "There were many transactions between the Shoshone Abstract Company and myself. Statements would be handed me showing how much the company was indebted to me. Columbus sold it all except the 9,000 shares I transferred to him to balance accounts when I left the Shoshone Abstract Company." (8) That all of the admissions in the pleadings and the evidence support the equities of the complaint, and show that defendant Bracking had paid no consideration whatever of any kind or nature for the stock of the Laclede Mining Company now standing in his name

on the books of the company. (9) The evidence does not support the findings of fact made by the court. (10) A preponderance of evidence supported the allegations in plaintiff's complaint.

Counsel for respondent Bracking objects to the form of the assignments of error above set forth, for the reason alleged that "they do not allege any error in the findings of the court below. They are merely a recitation of the allegations of the complaint." The purpose to be served by requiring an assignment of the errors upon which the appellant will rely in the appellate court for a reversal of the judgment is that the respondent may be informed what is to be met to sustain the judgment. It is immaterial what language is used, if it conveys to the respondent the necessary information upon which he may prepare to meet the issue sought to be reviewed. This question was very recently before this court in the case of *Palmer v. Northern Pac. R. R. Co.*, 83 Pac. 947. The second paragraph of the syllabus says: "Where the specification is sufficient to inform opposing counsel of the grounds of the alleged insufficiency of the evidence to support the verdict, it is sufficient." It occurs to us that appellant, by his assignments of error, informs respondent that he desires to have this court review the pleadings and evidence, and ascertain whether this judgment should be affirmed or reversed. The pleadings are not complicated, neither is the evidence seriously conflicting.

The contention of appellant is that respondents Bracking and Columbus did not carry out the agreement entered into by appellants and these two respondents; that after the organization of the corporation and the issue and delivery of the stock to the respective parties, which is conceded to be as alleged in the complaint, the respondents disposed of large holdings of their individual stock instead of the treasury stock, all of which (400,000 shares) was contributed by appellants for the purpose of paying the expense of organization of the corporation and development of the mines; that none of the treasury stock was ever disposed of by respondents. These facts are not contradicted, excepting respondent Bracking testifies that there was no agreement to pool the private holdings of the members of the corporation, or that no individual stock should be disposed of until at least half of the treasury stock was exhausted. Bracking further testified that he made every reasonable effort to sell the treasury stock, but failed. He admits that, if the books show he sold 17,500 shares of his stock, it is true. He says Columbus sold all of his stock. Columbus testifies that he was engaged in the abstract business in 1903 in October, and after that period with the Shoshone Abstract Company. He testifies: "Q. What association did you have with Mr. Bracking? A. We were in partnership in the brokerage business and

promoting mines. Bracking was not a member of the Shoshone Abstract Company. The Court: Did you state that Mr. Bracking and the Shoshone Abstract Company were partners? A. Why, the Shoshone Abstract Company and Mr. Bracking were really partners in the brokerage business. The relation continued from July, 1903, until January, 1904." This is all the evidence given by Mr. Columbus, with the exception of some unimportant statements with reference to a communication with appellant Brown relative to a statement of Mr. Brown that he did not desire to make him trouble; that he was simply after Mr. Bracking. Bracking testifies that he was only an employé of the Shoshone Abstract Company, and that "Mr. Columbus was mistaken in a way when he said he was a partner. I was an employé of the Abstract Company on a commission basis."

An examination of the entire record fails to disclose wherein either of the respondents Bracking or Columbus ever contributed to exceed \$125 toward the enterprise in compliance with their agreement, and this was in the organization of the company, the stock books, seal, etc., necessary to issue stock of the corporation. Soon after the stock was issued and delivered respondent Columbus disposed of his entire holdings, none of the proceeds of it going toward the development of the mines unless he contributed toward purchasing the stock books, seal, etc., or paid some of the fees necessary in the organization of the corporation under the laws of this state. It is shown that the appellant Brown worked nearly all winter on the claims after the mines were incorporated under the name of the Laclede Mining Company. Brown testifies that Bracking and Columbus told him to go to some grocery store and get supplies on a note, "and I went to Hanes & King and told them we had incorporated a company. They asked me who the promoters were. I told them, and they would not take their note, but let me have goods on my own say so, and I got about \$80 of supplies on my own account. Neither Bracking nor Columbus paid any part of that bill. I paid it myself. Columbus, Bracking, and I had to sign a note together, the three of us, for supplies from the Cœur d'Alene Hardware Company. Neither Bracking nor Columbus paid any part of that note, or me anything for my work. The note was paid by the company after Barnard took hold of it; paid by money out of the company treasury." Tom-sche corroborates Brown in all his evidence with reference to the obligations of Bracking and Columbus to incorporate the company at their own expense, do the assessment work, sell treasury stock, etc. It is apparent from the record that Columbus and Bracking did not live up to their agreement in an effort to develop this property. After incorporating

the company they began to sell their individual stock, and more than reimbursed themselves for all the money they had expended. They did nothing toward developing the mines. Bracking says the work has been practically continuous since the incorporation. With reference to the Cœur d'Alene Hardware Co., note for \$125 for supplies to be by that company furnished Mr. Brown, he says: "Brown got \$155, and Columbus and I paid \$30 difference in cash, and the note was paid by the company." This note was paid by the company after Mr. Barnard assumed charge of the property. He describes the work since the incorporation, to wit: "One tunnel 60 feet, one tunnel in the neighborhood of 200 feet, I understand the lower tunnel 350 feet. Get my information from newspaper. Two cabins built, cars, track, blacksmith shop, and necessary tools. The company got the money from sale of treasury stock under Barnard option." All that can be claimed by either Bracking or Columbus for development work since the organization of the company is the \$30 claimed to have been paid for supplies furnished Brown by the Cœur d'Alene Hardware Company in excess of the note of \$125. It is not contended that Bracking or Columbus had anything to do with inducing Barnard to take the option on the property and develop it by the sale of the treasury stock or his private means. It is shown by the record that, since Barnard assumed control of the property, old debts of the company have been paid and a large amount of development work done; that the treasury stock has been selling at an average price of 12 cents a share. Mr. Barnard says: "At the time I was negotiating for this option on Laclede stock Mr. Bracking told me he was hard up for money; that the price was cheap, and he wanted me to take 20,000 shares of his stock and pay him \$400 for it. I positively refused, and said I intended to use the money in buying treasury stock to develop the property. That was before I took hold of the property." Thus it is shown that Mr. Bracking, as well as Mr. Columbus, seems to have been more interested in disposing of his individual stock than the treasury stock of the company for the development of the property. If he influenced the sale of treasury stock, it must go toward the development of the mine; if private stock, the proceeds were his.

From all the evidence in this case we are unable to find anything that indicates good faith on the part of Bracking, and we cannot affirm the judgment of the district court. Judgment reversed, and cause remanded to lower court for new trial. Costs to appellant.

AILSHIE and SULLIVAN, JJ., concur.

KERNS v. MORGAN, Judge, et al.
 CALIFORNIA CONSOL. MIN. CO. v. SAME.
 (Supreme Court of Idaho. Dec. 20, 1905.)

1. MOTION—EX PARTE ORDER—APPLICATION OF STRANGER.

Where a stranger to an action or proceeding, who has not intervened, and has never been made a party by order of court, or in any manner recognized by the statute or rules of practice, files a petition and obtains an ex parte order without notice to any of the original parties to the action or proceeding, or any person interested therein, *held*, that the order so procured is a nullity and void.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Motions, §§ 13, 14.]

2. SAME—VACATING—TIME OF APPLICATION.

The provisions of section 4229, Rev. St. 1887, that: "The court may likewise, in its discretion, after notice to the adverse party, * * * relieve a party or his legal representative from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect; and * * * may grant the relief upon application made within a reasonable time, not exceeding six months after the adjournment of the term," do not apply to judgments and orders which show upon their face that they are nullities and void, and in such case the void order may be vacated after the lapse of more than six months after adjournment of the term.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 739; vol. 35, Cent. Dig. Motions, § 78.]

3. APPEAL—REMAND—LAW OF THE CASE.

After a case wherein the district court granted a perpetual injunction has been reversed on appeal, and the injunction ordered dissolved by the appellate court, the district court has no power or authority to again issue an order in the same case which will have the same effect, for a time at least, as the original judgment which has been reversed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4661-4665.]

(Syllabus by the Court.)

Original application by A. G. Kerns, receiver of the property of the Coeur d'Alene Bank, insolvent, to review the action of Hon. R. T. Morgan, district judge, in making an order recalling an execution and restraining its further execution. Order vacated and annulled. Also original application by the California Consolidated Mining Company, a corporation, for a writ of certiorari to review the action of Hon. R. T. Morgan, district judge, in making an order vacating and setting aside a previous void order. Writ quashed.

This is a continuation of the case of California Consolidated Mining Company v. Manley, heretofore decided by this court and reported in 81 Pac. 50. While that case was pending in this court on appeal, Joseph P. Keane filed his petition in the district court in and for Shoshone county, as manager of the California Consolidated Mining Company, and on its behalf praying for an order permitting his company to deposit the sum of \$6,000 with the court, or in such bank as the court might designate, and subject to the control and orders of the court to be applied on certain conditions, in full payment

and satisfaction of the judgment and lien held by Abner G. Kerns, as receiver of the Coeur d'Alene Bank, against George B. McAulay and Van B. De Lashmutt. This judgment held by the receiver was for the sum of \$58,950.76, besides interest. Keane's petition was entitled: "Geo. B. McAulay and Van B. De Lashmutt, Plaintiffs, v. The Coeur d'Alene Bank, Defendant. In the Matter of the Receivership of the Coeur d'Alene Bank, a Corporation and Insolvent Debtor." In this petition is set out considerable of the history of the litigation as narrated in California Consolidated Mining Company v. Manley, supra, and especially the order of June 24, 1901, made by Hon. A. E. Mayhew, district judge, authorizing a compromise and settlement of the claim of the receiver against McAulay and De Lashmutt, for the sum of \$6,000. The petitioner then states that Kerns, the receiver, had appealed to the Supreme Court from the order and judgment granting a perpetual injunction against the sale of the thirteen-sixteenths interest in the California lode claim, and that the appeal was then pending in the Supreme Court, and that the entire outstanding indebtedness of the Coeur d'Alene Bank was at that time less than \$6,000. Here follows the prayer of this extraordinary petition: "Your petitioner therefore respectfully prays that the court will make an order that whenever the said California Consolidated Mining Company shall deposit the sum of \$6,000, in such bank or banks as the court may direct, said sum to be and remain in said bank or banks, subject to the order of the court, until the final determination of the appeal in the case of the California Consolidated Mining Company, a Corporation, v. Charles Manley, as Sheriff, etc., and Abner G. Kerns, Receiver, etc., and in event the courts finally decide that the said Coeur d'Alene Bank has any interest or lien upon the said California lode mining claim or any part thereof by virtue of the said pretended judgment in the case of Abner G. Kerns, Receiver of the Property of the Coeur d'Alene Bank, v. Geo. B. McAulay and Van B. De Lashmutt, said case being numbered 1,760, then the said sum of \$6,000 shall be turned over to and received by said receiver or his successor in office as payment in full of all claims, liens, or judgments, if any there be, of the said Coeur d'Alene Bank against the said California lode mining claim, and against all property of the said California Consolidated Mining Company or its grantees or successors in interest. That during the time that said sum of \$6,000 is so deposited in the bank it shall be in the custody of the court, and not subject to attachment, liens, or executions of any kind or nature, and in case the judgment of the district court in the case of California Consolidated Mining Company v. Charles Manley, etc., and Abner G. Kerns, Receiver, etc., be affirmed in the Supreme Court of this state, then said sum of \$6,000

so deposited shall be immediately delivered to the said California Consolidated Mining Company or its assigns. That as soon as said deposit is made of the said sum of \$6,000, as may be directed by the court, it shall release the said California lode mining claim, and all the property of the said California Consolidated Mining Company, from all claims, liens, and judgments, whether valid or invalid, now claimed or hereafter to be claimed by the said A. G. Kerns, receiver of the said Coeur d'Alene Bank, in favor of said bank, and shall enable the said California Consolidated Mining Company to transfer the said property free from all claims, liens, or judgments of the said Coeur d'Alene Bank."

This petition was filed January 7, 1905, and immediately, without notice to any one, an order was made and filed by the district judge in substantial conformity with the prayer of the petition. Thereafter the case of the California Consolidated Mining Company v. Manley was argued and submitted in this court, and on May 8th an opinion was filed and judgment entered reversing the judgment of the lower court. A petition for rehearing was filed, and on June 6th a further opinion was filed denying the respondent a rehearing. In the meanwhile neither Keane nor the California Consolidated Mining Company had deposited the \$6,000 which he had secured leave to deposit in satisfaction and liquidation of the receiver's judgment against McAulay and De Lashmutt. Thereafter, however, and on July 3d, it appears that this money was deposited with the First National Bank of Wallace, with instructions that the same be held for the period of 60 days from June 28th, subject to the order of the district court of the First judicial district. On June 23d A. G. Kerns, the receiver, made and filed his affidavit stating that he never had had any notice of the order of January 7th, and that the first he ever heard of such order was on the date he made this affidavit. On June 26th Kerns filed a further affidavit, stating that on the latter date he had a conversation with the president of the First National Bank of Wallace, and that he was informed that up to that time no deposit had been made under the order of January 7th. These affidavits were submitted to the district judge, and he thereafter made an order vacating and setting aside the order of January 7th, which order, vacating the original order of January 7th, was filed August 1st. In the meanwhile the remittitur in the case of the California Consolidated Mining Company v. Manley, supra, had gone down, and on August 1st the district judge filed his findings of fact and conclusions of law and judgment in conformity with the judgment of this court. Thereafter, and on the 31st day of August, the California Consolidated Mining Company applied to and received from Mr. Chief Justice STOCKSLAGER, of this court, a writ of error

to the Supreme Court of the state of Idaho for a review of its judgment by the Supreme Court of the United States, and on that date the Chief Justice approved the usual cost bond required on the granting of such writs. On August 11th a writ of execution was issued out of the district court in and for Shoshone county in the case of Abner G. Kerns, Receiver, v. Geo. B. McAulay and Van B. De Lashmutt, and was placed in the hands of the sheriff of Shoshone county, and by him levied on the thirteen-sixteenths interest of the California lode claim, and the same was noticed for sale on September 5th. The sale was postponed from time to time by order of the court, etc., until October 6th. About September 13th Kerns prepared and filed a further petition in the original case of Kerns, Receiver, v. McAulay and De Lashmutt, again setting forth the history of the case and the reversal of the judgment of the lower court in the case of the California Consolidated Mining Company v. Manley, and the further fact that a writ of error had theretofore been sued out of the Supreme Court of the United States to review the judgment of the Supreme Court of Idaho; and after reciting the various steps and transactions in detail the petition closes with the prayer that the execution issued on August 11th be recalled pending the final determination of the case of the California Consolidated Mining Company v. Manley, and others in the Supreme Court of the United States.

After a hearing on this petition the district judge, on September 23d, made his order recalling the execution, which order is as follows:

"Now, therefore, it is by the court ordered that said execution heretofore issued in the above-entitled action be, and the same is, hereby recalled, and the sheriff of the county of Shoshone, state of Idaho, is hereby directed to return said execution to the clerk's office of this court, and to refrain from selling or attempting to sell said California lode mining claim, mineral survey No. 1,668, or any interest therein, until the further order of this court, the foregoing order to be effective upon the execution and filing of the supersedeas, as provided by the Revised Statutes of the United States; and it is further ordered that the sale heretofore postponed until September 26, 1905, be again postponed for 10 days from said September 26, 1905, in order that the supersedeas above mentioned may be secured and filed."

On October 6th the California Consolidated Mining Company filed with the clerk of the district court in and for Shoshone county an undertaking in the case of "California Consolidated Mining Company, a Corporation, Plaintiff, v. Chas. Manley, as Sheriff of Shoshone County, State of Idaho, and Abner G. Kerns, as Receiver of the Property of the Coeur d'Alene Bank, Defendants," which bond is as follows:

"Know all men by these presents, that the California Consolidated Mining Company, a corporation, as principal, and the U. S. Fidelity and Guaranty Co., as surety, are held and firmly bound unto the above-named defendants and respondents, Chas. Manley, as sheriff of Shoshone county, state of Idaho, and Abner G. Kerns, as receiver of the property of the Coeur d'Alene Bank, in the penal sum of \$11,000. For the payment of the same well and truly to be made, we hereby bind ourselves, our heirs, successors or assigns jointly and severally firmly by these presents.

"The condition of this obligation is such that whereas said plaintiff has appealed to the Supreme Court of the state of Idaho from a judgment and decree made and entered herein on the 1st day of August, A. D. 1905, in favor of the defendants and against the plaintiff, and has applied to the court for an order fixing the amount of bond to be furnished by said plaintiff on a stay of execution in accordance with section 4813 of the Revised Statutes of Idaho, and the court having fixed said bond in the sum of \$11,000:

"Now, therefore, if the said plaintiff and appellant shall not commit or suffer to be committed any waste in or upon the California lode mining claim, situate in Placer Center mining district, Shoshone county, Idaho, and will pay the value of the use and occupation of said property from the time of said appeal until the delivery of possession thereof pursuant to the judgment and order of the Supreme Court of the state of Idaho, not exceeding the sum of \$11,000, then and in that event this obligation to be null and void, otherwise to remain in full force and effect."

After the filing of this bond, and on the same date, the district judge made the following order:

"Whereas, an execution was heretofore issued in the above-entitled action, directing the sheriff of the county of Shoshone, state of Idaho, to sell an undivided thirteen-sixteenths interest in the California lode mining claim, situate in Placer Center mining district, county of Shoshone, state of Idaho, and said sheriff has advertised the said interest for sale at public auction on October 6th, 1905; and whereas, the said interest is claimed by the California Consolidated Mining Company, and the said California Consolidated Mining Company has appealed to the Supreme Court of Idaho from the judgment and decree made by this court and filed August 1, 1905, in the case of California Consolidated Mining Company v. Charles Manley, as Sheriff of the County of Shoshone, and Abner G. Kerns, as Receiver of the Property of the Coeur d'Alene Bank; and whereas, a stay of proceedings has been granted in said action pending such appeal on the filing of a stay bond in the sum of \$11,000, in accordance with the provisions of section 4813 of the Revised Statutes of

Idaho, and said bond having been filed and approved by this court: Now, therefore, it is by the court ordered that said execution heretofore issued in the above-entitled action be, and the same is, hereby recalled, and the sheriff of the county of Shoshone, state of Idaho, is hereby directed to return said execution to the clerk's office of this court, and to refrain from selling or attempting to sell said California lode mining claim, mineral survey No. 1,608, or any interest therein, until the final determination of the appeal in the case of the California Consolidated Mining Company v. Charles Manley, as Sheriff of the County of Shoshone, State of Idaho, and Abner G. Kerns, as Receiver of the Property of the Coeur d'Alene Bank, to the Supreme Court of Idaho. Dated this 6th day of October, A. D. 1905. R. T. Morgan, Judge."

On application of Abner G. Kerns, receiver, filed in this court October 16th, a writ of certiorari was issued to review the action of the district judge in making the foregoing order of October 6th. On petition of the California Consolidated Mining Company, filed in this court October 31st, a writ of certiorari was issued to review the action of the district judge in making his order of August 1st, vacating and setting aside the order of January 7th. The hearings on the return to both writs were had at the same time, and the questions involved are so intimately related that we will dispose of both cases in one opinion.

J. H. Forney, W. W. Woods, John P. Gray, and H. S. Gregory, for plaintiff Kerns. W. E. Borah, M. A. Folsom, A. H. Featherstone, and Hamblen, Lund & Gilbert, for plaintiff California Consol. Min. Co.

ALLSHIE, J. (after making the statement of facts). Keane and the California Consolidated Mining Company were total strangers to the case of Kerns, Receiver, v. McAulay and De Lashmutt, and to recognize their right, or that of any other stranger to the proceeding, to come in by petition or otherwise, without notice to the receiver or any one interested in the proceeding, and procure an ex parte order, like the one of January 7th, affecting the entire assets of the insolvent estate, would be permitting a practice contrary to every principle of law and justice, and too dangerous to be tolerated for a moment. The petitioner had no standing in the proceeding, and could not rightfully obtain a standing without notice and an order of court allowing him to become a party or to intervene. The receiver, acting under direction and authority of the court, is the legal representative of the insolvent bank, and as such is the party whose duty it is to know the condition of the business and affairs of the insolvent estate. He is presumed to be better informed as to the debts and liabilities outstanding against the insolvent estate, and the orders and judgments necessary for its protection, than a mere in-

truder and interloper, whose petition shows upon its face that his entire interest is personal and private and adverse to the interests represented by the receiver. An order made under the conditions and circumstances accompanying the order of January 7th, 1906, is and was void from the beginning.

It is contended, however, by counsel for the California Consolidated Mining Company, that the order of August 1st, vacating and setting aside the order of January 7th, was void and in excess of the jurisdiction of the court making it, for the reason that it was made more than six months after the adjournment of the term of court at which the original order was made, and without notice to the California Company or Keane. Section 4229, Rev. St. 1887, provides, *inter alia*: "The court may likewise, in its discretion, after notice to the adverse party * * * relieve a party or his legal representative from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect; and * * * may grant the relief upon application made within a reasonable time, not exceeding six months after the adjournment of the term." We do not think this provision of the statute applies to judgments and orders which were nullities and void from the beginning, and so appear on their face. *People v. Greene*, 5 Am. St. Rep. 448, and note; *Id.*, 16 Pac. 197. Notice is required, under section 4229, *supra*, to "the adverse party." "Adverse party," as here used, must mean a party to the original action or proceeding, or one who has been brought in to the case by order of court, or one who has been allowed by order of court, to intervene or become a party plaintiff or defendant in the action as originally instituted. Here neither Keane nor the California Consolidated Mining Company became a party to the proceeding in any manner known to the statute or rules of practice, and was not, with reference to the order of January 7th, entitled to notice and consideration as an adverse party. Keane did not seem to think it necessary to notify the receiver that he would apply for the order of January 7th, but, after making himself a party to the case without notice to or consent of any one, he concludes that he is an "adverse party," and that the order he thus obtained should not be vacated or set aside without first notifying him; and this, too, after he or his company has failed to deposit the money in the bank in compliance with the order he thus procured. Litigation usually subjects the moving party to the risks of losing, as well as affording him the chances of winning; but not so with this company. It was proceeding altogether on the chances of winning without the risks of losing. If it could win on appeal, it did not propose to live up to the compromise agreement, but, if it lost on appeal, then it proposed to compel the receiver to live up to the agreement to com-

promise a \$58,000 judgment for \$6,000 after over two years of litigation. We conclude that the order of January 7th was unauthorized and void, and the court had the power to vacate and set aside such order on his own motion or at the instance of any person affected thereby at any time the matter might be called to his attention.

Passing, now, to a consideration of the order of October 6th, we find that the effect thereof is to enjoin the collection of this \$58,000 judgment or any part thereof out of the thirteen-sixteenths interest in the California lode claim until such time as the case of the California Consolidated Mining Company v. Manley et al. shall be again heard and finally determined in this court on appeal. There has been no pretense made at giving a supersedeas bond in the appeal case on the writ of error from the United States Supreme Court to this court, as provided by section 1007, U. S. Comp. St. 1901, and that question does not therefore enter into the consideration of the present case. In the California Consolidated Case the trial court held that the plaintiff was an innocent purchaser of the thirteen-sixteenths interest in the California lode claim, and entered a decree perpetually enjoining and restraining a sale thereof under execution issued in the case of *Kerns, Receiver, v. McAulay and De Lashmutt*. On appeal this court held that the California Consolidated Company was not an innocent purchaser, but that the sale had been made in fraud of the creditors of the *Coeur d'Alene Bank*, insolvent, of which Kerns is receiver. The judgment and mandate of this court was as follows: "The perpetual injunction is dissolved, and the cause is remanded, with directions to the trial court to make findings and enter judgment in accordance with the views herein expressed." The trial court, in compliance with the judgment of this court, made and entered findings and judgment against the California Company and in favor of the receiver, and it appears that the company appealed from the judgment so made and entered, and the court fixed the amount of a supersedeas bond to be given under section 4813, Rev. St. 1887, and a bond in accordance therewith was executed, filed, and approved October 6th, whereupon the order complained of by the receiver was made and entered by the trial judge. This practice and procedure would be regular and proper in a case that has not already been passed upon and disposed of on appeal; but here the case had already been heard and determined on appeal, and this court had dissolved the injunction and held that the thirteen-sixteenths interest in the California lode claim previously levied upon by the sheriff under his writ in case of *Kerns, Receiver, v. McAulay and De Lashmutt*, was subject to sale under that writ. Now, to allow the district court to again delay the execution of that writ indefinitely by recalling the same until such

time as another appeal can be prosecuted, heard, and determined in the same case, would amount to trifling with final judgments and decrees, and justly bring the administration of the law into reproach. The district court has no power or authority to again issue, in the same case, an injunction or restraining order which has, on appeal, been dissolved by the Supreme Court. It is the duty of the courts to dispose of and close up litigation. It is to the interest of honest litigants, and also the public, whose interests are often largely affected by prolonged legal controversies over vast property rights.

The writ issued on application of the California Consolidated Mining Company to review the action of the district judge in making the order of August 1st is quashed. The order made by the district judge October 6th, recalling the execution in case of Kerns, Receiver, v. McAulay and De Lashmutt, is hereby annulled and vacated. Costs incurred in both these cases are awarded in favor of the receiver and against the California Consolidated Mining Company, and, if not paid within 10 days after filing a copy of this decision with the clerk of the district court in and for Shoshone county, execution may issue therefor.

STOCKSLAGER, C. J., and SULLIVAN, J., concur.

PATERSON et al. v. WATSON et al.

(Supreme Court of Colorado. Jan. 8, 1906.)

1. STATUTES—TITLE—SCOPE—AMENDMENT.

Laws 1881, p. 96 (Gen. St. 1883, c. 23), is entitled "An act to require county commissioners" to give bonds and to prescribe penalties for their refusal to do so, and section 7 (page 98), which provided for bringing suit in case of a breach of the bond, was numbered section 50 in General Statutes. In 1885 an act was passed entitled "An act to amend section 50 of chapter 23 of the General Statutes of the state of Colorado, entitled 'County Government'" (Laws 1885, p. 162), which section as amended provides that, in addition to the officers theretofore authorized to sue, any taxpayer of the county who would become responsible for the costs of the suit might institute an action in the name of the board of county commissioners of the county against the principal and sureties on a commissioner's bond. *Held*, that the matters expressed in section 7 of the original act and section 50 of the amended act were fairly germane to and within the scope of the title of the original and amended acts.

2. PLEADING—SEPARATE PARAGRAPHS—CAUSE OF ACTION.

Where, in an action on a bond, a paragraph of the complaint set out one of the items assigned as a breach of the condition of the bond merely, it should be taken in connection with the introductory paragraphs of the complaint, and was therefore not demurrable because it did not contain a repetition of certain necessary allegations, though it was mistakenly designated as a "cause of action."

Error to District Court, Hinsdale County; Theron Stevens, Judge.

Action by Samuel Watson and another suing in the name of the board of county commissioners of Hinsdale county against J. R. Paterson and others. From a judgment in favor of plaintiffs, defendants bring error. Affirmed.

Charles F. Repath, for plaintiffs in error.
H. C. Clay, for defendant in error Farrell.

GODDARD, J. This action was instituted by the defendants in error (plaintiffs below) against the plaintiffs in error (defendants below) to recover, in the name of the board of county commissioners of Hinsdale county, certain county money alleged to have been misappropriated by plaintiffs in error while acting as county commissioners of said county. In addition to the allegations showing the election and qualification of defendants as county commissioners, the amended complaint contains two paragraphs designated as first and second causes of action. The jury found in favor of defendants upon the first, and against them upon the so-called second, cause of action, which alleged the misappropriation by defendants, as county commissioners, of the sum of \$30 out of the money of the county to G. D. Bardwell to reimburse him for money expended for law books which were purchased and retained by him. Judgment was rendered on the verdict for \$30 and costs. Defendants bring the case up on error. The evidence introduced was not preserved by bill of exceptions. Our examination is therefore limited to the consideration of two questions raised by the demurrer: (1) Whether section 825, Mills' Ann. St., which confers upon a taxpayer the right to maintain an action in the name of the board of county commissioners against members of the board for misappropriation of the county funds, is valid; (2) whether the court below erred in overruling the demurrer to the so-called second cause of action.

1. Upon the first proposition counsel for plaintiffs in error contend that the section is unconstitutional because its provisions are not germane to the title of the original act, or to the title of the amendment of the act of 1885, and are therefore obnoxious to the provisions of section 21 of article 5 of the Constitution. The original act of 1881 was entitled "An act to require county commissioners of the several counties in this state to give bonds for the faithful discharge of the duties of their office and to prescribe penalties for refusing to give the required bonds." Laws 1881, p. 96. This act was incorporated in chapter 23 of the General Statutes of 1883, entitled "County Government," and section 7, which provided for bringing suit in case of a breach of the bond, was numbered therein as section 50. In 1885 the Legislature passed an act, entitled "An act to amend section 50 of chapter 23 of the General Statutes of the state of Colorado, entitled 'County Government.'" Laws 1885, p. 162. This section as amended is the law

as it now stands, and provides, in addition to the officers theretofore authorized to bring suit, that "any taxpayer of the county who will become responsible for the costs of suit, may institute an action in any court in such county, of competent jurisdiction, in the name of the board of county commissioners of the county against the principal and sureties upon such bond." We think that, under the rule of construction heretofore given to this constitutional provision by this court, the legislation complained of, as expressed in section 7 of the original act and section 50 of the amended act, is fairly germane to and within the scope of the subject-matter as expressed in those titles. *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. 142; *In re Pratt*, 19 Colo. 138, 34 Pac. 680; *Stocknan v. Brooks et al.*, 17 Colo. 248, 29 Pac. 746; *Dallas v. Redman*, 10 Colo. 297, 15 Pac. 397. The object of the legislation, as expressed in the title of the original act, was to require county commissioners to give bonds for the faithful discharge of their duties. A provision for the recovery of such damages as the county shall sustain by reason of a breach of the conditions of the bond, and designating who might bring suit for such recovery, is certainly germane to the subject-matter of such a title.

2. The only remaining objection presented by the assignment of errors that we can consider upon the record before us is whether the allegations of the complaint are sufficient to entitle plaintiffs to recover upon what is designated as the second cause of action. The claim is that the matters pleaded as an inducement, and which are necessary to show the official capacity of the defendants, and their liability under their official bonds for the acts set out in the so-called second cause of action, to wit, their election and qualification as county commissioners, and the giving of the bonds required by the statute, are not restated in this subdivision of the complaint, and because of this omission it is contended that there are not sufficient facts alleged therein to show any official misconduct on the part of the defendants. If this paragraph of the complaint is to be treated as the statement of a cause of action in itself, the objection to its sufficiency is well taken. But we do not think it should be so regarded. While mistakenly designated a cause of action by the pleader, it is, and should be, regarded only as a separate paragraph setting out one of the items assigned as a breach of the conditions of the bond, and is to be taken in connection with the introductory averments of the complaint, for the purpose of forming the issues to be tried. The appropriation of the county funds, as therein alleged, to *Bardwell*, was for law books which the county commissioners were not authorized to purchase. Such allowance constituted a wrong or delict on their part which was an essential element of the cause of action stated in the complaint. The court,

therefore, committed no error in overruling the demurrer. The errors assigned upon the giving and refusing of certain instructions cannot be considered in the absence of the testimony.

Our conclusion is that by the record before us no error is presented that would justify a reversal of the judgment. It is therefore affirmed.

Affirmed.

GABBERT, C. J., and BAILEY, J., concur.

35 Colo. 117

WILLIAMS v. CONROY et al.

(Supreme Court of Colorado. Dec. 4, 1905.)

1. TAXATION—SALE—RECOVERY OF POSSESSION—LIMITATIONS.

Under Mills' Ann. St. § 3904, providing that no action for the recovery of land sold for taxes shall lie unless the same is brought within five years after the execution and delivery of the tax deed, the title of an owner, who for more than five years after the recording of a deed given at a sale for taxes did nothing to recover possession or to question the title of the grantee in the deed, was barred, though the deed, regular on its face, was void because of informalities; it constituting color of title under the statute of limitations.

2. SAME.

Land was sold to plaintiff for taxes. He did not take possession nor pay subsequent taxes. At a tax sale for subsequent taxes defendant became the purchaser. Defendant's tax deed was recorded before the full five years had elapsed within which plaintiff's title under his deed could be defeated by the owner; but plaintiff's title was not questioned until after the expiration of five years after recording his deed, and defendant did not take possession until after the expiration of that period. *Held*, that the constructive possession which followed plaintiff's deed was not affected by the recording of the deed to defendant, and plaintiff's rights were not thereby concluded, but he might, within the five years fixed by Mills' Ann. St. § 3904, attack defendant's title.

3. DEEDS—QUITCLAIM—RIGHTS CONVEYED.

Where an owner whose title was extinguished by a tax deed quitclaimed the premises, the grantee in the quitclaim deed acquired no title as against the grantee in the tax deed.

Appeal from District Court, Las Animas County; Jesse P. Norrhcutt, Judge.

Action by F. A. A. Williams against Kate Conroy and others, in which defendant Asa Haines filed a cross-complaint. From a judgment for cross-complainant, plaintiff appeals. Reversed.

W. B. Morgan, for appellant. Fred A. Sabin and R. S. Beall, for appellees.

CAMPBELL, J. Both parties claim ownership and right to the possession of certain lands in Las Animas county, of which Richard L. Survant is the patentee. Plaintiff's title is evidenced by tax deeds. Of the defendants, all have suffered default except Asa Haines, and, as he has succeeded to the title of the others, the case will be discussed as if he were the only defendant. Haines' title is two-fold: One is evidenced by tax

deeds issued in pursuance of a tax sale at a later time and for a later year than were the tax deeds under which plaintiff claims. The other of defendant's titles is evidenced by a quitclaim deed from the patentee, obtained after this action was begun, but before the answer was filed. Defendant Haines was in actual possession of the land under his tax deeds at the time the complaint was filed. This action was brought by plaintiff to recover possession, and to have defendant's tax deeds canceled because they are void. In the amended answer, by way of cross-complaint, defendant Haines sets out his two titles just mentioned, and, as he was in actual possession when the action was brought, he asks to have his title quieted, his possession confirmed, and for a cancellation of plaintiff's tax deeds. The cause was tried to the court without a jury upon an agreed statement of facts, and resulted in a decree for defendant in accordance with the prayer of the cross-complaint.

From this statement it appears that R. L. Survant, the patentee, allowed the taxes on the lands for the year 1889 to become delinquent, for which they were sold, and tax deeds, now held by plaintiff, issued under the sale, which were recorded in June, 1893. The land was vacant and unoccupied; no one being in actual possession of the same after the tax sale and before the tax deeds were recorded, and not until some time in January, 1900, when defendant entered under the tax deeds hereinafter mentioned. The original owner, though cognizant of the tax sale and the execution and recording of the tax deeds, never took any steps to recover possession, apparently abandoning all his rights thereto. Plaintiff's tax deeds are regular and valid on their face, though because of informalities in the sale they are as a matter of law void. After plaintiff's purchase at the tax sale referred to he neglected to pay the taxes on the land for the year 1891, and for such delinquency the land was again sold and tax deeds issued therefor, which were recorded December 18, 1896, and it is these tax deeds upon which the defendant Haines relies for his tax title. He took possession of the land thereunder January 1, 1900, and was so holding at the time of the beginning of this action. These tax deeds, though valid on their face, are void for the same irregularity which affects the plaintiff's earlier ones. From this statement it appears that plaintiff relies upon tax deeds which were recorded, and under which he held for more than five years thereafter without any action by the original owner, or any other person, in any way questioning that title. The defendant claims title, first, under tax deeds which were recorded less than five years, but under which actual possession was not taken by him for more than five years, after the date of the recording of plaintiff's tax deeds; and, second, by virtue of a quitclaim deed executed and delivered

by the original patentee owner in February, 1902, and which was after this action was begun and before the amended answer was filed.

1. The defendant obtained nothing by his quitclaim deed, for section 3904, Mills' Ann. St., says that no action for the recovery of land sold for taxes shall lie unless the same be brought within five years after the execution and delivery of a deed therefor by the treasurer, any law to the contrary notwithstanding. More than the full period of five years prescribed by this act of limitation had expired without any act of any sort by the patentee owner to recover possession or to question plaintiff's title under his tax deeds. The quitclaim deed gave to the defendant such rights, and such only, as the grantor himself had. The patentee owner's title, under section 3904, Mills' Ann. St., was completely extinguished and barred; hence the patentee had nothing to give when he executed his quitclaim deed, and the defendant received nothing thereby. Express authority for this conclusion is found in *Crisman v. Johnson*, 23 Colo. 204, 47 Pac. 293, 58 Am. St. Rep. 224, *De Foresta v. Gast*, 20 Colo. 307, 38 Pac. 244, and *Bennet v. N. O. S. L. & I. Co.*, 23 Colo. 470, 48 Pac. 812, 58 Am. St. Rep. 281, which hold that a void deed, taken in good faith, constitutes sufficient color of title under our statute of limitations. See, also, *Desty on Taxation*, § 149. That the patentee's title was extinguished, and the same vested in the plaintiff under the facts of this case, see, also, *Lebanon Mining Co. v. Rogers*, 8 Colo. 34, 5 Pac. 631; *Molingona Coal Co. v. Blair*, 51 Iowa, 447, 1 N. W. 768; *Harris v. Curran*, 32 Kan. 580, 4 Pac. 1044; *Griffin v. Turner*, 75 Iowa, 250, 39 N. W. 294; *Black on Tax Titles* (2d Ed.) § 284; *Shawler v. Johnson*, 52 Iowa, 472, 3 N. W. 604. *Morris v. St. Louis Nat. Bank*, 17 Colo. 231, 29 Pac. 802, is not opposed to this conclusion. There are some observations in the opinion, in the nature of dicta, which might seem pertinent, but the holding was that the statute of limitations we are considering was not applicable to that case, as the action was not "for the recovery" of land, and the deed had not been on record for five years before the action was brought.

2. The remaining question, then, is as to which of the titles obtained under the tax deeds shall prevail. Let us again consider the respective claims of the parties at the time the action was begun. By the tax deeds which plaintiff held the former owner's title was extinguished. This result was effected before defendant's tax deeds were executed. When these later deeds were recorded, though the patentee owner's title was vested in plaintiff by the earlier deeds, it was a defensible, not an absolute title, because the full period of limitation had not then run; but afterwards, and before this suit was instituted, plaintiff's title had be-

come absolute by the lapse of the full period. When defendant's tax deeds were subsequently recorded, the title, as to the patentee, the original owner, and all the world, was absolute in plaintiff. Whatever effect the recording of defendant's tax deeds had on the title, it was merely, and nothing more than, that which the record of tax deeds has on the rights and title of an owner whose lands are sold for delinquent taxes. These deeds of the defendant, then, operated to divest plaintiff's title and vest it in the defendant, and they are prima facie evidence in this suit of defendant's ownership and right of possession. But the defendant's title thereunder was, when the plaintiff filed his complaint, merely defeasible, because the full period of limitation had not expired within which the plaintiff, as the owner, might attack it. Since the plaintiff thus questioned its validity within this period, and as the defendant concedes his deeds are void because of certain irregularities preceding the sale, they must be canceled, and his possession thereunder deemed a trespass.

The defendant concedes that such would be the law were it not for the fact that the recording of his tax deeds has introduced into the case another element that changes such rule. The result of our investigation, however, satisfies us that in this action no weight or significance is to be given to the fact that defendant's tax deeds were recorded before the full five years had elapsed within which the plaintiff's defeasible tax title under the earlier tax deeds could be defeated by the patentee owner. If it be true, as contended, that the recording of defendant's tax deeds interrupted the constructive possession which the tax deeds drew to the plaintiff, it cannot avail the defendant in this action. Certainly as to the original patentee owner, plaintiff's rights were not thereby affected; otherwise, a delinquent taxpayer would profit by his own wrong in failing to observe the law by not paying his taxes. Neither do we see how it can affect the relation which exists between plaintiff and such patentee owner, or weaken, or in any wise interfere with, plaintiff's rights under his tax deeds, unless, of course, defendant's inchoate title under the later tax deeds becomes perfected by the lapse of time. The defendant is not claiming in privity with, but adversely to, the original owner, as well as the plaintiff, and his relation to the plaintiff, being that of a tax purchaser to a former owner, makes immaterial the supposed interrupted constructive possession with which plaintiff's tax deeds clothe him. True it is some courts have held that, while the owner is in actual possession, the statute does not apply, and that, if not in possession when the tax deeds are recorded, the subsequent taking of actual possession by the former owner, but nothing short of that, stops the running in the tax purchaser's favor of the statute of limitations

which such recording sets in motion; but we find no case which holds that the constructive possession which attends the recording of a later tax deed under a sale for a later year operates to interrupt the constructive possession, or stop running the statute of limitations under the earlier deed, so far as concerns the relative rights of its holder and his former owner, and we apprehend that neither actual possession taken by the later purchaser, nor the constructive possession which follows the tax deeds, can in any way affect the rights of the earlier purchaser as against his former owner. The delinquent original owner's title cannot be saved by any act not taken by him, or in his behalf, and certainly not by the act of one who holds in hostility to him.

Furthermore, our statute does not require possession to be taken of land by the purchaser at a tax sale as an essential condition to the running of the statute of limitations. The tax deed draws to it constructive possession of unoccupied land, and it may be, though such a case is not before us, that where to maintain the action a plaintiff must have actual or constructive possession, or where some other statute of limitation requires possession to be taken, the absence of the one, or the divestiture of the other, may injuriously affect the tax purchaser's rights when he attempts to enforce them in an action. But such conditions and such state of facts are not here present. The case made by the agreed statement is in law merely one where the owner of land sold for delinquent taxes within the prescribed period of limitation comes into court to recover possession, and to have canceled as void tax deeds executed in pursuance of such sale. So that, as between the plaintiff and the defendant, whose relation was merely that of tax purchaser and delinquent former owner, whatever be the consequences of the circumstance that defendant's tax deeds were recorded less than five years from the date of the record of plaintiff's tax deeds, the latter's rights are not thereby concluded if he acts, as he has done here, within the time which the statute of limitations gives him for the purpose of having the defendant's defeasible title under the later tax deeds nullified. As all the tax deeds of plaintiff and defendant, though valid on their face, were void, as the parties concede, the learned trial judge was of the opinion that neither those held by plaintiff nor those held by defendant operated to divest the title of Survant, the patentee. Hence he decided that the quitclaim deed from Survant vested the title in defendant. He was right with respect to defendant's tax deeds, but wrong as to plaintiff's. The latter, as we have held, divested Survant's title, and, by aid of the statute of limitations, vested it in plaintiff. The quitclaim deed was therefore abortive.

The judgment must be reversed, and the

cause remanded, with instructions to vacate the same and enter judgment for plaintiff for possession according to the prayer of his complaint.

Reversed.

GABBERT, C. J., and STEELE, J., concur.

35 Colo. 72

**FARMERS' ALLIANCE MUT. FIRE INS.
CO. OF COLORADO v. VALLIE.**

(Supreme Court of Colorado. Dec. 4, 1905.)

INSURANCE—FIRE POLICY—LOSS BY NEGLIGENCE—ACTION ON POLICY.

Where property covered by a fire policy was destroyed by the negligence of a railroad company, and insured settled with the railroad company for a portion of the loss, there being no express covenant in the policy requiring the insured to assign to the insurer any claims for negligence causing a loss, the settlement did not preclude insured from maintaining an action on the policy.

Error to District Court, Park County; M. S. Bailey, Judge.

Action by U. Vallie against the Farmers' Alliance Mutual Fire Insurance Company of Colorado. Judgment in favor of plaintiff, and defendant brings error. Affirmed.

John F. Mail, for plaintiff in error.

MAXWELL, J. This is an action upon a fire insurance policy for loss by fire. From the complaint it appears that the defendant in error, plaintiff below, was the owner of certain hay in stacks on the premises described. August 20, 1898, plaintiff in error, in consideration of premiums paid and to be paid, issued to defendant in error, its policy of insurance against loss by fire on sundry buildings, grain, and hay in stacks and in barn, on the described premises; \$1,000 of such indemnity sum covering and applying to grain and hay in stacks and barn. October 31, 1898, 107¼ tons of hay in stacks was wholly destroyed by fire, whereby loss was sustained by defendant in error in the sum of \$703.50. All conditions as to proof of loss imposed by the policy were complied with. Demand for payment of the loss was refused by plaintiff in error.

Plaintiff in error admitted in its answer that it issued the policy of insurance mentioned in the complaint upon the terms, and upon the property stated in the complaint; that a fire on or about the date mentioned destroyed some part, or all of the insured and other property of plaintiff, occasioning a loss to him in an amount unknown; that such loss had not been paid. A second defense admits liability for the loss, but only as to the hay covered by the insurance policy, and avers that the fire which destroyed the hay occurred through the negligent operation of locomotive engines by certain railroad companies or the receiver thereof; that such railway companies or the receiver thereof, were liable for such damages for the full value of all the hay destroyed; that within

30 days following the fire, the plaintiff agreed with the defendant, that in consideration of the primary liability for the loss of the insured hay being with the railway companies or the receiver, and the secondary liability being with the defendant insurance company, he (plaintiff) would allow the defendant to recoup its loss from the railway companies or receiver, and that he (plaintiff) would not collect any money or damages on account of the loss from the railway companies or receiver, and in no event would he settle or release his cause of action against the railway companies or the receiver; that thereupon defendant stated to plaintiff that it would pay whatever plaintiff proved the loss to be, not exceeding the amount of the insurance thereon, but that prior to such payment, plaintiff would allow defendant a reasonable time to collect from the railway companies or the receiver, and in consideration of the premises plaintiff agreed with the defendant company that it should have a reasonable time to make such collection before paying the plaintiff the loss under his policy; that neither of said companies nor the receiver would make settlement with the defendant, and soon thereafter defendant gained knowledge that plaintiff had settled with the railway companies or the receiver for all of his loss on the hay insured and other property; and that the plaintiff executed and delivered to the railway companies a certain written instrument in the nature of a receipt, material parts of which are as follows: "U. Vallie, the claimant herein, hereby acknowledges payment of the sum of three hundred fifty (\$350) dollars, acknowledging that said sum is paid in full accord and satisfaction of any, every and all claims of every class or character against Frank Trumbull, receiver of the Denver, Leadville & Gunnison Railway Company, or against the Colorado & Southern Railway Company, or either of them. By reason of the destruction by fire of one hundred thirty-two (132) tons of hay, three hundred (300) acres of pasture land, fences, and other property, all of which occurred during the month of October, 1898, and which hay was destroyed on or about October 31, 1898, between mile posts 81 and 84, on section 19 township 8, range 75 west, in Park county, Colorado. * * * It being distinctly understood in this compromise that the claimant has, for the purpose of compromise, deducted from his claim a substantial portion of insurance on said hay, which said insurance was carried with the Farmers' Alliance Mutual Fire Insurance Company of Colorado; the difference between the amount paid by the receiver and the said railway companies for said hay being collectible from the said the Farmers' Alliance Mutual Fire Insurance Company of Colorado, by the said U. Vallie, claimant herein." The answer further avers that the cause of action referred to in the receipt is the liability of said companies, and receiver

for said insured, and other hay destroyed; that by reason of the premises and the execution and delivery of said written instrument, the plaintiff in violation of his said express agreement with the defendant, and of the equitable right of subrogation of the defendant, absolutely settled, compounded, and released the said cause of action, and took the same away from this defendant, and prevented the defendant from recovering the amount of the loss from the said railway companies or said receiver, to the direct damage and injury of defendant in the sum now claimed by plaintiff in his complaint; that the plaintiff thereby appropriated the fund available and belonging in equity to the defendant for recoupment, and paid himself the insurance due on account of said hay out of this defendant's said fund, and the said insurance policy, as far as the said loss of said hay is concerned, is now fully paid and discharged.

To this answer a reply was filed, which in substance denied all of the material allegations of the answer, and further averred that while it was true that the cause of action with reference to the fire loss in the receipt mentioned is the liability of the companies or the receiver for said insured hay and other hay destroyed, it is not true that said cause of action and liability was the only cause of action and liability in said writing referred to, and in said settlement included, the fact being, that the cause of action and liability for pasture and fences burned was also included in said receipt, and that the amount paid and receipted for no more than fully paid said other cause, and that the release of said fire loss cause of action was without consideration.

A trial to the court resulted in a judgment in favor of defendant in error for the amount claimed, to wit, \$703.50. The abstract of the record presented by counsel for plaintiff in error contains the pleadings, the findings, and judgment of the court below, and what purports to be the testimony of plaintiff, and the secretary of the insurance company, to the effect, that the plaintiff had notice that the insurance company desired to collect from the receiver of the railroad companies, and that the settlement made by plaintiff with the receiver of the railroad companies, was against the protest of the secretary of the insurance company. We are wholly unadvised by the abstract of record as to what the evidence at the trial disclosed, other than as above stated. The errors assigned are that the court erred in finding the issues, and in rendering judgment for plaintiff.

The position of counsel for plaintiff in error (as set forth in his printed brief) seems to be that the fire having been caused by the railroad companies, the insurance company

had an equitable right, upon payment of the loss, to be subrogated to all the rights of Vallie; that when he settled with the railroad companies there was no right either in law or equity to which the insurance company could be subrogated, and that Vallie, by taking payment from and releasing the railroad companies, took away the highly important right of the insurance company; that he cannot have two payments for the same loss, and hence has no cause of action against the insurance company. The answer of the insurance company admitted that the loss had not been paid to Vallie by the insurance company. All of the authorities are to the effect, that the right of subrogation will not be enforced, until the creditor or other person to whose place subrogation is claimed, has been fully satisfied. The rule applicable to this case is as follows: The right of subrogation does not accrue, until full payment of the liability which gives rise to such right on the part of the insurance company claiming to be subrogated. Where there is no express covenant contained in the policy requiring the insured to assign to the company any claims he may have against any one whose negligence or fault may have caused the loss, no subrogation can be demanded, until the company has paid the loss, and the insured may settle with and release the negligent party as to damage, other than that insured, without effecting his remedy against the insurer. If, however, the insured recovers from the negligent person for the whole loss, he cannot afterward sue the insurer. *May on Insurance*, § 454. See, also, *Fire Insurance Co. v. Fidelity Co.*, 123 Pa. 516, 16 Atl. 790, 10 Am. St. Rep. 543; *Insurance Co. v. Fidelity Co.*, 123 Pa. 523, 16 Atl. 791, 2 L. R. A. 586, 10 Am. St. Rep. 546; *Railroad Co. v. Pullman Car Co.*, 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97. It appears from the receipt set forth in the answer of plaintiff in error and the replication, that other property than the insured hay was destroyed by the fire, and that the receiver of the railroad companies settled with defendant in error for the loss of the other property and a portion of the insured hay. There is no evidence presented by the abstract of record to indicate that defendant in error recovered from the railway companies or the receiver the whole loss sustained by him by reason of the fire.

Counsel for plaintiff in error, not having called our attention to any error by the abstract of record prepared and filed by him, to which we confine our investigation, under the authorities above cited, the judgment must be affirmed.

Affirmed.

The CHIEF JUSTICE and GUNTER, J., concur.

35 Colo. 78

FARMERS' ALLIANCE MUT. FIRE INS. CO. OF COLORADO v. SANBORN.

(Supreme Court of Colorado. Dec. 4, 1905.)

Error to District Court, Park County; M. S. Bailey, Judge.

Action by W. R. Sanborn against the Farmers' Alliance Mutual Fire Insurance Company of Colorado. Judgment in favor of plaintiff, and defendant brings error. Affirmed.

John F. Mall, for plaintiff in error.

MAXWELL, J. The facts involved in this case are substantially the same as those involved, considered, and ruled in the Farmers' Alliance Insurance Company v. Vaille (Colo.) 83 Pac. 962. By stipulation and order of the court below this case was consolidated with that case for the purpose of trial and determination in the court below. The questions presented for determination here, are the same as those presented in that case, and for the reasons there given, the judgment herein is affirmed.

Affirmed.

The **CHIEF JUSTICE** and **GUNTER, J.**, concur.

35 Colo. 100

ORTIZ et al. v. HANSEN.

(Supreme Court of Colorado. Dec. 4, 1905.)

1. EMINENT DOMAIN—EXERCISE BY PRIVATE INDIVIDUAL.

A legislative delegation of the power of eminent domain to a private individual may be invoked by him, though other remedies are available.

2. SAME.

Under Mills' Ann. St. § 2257, giving to a private individual the right to invoke the power of eminent domain to acquire the right of way for a ditch, to enable him to utilize a valid appropriation of water, a proceeding is not authorized by a private individual in his own right, in a representative capacity and as a trustee for the public, to acquire private lands for the purpose of making an artificial channel for a natural stream which has been wrongfully obstructed, which will enable him, in his individual capacity, to utilize an individual right.

3. APPEAL—CHANGE OF THEORY.

Where a private individual invokes the power of eminent domain to acquire land for an artificial channel, the court cannot on appeal treat as surplusage the allegations of the petition asserting the right to proceed in a representative capacity.

Error to Conejos County Court; A. B. Ruby, Judge.

Proceedings by Peter Hansen, in behalf of himself and others similarly situated, against Romualdo Ortiz and others for the purpose of acquiring certain land, owned by defendants, for the purpose of making an artificial channel for irrigation purposes. From a decree for petitioners, defendants bring error. Reversed.

Proceedings under the eminent domain act. The La Jara river is a natural stream situated in water district No. 21 of this state, of which Hot creek is a tributary. Peter Hansen, the petitioner and defendant in error here, is an appropriator of water direct from the river for irrigating his agricultural lands. Juan Gallegos, who is not a party to this proceeding, wrongfully appropriated and took possession of, and put obstructions in, the natural channel of Hot creek, and thus prevented waters from flowing into the channel of the La Jara river, into which otherwise they would have emptied and contributed to its volume. By reason of the unlawful act of Gallegos, Hansen was deprived of a large volume of water to which he was entitled. He thereupon filed this petition, in his own behalf and of others similarly situated, and as the trustee of the general public, for the purpose of acquiring a strip of land owned by respondents, who are plaintiffs in error here, for the purpose of making an artificial channel for a portion of Hot creek lying below the point of obstruction already mentioned, and the headgate of his ditch in the La Jara river. Over the objection of respondents that no such power is conferred upon Hansen, the court conducted the proceedings to a conclusion in accordance with the forms and method prescribed in the eminent domain act, and entered a decree vesting in Hansen, in his representative capacity, title to parcels of land of respondents for such purpose.

George T. Sumner, for plaintiffs in error. Rogers, Inafroth & Gregg and Charles A. Merriman, for defendants in error.

CAMPBELL, J. (after stating the facts). From the foregoing statement it would appear that Hansen had an adequate remedy aside from any claimed under the eminent domain act. Under section 2391, 1 Mills' Ann. St., it was the duty of the water commissioner of that district to keep the natural streams clear of unnecessary dams or other obstructions, and that officer might, without an order of court, remove the obstruction of which the petitioner complains, and petitioner himself, as a ditch owner, by legal action, could compel Gallegos to remove it. If, however, the legislative department has in such a case delegated to a private individual the power of eminent domain, this remedy may be open to petitioner, even though other remedies are available; for that department of government determines the necessity for the exercise of this sovereign power, while the courts may ascertain if the use is of the character contemplated.

Under section 2257, Mills' Ann. St., if any person who owns farming land which has not sufficient length of area exposed to a stream to obtain a sufficient fall of water to irrigate it, or where his land is too far removed from the stream to build a ditch directly therefrom to the lands wholly upon

the same, he may, if necessary to that end, take and condemn lands belonging to others for a right of way for a ditch, to divert and carry waters from the stream to irrigate his own lands; and if, in any case, after having built a ditch for the purpose of carrying water to his lands from a natural stream, its channel becomes changed from any cause, so as to prevent the ditch from receiving the proper inflow of water to which it may be entitled, the owner has the right to extend the head of the ditch for such distance up the stream as may be necessary for securing a sufficient flow of water for his purpose, and may have the right to maintain proceedings for condemnation of right of way for such extension. This is the statute which gives to a private person the power to invoke the power of eminent domain for a private use. The petitioner here has not brought himself within its purview. The right which he here asserts is not conferred by it. We do not say that petitioner may not, under this law, acquire lands of the respondents, where the taking of the same is necessary in order to enable him to avail himself of his appropriation. Indeed, he may do so. But he has not brought these proceedings for his own benefit solely. In a representative capacity, as well as in his own right, and as a trustee for the public, whatever that means, he seeks to acquire lands of respondents for the purpose of making an artificial channel for a natural stream which has been wrongfully obstructed, which will enable him, in his individual capacity, to utilize an individual right.

The sovereign power of eminent domain may be delegated by the Constitution or by an act of the Legislature, and property of every kind, whether public or private, may be taken for an authorized public or private use. Our Constitution, and the statutes passed in pursuance thereof, have, as we have said, conferred upon private persons the right to take land for a private use, such as ditches for irrigating agricultural lands. Such authority, whether found in the Constitution or statute, must be strictly construed and limited to the persons and the uses specified, and must not be extended. Neither the Constitution, nor any statute to which our attention has been called, authorizes a private individual to maintain a condemnation suit for the benefit of himself and others similarly situated, and as a trustee of the public, to take lands belonging to still other persons for a channel of a natural stream, or permits a court to vest title thereto in a private individual, as trustee for the public. The county court entered a decree in this case which had the effect of a conveyance of this right of way to Hansen in trust for the public. We do not think its proceeding was authorized. We cannot, at the request of the defendant in error, treat as surplusage the allegations of the petition

which assert the right of Hansen to proceed in a representative capacity, and treat the proceeding as one brought by him in his individual capacity and for his exclusive benefit. This is not a case where he is seeking to acquire, under the statutes of this state, merely a right of way for, or extension of, a ditch to enable him to utilize a valid appropriation of water, or to utilize the channel as a conduit for such purpose; but it is a proceeding which he has brought, for himself and others similarly situated, and as trustee for the general public, to acquire lands of private individuals for an artificial channel of a natural stream. Whether the state itself or one of its political subdivisions may institute and maintain such a proceeding, or whether Hansen, for himself alone, may, by condemnation, appropriate the channel of a natural stream and use it as part of a ditch, are questions not before us.

The judgment should be reversed, and the cause remanded, with instructions to the county court to dismiss the petition.

Reversed.

GABBERT, C. J., and STEELE, J., concur.

35 Colo. 149

NATIONAL BANK OF COMMERCE IN DENVER v. APPEL CLOTHING CO. et al.
(Supreme Court of Colorado. Dec. 4, 1905.)

FRAUDULENT CONVEYANCES—VALIDITY OF TRANSACTION—NECESSITY OF SHOWING INDEBTEDNESS.

Endowment life insurance policies, payable to insured in case he shall survive a certain definite period and to beneficiaries in case insured dies within that period, and having a definite cash surrender value, cannot be subjected to the payment of a judgment obtained against insured, although the interests of the beneficiaries are subject to revocation by insured, in the absence of a showing that insured was insolvent when the policies were issued or the beneficiaries designated, or that the indebtedness on which the judgment is based existed at the time of the issuance of the policy or the designation of the beneficiaries, or that the policies were taken out or the beneficiaries designated with a view to the creation of future indebtedness.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 764-770.]

Appeal from District Court, Arapahoe County; Calvin P. Butler, Judge.

Action by the National Bank of Commerce in Denver against the Appel Clothing Company and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

The purpose of this action, commenced by appellant as plaintiff in the court below, is to subject certain life insurance policies issued upon the lives of debtors of the plaintiff to the payment of a judgment in favor of the plaintiff and against such debtors. The material averments of the bill necessary to consider are to the effect that these policies provided for the payment of certain sums of

money to the insured within specified periods, but in the event of their death before the expiration of such periods then certain sums would be paid the wife or daughters of each debtor, and that these policies, by virtue of their terms, had certain values which could be obtained from the companies issuing them upon the surrender thereof without the consent of the beneficiaries. To this action the judgment debtors, beneficiaries and insurance companies, were made parties defendant. A general demurrer was interposed to the complaint, which was overruled. Thereafter answers were filed and a trial had on the issues made. The policies were issued or assignments thereof made prior to the rendition of plaintiff's judgment. It is claimed on behalf of plaintiff that these policies, either by their express terms or under the terms of the assignments, vest the insured with full authority to change the beneficiaries without their consent. Judgment was rendered in favor of the defendants, from which the plaintiff appeals.

H. S. Silverstein and T. J. O'Donnell, for appellant. D. V. Burns, M. B. Carpenter, Talbot, Denison & Wadley, and Muller & Summerfield, for appellees.

GABBERT, C. J. (after stating the facts). Counsel for plaintiff say that this action is in the nature of a creditors' bill. Their theory upon which they claim this action can be maintained is that where a debtor takes out a policy of life insurance upon his own life by the terms of which, should he survive a certain definite period, the company undertakes to pay him a certain sum of money, with the contingency that upon the death of the insured during this period the company will in that event pay certain sums of money to a beneficiary named in the policy or by assignment, and where such policy by its terms has a value which the insured can obtain by surrender of the policy, without the consent of the beneficiary, such a policy is an asset of the insured which can be reached by his creditors. In other words, they claim that what he himself may do under such a policy a court of equity will compel him to do for the benefit of his creditors. This suit being in the nature of a creditors' bill, the elements necessary to maintain it must be present. Conceding, but not deciding, that the contention of counsel for plaintiff is correct in the abstract, a case must be made, both in the complaint and by proof, which would entitle a creditor to subject the property of his debtor, not reachable on execution, to the payment of his debts. There is no averment in the complaint to the effect that when these policies were issued, or the assignments thereof made to the beneficiaries, the insured, who are now the judgment debtors, were insolvent, or that the indebtedness which forms the basis of the judgment, existed at either of these times, or that the in-

sured were indebted to other parties, or that the policies were taken out or assigned to the beneficiaries with a view to the creation of future obligations. In short, there is no averment of fraud whatever on the part of either of the insured or the beneficiaries. The fact that the property sought to be subjected to the payment of the debts of the insured is represented by life insurance policies in which beneficiaries have an interest does not change the rules with respect to creditor's suits. They must necessarily be the same, without regard to the character of the property of the debtor which it is sought to reach. Before a court of equity is authorized to cancel a voluntary conveyance or transfer of property on the ground of fraud upon creditors, it must be alleged and proved that debts existed at the time the conveyance or transfer was made, or that the conveyance or transfer was made with a view to the contracting of future obligations. *Emery v. Yount*, 7 Colo. 107, 1 Pac. 686; *Sexton v. Wheaton*, 8 Wheat. 229, 5 L. Ed. 603; *Arnett v. Coffey*, 1 Colo. App. 34, 27 Pac. 614.

The beneficiaries obtained their respective interests before the judgment in favor of plaintiff was rendered. Whether these interests be subject to revocation by the insured is immaterial. The beneficiaries cannot be divested of their interests except by the acts of the insured. As the policies now stand, the money which the beneficiaries would receive in the event of the death of the insured would not belong to their respective estates, but to the beneficiaries. *Mfg. Co. v. Platt*, 13 Colo. App. 15, 56 Pac. 209. This assignment was made for their benefit, when, so far as the bill and proofs disclose, the insured had the right to do so. It does not appear that the plaintiff was in any manner prejudiced thereby, or that any property of the insured was applied in order to effect this arrangement, which in equity plaintiff would be entitled to have applied to the payment of its indebtedness, or that any conditions exist which would authorize a court of equity, at the instance of a creditor, to annul a voluntary arrangement on the part of the insured for the benefit of those for whom, by the laws of nature as well as man, it was their duty to make provision. If the latter should be compelled to surrender these policies to the companies issuing them, and accept the value thereof, the rights of the beneficiaries would be destroyed. The insured may have interests in these policies which a court of equity, if their rights only were involved, might have the power to compel them to apply to the payment of their indebtedness; but, however this may be, a court of equity would not be authorized to exercise this power when thereby the vested rights of third persons would be destroyed, unless it should appear that the conditions existed under which a court of equity, at the instance of a creditor, may

annual voluntary arrangements entered into between his debtors and third persons.

The judgment of the district court is affirmed.

Affirmed.

GUNTER and MAXWELL, JJ., concur.

35 Colo. 79

BURNETT v. DOYLE.

(Supreme Court of Colorado. Dec. 4, 1905.)

1. APPEAL—QUESTIONS REVIEWABLE.

Objections to certain answers on the ground that the parties thereto had not complied with the law in making themselves parties to the suit, not presented in the court below, will not be considered on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1184.]

2. SAME—ABSENCE OF SPECIFIC FINDINGS OF FACT—EFFECT—PRESUMPTIONS.

In the absence of specific findings of fact, it will be presumed on appeal that the trial court intended to find those facts responsive to the issues made by the pleadings and essential to the judgment rendered.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3768.]

Appeal from District Court, Arapahoe County; John I. Mullins, Judge.

Action by James N. Doyle against John A. Burnett. Judgment for plaintiff, and defendant appeals. Affirmed.

Ward & Ward, for appellant. Wm. L. Dayton and Wilbur F. Denious, for appellee.

MAXWELL, J. Doyle, appellee, sued the New Creamery Restaurant Company in attachment, and caused to be issued garnishment summons, which was served on the Festival of Mountain & Plain Association, which answered, no indebtedness. The answer of the garnishee was traversed by Doyle, and an indebtedness from the garnishee to the restaurant company of \$206.50 was alleged. The traverse also alleged that the restaurant company was a corporation; that one J. J. Wood was its general manager; that on September 19, 1899, the Festival Association and Restaurant Company, acting through Wood, its manager, entered into a contract whereby there became, and is, due the Restaurant Company from the Festival Association, \$206.50; that at the time the contract was made the Festival Association had full knowledge and notice that Wood was the manager and general agent of the Restaurant Company, and acting for and on behalf of the Restaurant Company. In reply to this traverse the Festival Association filed a petition, wherein it set forth the service of the garnishee summons, its answer to the same, and the traverse thereof, and that the issue presented by its answer and traverse could not be determined without prejudice to the rights of other parties for the following reasons: That the association, September 21, 1899, entered into a contract with J. J. Wood whereby the association became, and

is, indebted to Wood in the sum of \$206.50; that September 22, 1899, Wood assigned in writing to J. A. Burnett (appellant) all moneys to become due him under said contract; that said assignment in writing was served on the association October 2, 1899, 3:50 p. m., subsequent to the service of the garnishment summons herein; that February 16, 1900, Burnett commenced suit against the association in the district court of Arapahoe county to recover the identical \$206.50 involved herein; that the association has filed its answer setting forth facts substantially as set forth in its petition; that plaintiff, Doyle, claims the same money under the garnishment issued against the association as due the defendant, the Restaurant Company; that October 28, 1899, garnishment summons was served on the association in suit of one Wilhelm against J. J. Wood, to which summons the association made answer that it was indebted to Wood in the sum of \$206.50, subject to the assignment made by Wood to Burnett; that said sum of \$206.50 claimed by plaintiff (appellee) is also claimed to be due Burnett and Wilhelm. Prayer is that Burnett and Wilhelm be made parties to this action. The answer of Burnett to the petition of the association admits the allegations of the same, and avers that the assignment of Wood to Burnett was filed with the association October 2, 1899, and prays that the \$206.50 be adjudged his property. By order of the trial court Burnett's complaint in his suit against the association was made a part of his pleadings to the petition of the association. Wilhelm, pursuant to the order of the trial court, filed his answer to the petition of the association, in which he, in substance, sets forth the commencement of two suits by him against Wood, the issuance and service of garnishment summons on the association; and the answer of the association to the effect that it owed Wood \$125, and charges the association with certain representations which estop it to deny its indebtedness to Wood in an amount sufficient to satisfy his claim. Doyle replies to the answer of Burnett, in substance denying the validity of the assignment of the contract by Wood, the good faith of Burnett, his knowledge of the fact that Wood made the contract assigned to him as general manager and agent of the Restaurant Company, that the contract was made with the intention of defrauding the creditors of the Restaurant Company, of which fact Burnett had knowledge, and other matters not material to this discussion. Doyle also replies to the answer of Wilhelm, in substance alleging that the money due from the Festival Association was the property of the Restaurant Company, and that same was not the property of Wood and not subject to garnishment in any suit against Wood. To the answers of both Wilhelm and Burnett Doyle interposed objections that said parties had not complied with the statutes or Code in making them-

selves parties to the suit, and for that reason their answers should be disregarded. It does not appear from the record that this objection was presented or urged in the court below. The court was given no opportunity to pass upon the same, and for this reason we do not consider or pass upon this point. The judgment was against Burnett, who appealed to the Court of Appeals.

The pleadings, as hereinbefore outlined, presented two issues of fact: (1) That the contract entered into by and between Wood and the Festival Association, while in the name of Wood, was in fact the contract of the Restaurant Company. (2) That Burnett, at the time of taking the assignment of the contract from Wood, had knowledge of the above fact. The trial court made no specific findings of fact, simply adopting the view taken by counsel for Doyle. "Appellate courts must assume, in the absence of specific and unambiguous findings of facts to the contrary, that the lower court intended to find those facts which are responsive to the issue made by the pleadings, and essential to the judgment rendered." *Fanny Rawlings M. Co. v. Tribe*, 29 Colo. 302-305, 68 Pac. 284; *Perse v. Gaffney*, 5 Colo. App. 374, 38 Pac. 837. Applying this rule, the trial court must have resolved the issues stated in favor of Doyle and against Burnett, which conclusion finds support in the evidence adduced at the trial, and cannot be disturbed by this court.

The judgment will be affirmed
Affirmed.

GABBERT, C. J., and GUNTER, J.,
concur.

KIBBY v. GIBSON.

(Supreme Court of Kansas. Dec. 9, 1905.)

1. TRIAL — DEMURRER TO EVIDENCE — DEFENSIVE EVIDENCE BY PLAINTIFF.

When a party, upon whom rests the burden of the issues upon a trial, introduces evidence which, uncontroverted, establishes a cause of action in his favor, and then proceeds to introduce evidence which *prima facie* defeats his cause of action, and then rests his case, and the opposite party demurs to the evidence, *held*, it is error for the court to overrule the demurrer and to render judgment in favor of the party who produced the evidence.

2. SAME—ORDER OF PROOF.

It is bad practice; but, where no objection is made on this ground, the party who has the burden of the issues may introduce all the evidence pro and con upon every issue in the case. If, however, he introduces evidence which, un rebutted, defeats his cause of action, he does so at his peril.

(Syllabus by the Court.)

Error from District Court, Seward County; Wm. Easton Hutchison, Judge.

Action by John W. Kibby against Charles E. Gibson, in which defendant filed a cross-petition. There was judgment for defendant on the cross-petition, and plaintiff brings error. Reversed.

Sluss & Wall, for plaintiff in error. Sutton & Scates, for defendant in error.

SMITH, J. The defendant in error, as the real plaintiff, though not nominally, in the court below, filed a cross-petition setting up a note and mortgage, and asked judgment for a mortgage lien and foreclosure of the mortgage on the land described therein. He also alleged that the mortgage was executed by one Barnes, who was the owner of the land at the time the mortgage was executed, and that by successive assignments he became and was the owner and holder of the note and mortgage. Kibby, in answer to the cross-petition, denied "all the allegations of the cross-petition inconsistent with plaintiff's [Kibby's] ownership of the land." This did not put the ownership of Barnes in issue. At the trial Gibson introduced in evidence the original note and mortgage under which he claimed, with the indorsements, over the objections of Kibby. None of these objections were well taken. Gibson might well have rested his case here, but he proceeded to introduce in evidence a tax deed, and quitclaim deeds tending to show that Kibby's title was derived from the tax deed, but introduced no evidence tending to show any infirmity in the tax deed. Thereupon he rested his case, and Kibby demurred to the evidence on the ground that it was not sufficient to justify a judgment in favor of Gibson. The court overruled the demurrer, and rendered judgment, giving Kibby a first lien for taxes, of which there was no evidence unless it be the tax deed, and also adjudged Gibson a second lien for the amount of the note and interest, and ordered the foreclosure of the mortgage and sale of the land. Kibby brings the case here.

The evidence shows that Kibby derived all the title acquired through the tax deed by the grantee therein, and, if the tax deed is valid, it defeats Gibson's mortgage lien on the land. No fact tending to show that the deed was void was shown in the evidence, and no infirmity on the face of the deed is suggested. We do not feel called upon to do so, but we have scrutinized the face of the deed and have failed to discover anything that would render it void, and there is no admission that it is void. As the case stands, then, Gibson offered evidence which, uncontroverted, showed his right to recover the relief he prayed for. He then proceeded to offer evidence which *prima facie* defeated his right of recovery, and the demurrer to his evidence as a whole should have been sustained.

The party upon whom rests the burden of the issue may, if he so elects and there be no objection thereto, proceed to offer evidence upon all the issues in the case pro and con. If, however, he produces evidence which, un rebutted, defeats his cause of action, or if he does his opponent the service of setting up a straw man and omits to knock him

down, he does so at his peril. He may safely follow the order of trial prescribed by section 275 of the Code of Civil Procedure.

The judgment of the district court is reversed, and the case remanded. All the Justices concurring.

WATKINS LAND CO. v. CREPS et al.

(Supreme Court of Kansas. Dec. 9, 1905.)

PUBLIC LANDS—TIMBER CULTURE—ENTRY—SALE BEFORE PATENT.

Section 2, c. 190, Act Cong. June 14, 1878, 20 Stat. 113, being "An act to amend an act entitled 'An act to encourage the growth of timber on the Western prairies,'" is not an inhibition on the privilege of the person who enters land and cultivates timber thereon from contracting, before he secures his patent, to sell the land after he makes his final proof; and such a contract is not void by reason of the provisions of this section.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 371.]

(Syllabus by the Court.)

Error from District Court, Edwards County; Chas. E. Lobdell, Judge.

Action by the Watkins Land Company against Nathan Creps and others. Judgment for defendants, and plaintiff brings error. Affirmed.

R. W. Turner and A. C. Mitchell, for plaintiff in error. Fred Dumont Smith, for defendants in error.

GREENE, J. This action was brought by the Watkins Land Company to foreclose its mortgage upon certain land described in its petition and in which Nathan Creps and Mary O. Creps, the mortgagors, and R. E. Edwards, a claimant to the land, were defendants. The two Creps answered, admitting the execution of the note and mortgages, but denying the allegations of the answer and cross-petition of Edwards. The defendant Edwards answered that he was the equitable owner of the land; that prior to the execution of the mortgage he had purchased the land from Creps, and had paid him the purchase price therefor; that he immediately went into actual possession of the land, and has ever since that time been in the actual, open, notorious, and exclusive possession thereof, and had made lasting and valuable improvements thereon; that Creps and his wife had neglected and refused to make him a deed therefor; that at the time of the execution of the mortgage in question the mortgagors had no interest in the land and held only the legal title thereto. The cause was tried by the court without a jury, and the court made special findings, among which are the following: That Edwards purchased the land of Creps on the 26th day of March, 1890, and paid him the agreed consideration therefor; that he took immediate possession and made lasting and valuable improvements thereon; that Edwards paid the taxes on the land in 1890 and 1891, and has ever since 1891

been in open, notorious, and exclusive possession; and that on April 5, 1892, Creps executed to plaintiff the mortgage set out in the petition. Upon these and other findings not necessary for the purposes of this opinion, the court rendered judgment for Edwards.

The plaintiff in error makes three contentions: First. That the answer filed by Edwards did not state sufficient facts to admit testimony of his claim. This contention cannot be sustained. The answer was amply sufficient.

The next contention is that the evidence did not establish the fact that Edwards had purchased the land or had taken immediate possession at the time alleged. Edwards testified that he purchased the land at the time stated in his answer; that he paid the full contract price therefor; that he immediately went into possession and fenced it; and that he had been in open, notorious, and uninterrupted possession thereof since that time. Although some of these facts were strenuously denied by Creps, it was the duty of the trial court to weigh these conflicting statements and determine where the truth was, and, having done so, we are not at liberty to say that the court erred in determining upon which side the evidence preponderated.

The last contention is that the alleged contract between Edwards and Creps for the purchase of the land, having been made before Creps made his final proof, was void under section 2, c. 190, Act Cong. June 14, 1878, 20 Stat. 113, being "An act to amend an act entitled 'An act to encourage the growth of timber on the Western prairies.'" Creps acquired title to this land under this act. This section provides: "That the person applying for the benefits of this act shall, upon application to the register of the land district in which he or she is about to make such entry, make affidavit, before the register or the receiver, or the clerk of some court of record, or officer authorized to administer oaths in the district where the land is situated; which affidavit shall be as follows, to wit: I, ———, having filed my application, number ———, for an entry under the provisions of an act entitled 'An act to amend an act entitled "An act to encourage the growth of timber on the Western prairies"' approved ——— 187 —, do solemnly swear, (or affirm) that I am the head of a family (or over twenty-one years of age), and a citizen of the United States (or have declared my intention to become such); that the section of land specified in my said application is composed exclusively of prairie lands, or other lands devoid of timber; that this filing and entry is made for the cultivation of timber, and for my own exclusive use and benefit; that I have made the said application in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever; that I intend to hold and cultivate the land, and to fully comply

with the provisions of this said act; and that I have not heretofore made an entry under this act, or the acts of which this is amendatory."

The contention is that, in view of the provisions of this section, the contract between Edwards and Creps was a fraudulent conspiracy to defeat the purpose of the timber culture law of the United States. As expressed by the defendant in error in his brief: "This might have some force if the land in question were a homestead or pre-emption, but it has no force as applied to a timber claim. At to the first two, the statute expressly prohibits contracts prior to final proof and declares them invalid. There is no such prohibition as to timber claims. The consideration in the two former cases is actual occupancy by the settler with intention to make it his home. In the latter the consideration is the planting and cultivation of the timber, and the government was indifferent as to who carried out the terms of the contract." It appears that Creps did comply with the oath he took when he made his application for the privilege of entering this land under this act. He planted and cultivated the amount and kind of timber required and for the time required, and by reason thereof obtained his patent. The affidavit is only required to show the good intention of the applicant to cultivate the timber.

It follows that the judgment must be affirmed. All the Justices concurring.

J. I. CASE THRESHING MACH. CO. v. MICKLEY.

(Supreme Court of Kansas. Dec. 9, 1905.)

1. SALE—CONTRACT—CONSTRUCTION.

The word "land," when used in a contract without limitation, is broad enough to include a piece of real property described as a block in a townsite.

2. SAME—CONDITIONS.

Where a person enters into a contract for the purchase of a threshing outfit, but reserves the right to countermand the order if he shall go to Oklahoma and buy land, in the absence of any special circumstances requiring other than an ordinary interpretation of the words used, this condition is met by his making a visit to Oklahoma and there purchasing a block in a townsite.

(Syllabus by the Court.)

Error from District Court, Ellsworth County; R. R. Rees, Judge.

Action by the J. I. Case Threshing Machine Company against John J. Mickley. Judgment for defendant, and plaintiff brings error. Affirmed.

Dallas Grover and C. J. Evans, for plaintiff in error. Ira E. Lloyd, for defendant in error.

MASON, J. John J. Mickley agreed in writing with the J. I. Case Threshing Machine Company to purchase a threshing out-

fit from it; the contract containing this provision: "In case party [Mickley] goes to Oklahoma and buys land, has the privilege of countermanding this order." The company shipped the machinery, and upon Mickley's refusal to accept it sued him for damages, alleging a breach of the contract. He defended upon the ground that he had countermanded the order and was justified in doing so by the fact that he had gone to Oklahoma and bought land there. Upon a trial the court directed a verdict for the defendant, and gave judgment thereon, from which the plaintiff now prosecutes error.

There was no substantial controversy over the facts. It was admitted that Mickley had notified the company that he had elected to countermand the order, and that before doing so he had visited Oklahoma and there purchased real estate, described as block 8 in Kingfisher, for \$200. The question involved is whether in doing this the defendant had gone to Oklahoma and bought land, within the meaning of the contract. The plaintiff claims that upon the face of the contract the condition that the defendant should go to Oklahoma and buy land could only be met by his permanently removing to Oklahoma and buying a farm there. In support of this claim it is argued that the word "land," when employed, as it was in this instance, without qualifying words, means, at least presumptively, agricultural land, as distinguished from town lots or blocks. To this contention we cannot agree. The use of the word "land" as a generic term covering real property of any character is sanctioned by custom and by authority. In its general sense it is defined by Webster as "Any portion, large or small, of the surface of the earth, considered by itself, or as belonging to an individual or a people, as a country, estate, farm or tract." As a law term the same work thus defines it: "Any ground, soil or earth whatsoever, as meadows, pastures, woods, etc., and everything annexed to it, whether by nature, as trees, water, etc., or by the hand of man, as buildings, fences, etc.; real estate." It is used throughout the Kansas statutes as a synonym of "real estate" and "real property." Subdivision 8, § 7342, Gen. St. 1901. "Land in its legal signification comprehends any grounds, soil, or earth whatever." 5 Words & Phrases Judicially Defined, 3975. The contract did not attempt to specify the quantity of land that defendant was to purchase in order to obtain the right to countermand his order. If he had bought an unplatted tract of ground equal in extent to block 8 in Kingfisher, it could not be denied upon any theory that this would have been a purchase of land. The rights of the parties can hardly be thought to be affected in any possible way by the question of whether the tract purchased had been laid out in lots and blocks.

It is suggested that the context shows that arable land and not a town block, and a per-

manent removal to Oklahoma and not a mere journey thither, were within the contemplation of the parties to the contract, inasmuch as it can be inferred that the defendant inserted the clause in question for his protection in case he should cease to have occasion to use the machinery by reason of his buying a farm elsewhere and going to reside upon it. It may equally well be supposed, however, that the clause was intended to release him in case his contemplated purchase of any Oklahoma real estate should divert enough of his resources to another channel to make it inexpedient for him to invest in this threshing outfit so large a sum as he could otherwise afford.

Evidence was offered for the purpose of showing that the contract should be given the interpretation for which the plaintiff contends. That upon which the greatest reliance seems to be placed was, in substance, that in a conversation which was had after the contract had been entered into, between the defendant and a representative of the plaintiff, the latter said that the former would not be relieved from his obligation to take the machinery unless he should buy a farm in Oklahoma, and that afterwards the defendant inquired of a third person whether he thought the purchase of a town lot or block there would be sufficient to effect his release. Neither this evidence nor any other that was offered had any tendency either to explain away the natural effect of the language of the agreement by exhibiting the circumstances under which it was made, or to show that the parties had given it an interpretation different from its obvious meaning.

It is true that the construction placed upon the reservation in the contract by the trial court is literal, but the language used is plain and unambiguous. If it does not mean precisely what it says, it would be difficult for any tribunal to attach to it any definite meaning whatever. It is also true that this construction practically makes the entire instrument subject to cancellation at the will of one of the parties, for the defendant, if desirous of escaping its burden, could easily comply with the conditions which would give him that privilege. But it is not apparent that this consideration gives the machinery company any just cause to complain. The contract was voluntarily made, was not unconscionable, and resulted in no hardship. No grounds are presented for a court to grant relief against its terms.

The judgment is affirmed. All the Justices concurring.

KENNEDY v. SCOTT et al.

(Supreme Court of Kansas. Dec. 9, 1905.)

1. TAXATION—TAX DEED—DESCRIPTION—ABBREVIATIONS.

The abbreviation "S E 4," employed in the description of the property conveyed by a tax deed, will be interpreted as meaning "south-

east quarter," when it is explicitly used in another part of the same instrument as the equivalent of these words.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1519, 1520.]

2. SAME—SUBSEQUENT TAXES—RECITALS—DEFINITENESS.

Where a tax deed states the total payments for subsequent taxes made by the holder of the tax sale certificate, but fails to show how much of this sum was paid for the taxes of any one year, the amount recited as the consideration of the deed will not be deemed excessive, if it can be accounted for by any apportionment of such taxes among the several years that is consistent with the recitals of the deed.

3. SAME—SUFFICIENCY OF DEED.

Where a tax deed has been of record more than five years, it will not be set aside by reason of the fact that it shows on its face that the amount stated as its consideration is excessive, where the excess can be accounted for by assuming that the county clerk, in computing the amount of the consideration, included the statutory fees for the issuance and recording of the deed.

(Syllabus by the Court.)

Error from District Court, Greenwood County; G. P. Aikman, Judge.

Action by Wilber W. Kennedy against Mary A. Scott and others. There was a judgment for the latter, and the former brings error. Affirmed.

W. S. Marlin, for plaintiff in error. Howard J. Hodgson and W. L. Fitch, for defendants in error.

MASON, J. The only question involved in this case is whether the trial court erred in sustaining a tax deed, which had been of record for more than five years, against several objections made to it for matters apparent upon its face. The tract sold and conveyed is described in the deed as "the S E 4 Sec. 25, Township 23, Range 8." It is argued that this is an insufficient and unintelligible description, because the letters "S E," followed by the figure "4," cannot be construed as equivalent to the words "southeast quarter." There are decisions which seem to sustain that contention. See 1 A. & E. Encycl. of L. (2d Ed.) 101, note. Whether it is sound as a general principle need not be determined. In the deed the land against which the tax was assessed is described in this manner: "The southeast quarter (S E 4) of section twenty-five (25), township twenty-three (23), range eight (8), situated in the county of Greenwood and state of Kansas." This explicitly shows that whoever prepared the deed employed "S E 4" as an abbreviation for "southeast quarter," and gives the clue, if one be needed, for the interpretation of the expression wherever found in the same instrument.

It is claimed that the consideration stated in the deed is excessive. The deed does not disclose what amount would have been required at the time of its execution to redeem the property. It shows that the taxes for three subsequent years were paid by the hold-

er of the tax sale certificate, and gives the total amount so paid, but does not indicate when these payments were made, nor how the amount was distributed between the three years. However, nothing is omitted that the statute requires. The only provision of the law applicable to this matter is found in the form of tax deed given in section 7676 of the General Statutes of 1901, which includes the recital: "And whereas, the subsequent taxes of the year —, amounting to the sum of — dollars, have been paid by the purchaser, as provided by law." The requirement imposed by this recital is met by a statement of the gross amount paid for the years named, without showing its apportionment among the several years. There is no presumption that the taxes of the several years were equal or bore any other definite relation to each other. On the contrary the court must assume any distribution of the taxes of the three years that is necessary to the validity of the deed, and not inconsistent with any of its recitals. To uphold the deed after it has been of record for five years, the court may assume that the greater part of the subsequent taxes referred to accrued in the year of the sale, and were paid at the earliest possible date, so that practically the whole amount bore interest from that time. *Martin v. Garrett*, 49 Kan. 131, 30 Pac. 168.

This principle will not alone save the deed in the present case, for the most liberal presumption in respect to the apportionment of the subsequent taxes will not serve to account fully for the consideration stated in the deed, which, upon any possible theory of the time of payment, is somewhat greater than the proper amount. The excess, however, viewed in the light of the presumptions most favorable to the validity of the deed, is less than the sum of the fees fixed by statute for the issuance and recording of the deed. These are not items that are intended to be or should be included in the consideration of a tax deed, but it has been held that, if they are so included, the deed is not thereby rendered vulnerable to an attack made after the lapse of the limitation period, although the fact is shown upon the face of the deed, for the reason that these are charges that would have to be paid by the original owner before he could recover the property. *Martin v. Garrett*, supra. It had already been decided, in *Bowman v. Cockrill*, 6 Kan. 325 (followed in *Davis v. Harrington*, 35 Kan. 196, 10 Pac. 532), that understating the amount of the consideration does not render a tax deed void, inasmuch as it can result in no possible injury to any one, unless it be the grantee. The apparent purpose of stating the consideration being to advise the owner of the property of the amount he would be required to pay if he should succeed in having the deed set aside, it was logically held in *Martin v. Garrett* that such owner had no cause to complain of an overstatement of the

consideration occasioned by including charges which were not required to be shown in the deed, but which, nevertheless, he would be obliged to pay in the event of his recovering the property.

The favorable treatment always given to one who has been permitted to hold possession of land under a tax deed for five years without his title being questioned warrants the court in presuming in this case that the trifling part of the consideration which cannot otherwise be accounted for was intended to cover the costs of issuing and recording the deed, and for that reason did not render it void. Other objections to the deed have been made which are not thought to require discussion.

As no valid objection has been pointed out, the judgment is affirmed. All the Justices concurring.

(72 Kan. 220)

YOUNGBERG v. WALSH.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. CHATTEL MORTGAGES—FAILURE TO RECORD—VALIDITY.

Under the provisions of section 4244, Gen. St. 1901, an unrecorded chattel mortgage or conveyance intended to operate as a mortgage of personal property, where there is no change in the possession of the property, is void as against the creditors of the mortgagor only while withheld from record, and, whenever recorded will from and after that time be valid.

2. SAME—PERSONS ENTITLED TO QUESTION—VALIDITY.

The creditors of the mortgagor mentioned in said section 4244, Gen. St. 1901, include only those having some specific lien upon or right to the mortgaged property, and do not embrace mere general creditors.

3. SAME—PRIORITY—OTHER SECURITY.

The purchaser of personal property at a mortgagee's sale under a junior mortgage, who buys with actual knowledge of the prior mortgage, which is recorded, and with notice that the seller obtained the possession of said property from the prior mortgagee by deceit and afterwards forcibly retained such possession, and who pays for the property only the amount secured by said junior mortgage, cannot, in a replevin suit brought by the prior mortgagee to recover the possession or said goods, avoid a recovery merely by showing that the plaintiff, in addition to his chattel mortgage, was secured by a mortgage on the homestead of the mortgagor, and that during the pendency of the replevin suit said homestead had been sold, and the plaintiff might have, but did not, enforce payment of his whole debt out of the proceeds of said homestead; it appearing that the value of the personal property then materially exceeded the amount of both chattel mortgages thereon.

(Syllabus by the Court.)

Error from District Court, Franklin County; C. A. Smart, Judge.

Action by James Walsh against J. E. Youngberg. There was judgment for plaintiff, and defendant brings error. Affirmed.

The district court upon the trial of this case made the following findings of fact and conclusions of law:

(1) On the 29th day of November, 1901,

one J. B. Lockwood sold a stock of drugs, then located in Ottawa, to the defendant, J. E. Youngberg, and executed and delivered to him a bill of sale of that date, which bill of sale was recorded by Youngberg in the office of the register of deeds on February 10 1902; the original paper remaining in the office of the register of deeds until June 11, 1902, at which time it was taken from the register's office by Youngberg, as hereinafter more fully described.

(2) At the time of the execution of said bill of sale by Lockwood to Youngberg, Lockwood and wife executed and delivered to Youngberg a note for \$1,200 and a mortgage securing the same, upon this same stock of drugs, which mortgage was retained by Youngberg until June 11, 1902. It was never recorded. Just why this mortgage was given by Lockwood and wife upon the stock sold by Lockwood to Youngberg is not made clear by the evidence.

(3) From November 29, 1901, until June 11, 1902, Lockwood continued to operate the store, sell the goods, and keep up the stock, as a clerk for Youngberg, receiving from Youngberg a salary of \$50 per month.

(4) On June 11, 1902, the defendant, Youngberg, had closed the store and caused it to be locked, and J. B. Lockwood desiring to continue the business, applied to the plaintiff, James Walsh, to furnish him the money with which to buy and operate the store and to pay off the indebtedness due from Lockwood to other parties. Thereupon Walsh, the plaintiff, furnished to Lockwood \$1,005, \$750 of which was paid by Walsh direct to Youngberg, the defendant, and then Youngberg executed and delivered to Walsh a bill of sale of that date, conveying to him the stock of drugs and store fixtures. This bill of sale was signed, not only by Youngberg, but was also signed by J. B. Lockwood (this latter fact, however, was unknown to Youngberg), and was recorded in the office of the register of deeds by Walsh on November 2, 1903. At the same time Lockwood and wife executed to Walsh a real estate mortgage upon their homestead in the city of Ottawa, for \$1,005. At the time of the delivery of the bill of sale from Youngberg and Lockwood to Walsh for the stock of drugs, Youngberg also delivered to Walsh the chattel mortgage under date of November 29, 1901, executed by Lockwood and wife to Youngberg, which at that time had never been recorded. Before delivering the said chattel mortgage, however, Youngberg caused three lines to be drawn lengthwise of said chattel mortgage across its face, with ink, intending thereby to obliterate and cancel the said mortgage. At the time of the delivery of said mortgage Youngberg caused to be written upon the back thereof as follows: "J. E. Youngberg, without recourse, James Walsh." He declined to sign a formal assignment, which was presented to him by Walsh for his signature. At the same time he took

from the office of the register of deeds the bill of sale from Lockwood to him, caused the same to be marked "Released," and delivered it to Walsh.

(5) At the time of the payment of the \$750 by Walsh to Youngberg, and the execution of the bill of sale by Youngberg and Lockwood to Walsh, it was the intention of both Lockwood and Walsh that Walsh was buying the stock of goods for Lockwood, and that Walsh should have security upon both the homestead and the stock of goods for the repayment of the \$1,005 above mentioned; and it was the belief of both, and they understood, that if Youngberg would deliver to Walsh the chattel mortgage made by Lockwood and wife to Youngberg under date of November 29, 1901, and the bill of sale from Lockwood to Youngberg, of the same date, that Walsh would hold the said chattel mortgage and bill of sale as security against the stock of goods for the repayment of the \$1,005.

(6) From the 11th day of June, 1902, until on or about January 1, 1904, Lockwood continued to operate the store in the usual and ordinary way.

(7) On November 21, 1903, Lockwood, being indebted to one B. Herron in the sum of \$144.42, for rent during the seven months next prior to said date, executed, together with his wife, a promissory note for that sum, due January 1, 1904, and secured the same by a chattel mortgage upon the same stock of goods, fixtures, and furniture, and delivered the same to A. S. Phillips, agent of said Herron, which was duly recorded on November 24, 1903. At the time of the execution and delivery of said chattel mortgage to Phillips for Herron, said Phillips was advised by Lockwood that the plaintiff (Walsh) had a lien upon the stock. Phillips also had seen the bill of sale from Youngberg and Lockwood to Walsh in the register of deeds' office before he took his mortgage.

(8) Some time between November 21, 1903, and January 1, 1904, and after the Herron mortgage had been duly recorded, Lockwood surrendered the possession of said stock to the plaintiff (Walsh) and put him in possession of the same by delivering to him the keys of the store for that purpose. A little later, and while Walsh was in the possession of the stock, Phillips, as agent of Herron, or as assignee of said mortgage (the evidence does not show just when the Herron mortgage was assigned to Phillips), applied to Walsh for an opportunity to go into the store and inspect the stock. Walsh went with Phillips to the store, unlocked the door, and both went in. Phillips also had a key, which he had obtained from the party with whom Walsh had left it. After examining the stock, Phillips declined to leave the store, but declared he was in possession of the stock under his chattel mortgage. Walsh left him in the store, and went out to seek advice. Mr. Walsh is a very old man, and

feeble in body. Some negotiations were had between Walsh and Phillips with reference to the joint possession of the stock, and later Phillips put a new lock upon the door, locked it up, and retained possession of the goods. He never was in possession of the stock with the consent of Walsh nor Lockwood, but his possession as against both was wrongful, and was obtained in the manner above indicated.

(9) About 10 days or more prior to January 26, 1904, A. S. Phillips, as assignee of the Herron mortgage, posted notices that he would sell the said stock under his mortgage on the 26th of January, 1904; and on the 26th of January, 1904, said stock was offered for sale by said Phillips as assignee, by and through a regular auctioneer; and at that time H. A. Richards, acting as attorney for Lockwood, appeared at the store and gave public notice that Walsh had a lien upon the stock, and that any one who purchased must purchase the same subject to the rights of Mr. Walsh. Youngberg was present and heard the notice given by Mr. Richards, after which he bid \$180 for the stock, and it was sold to him, and a bill of sale of that date executed to him by said A. S. Phillips, assignee, and Youngberg has held possession of the stock ever since.

(10) Before this suit was commenced, Walsh made due demand upon Youngberg for the return of the property, which demand was refused.

(11) At the time said demand was made, and at the time this suit was brought, the said stock of goods, furniture, and fixtures, described in plaintiff's petition and in the affidavit for replevin, was of the value of \$600.

(12) When the sheriff took possession of this stock, furniture, and fixtures under his writ of replevin, the defendant, Youngberg, executed a redelivery bond in the manner provided by law, and retained the stock of goods, furniture, and fixtures.

(13) On July 20, 1904, Lockwood and wife sold their homestead above referred to for \$2,175. There was a mortgage for \$975 on the same prior to the one held by Walsh for \$1,005, executed by Lockwood and wife to Walsh to secure him for money advanced to take up and pay off a first mortgage held by the Ottawa Loan & Savings Association. After the sale of said homestead, Walsh released both mortgages on the homestead, and received from Lockwood \$1,500; Lockwood retaining the balance. Walsh then had a settlement with Lockwood, and it was found that Lockwood was still indebted to him in the sum of \$275, on account of the transaction with reference to the drug stock referred to in these findings, and Walsh then agreed to look to his security on the drug stock for said sum of \$275, and that amount is now due Walsh from Lockwood, with interest at 6 per cent. from July 20, 1904.

(14) At all of the times above mentioned

Lockwood was a married man, and the real estate above referred to, mortgaged by him to Walsh, was a homestead, and occupied by Lockwood and his family.

Conclusions of Law.

(1) At the time of the commencement of this action the plaintiff had a special ownership in the property described in the petition, and the value of such special ownership was \$275, with interest thereon at 6 per cent. from July 20, 1904.

(2) The plaintiff is entitled to judgment against the defendant for the possession of the property described in the petition and in the order of the delivery herein, or for \$275, with interest thereon at 6 per cent. from July 20, 1904, if a delivery of said property cannot be had, and for costs.

Deford & Deford, for plaintiff in error. C. B. Mason and H. A. Richards, for defendant in error.

GRAVES, J. (after stating the facts). In this case three propositions are presented: First. Did the transaction between Walsh, Lockwood, and Youngberg of June 11, 1902, convey any interest in the property to Walsh? So far as the bill of sale and mortgage of November 29, 1901, which were delivered to Walsh, are concerned, probably not; but the bill of sale from Youngberg to Walsh, having been delivered with the intention upon the part of all the parties interested that it should give to Walsh a lien upon the property therein described, must, as we think, be regarded as equivalent to a chattel mortgage. The fact that Youngberg's name appears as grantor is not important, since Lockwood agreed to this form of security by attaching his name thereto, and Walsh by its acceptance. To hold otherwise would sacrifice the substance of the transaction for the sake of its mere form. We assume, from the manner in which this question was discussed, that it is not seriously insisted upon, and pass it without further comment. The second claim is that this bill of sale, assuming it to be a mortgage, became void as against Youngberg because it was not forthwith deposited in the office of the register of deeds as provided by law. This claim arises upon the construction of section 4244, Gen. St. 1901, which reads: "Every mortgage or conveyance intended to operate as a mortgage of personal property, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be forthwith deposited in the office of the register of deeds in the county where the property shall then be situated, or if the mortgagor be a resident of this state, then of the county of which he shall at the time be a

resident." The bill of sale to Walsh was executed June 11, 1902, but was not recorded until November 2, 1903. The Herron mortgage under which Youngberg claims was executed November 21, 1903, and was recorded three days thereafter. From this it appears that the bill of sale under which Walsh claims was on record when the Herron mortgage was taken. It has been decided by this court that, under this section of the statute, a mortgage, although invalid while withheld from record, becomes valid whenever recorded. In the case of *Cameron v. Marvin*, 26 Kan. 626, Justice Valentine used the following language: "Counsel for defendant in error seem to contend that where a chattel mortgage is not recorded immediately after it is executed, and the property is not immediately delivered to the mortgagees, it is absolutely void as to all creditors whose debts have been created subsequent to the execution of the mortgage and prior to its being recorded, and prior to the delivery of the property, without reference to any lien procured upon the property by virtue of an attachment or on execution or otherwise. That is, they claim that such a mortgage is so absolutely void as to general creditors whose debts have been created after the execution of the mortgage and before the recording of the same or before the delivery of the property that they may obtain a lien upon the property after the mortgage is recorded and after the property is delivered by virtue of an attachment or other legal process. * * * But whether the doctrine claimed by counsel is sustained by any authority or not, we do not think it is sound." This language of Justice Valentine has since been cited, approved, and followed in *McVay v. English*, 30 Kan. 368, 1 Pac. 795; *Dry Goods Company v. McKee*, 51 Kan. 704, 33 Pac. 594; *American Lead Pencil Company v. Champion*, 57 Kan. 352, 46 Pac. 696.

The rule has become settled in this court that an unrecorded mortgage, although void for some purposes, becomes valid whenever recorded, and of the same force and effect thereafter as a new mortgage then executed and recorded. *Utley v. Fee*, 33 Kan. 683, 7 Pac. 555, and cases cited, *supra*. The failure of Walsh to place his bill of sale upon record was therefore immaterial as to the Herron mortgage, for the reason that when it was taken the Walsh bill of sale was on record. It may be further mentioned that Youngberg was not a creditor within the meaning of this statute. The protection given to creditors by this law was intended to include only those having some specific lien upon or right to the mortgaged property, and not mere general creditors. *Cameron v. Marvin*, *supra*; *Dry Goods Company v. McKee*, *supra*; *Hausner v. Leebrick*, 51 Kan. 591, 33 Pac. 375.

The only case cited by plaintiff in error directly supporting a contrary doctrine is the case of *Dempsey v. Pforzheimer*, 86 Mich.

652, 49 N. W. 465, 13 L. R. A. 388. This case does sustain his contention, and, were it not that this state has adopted another rule, it would be a strong authority. In the case of *Cameron v. Marvin*, *supra*, Justice Valentine challenged the law as announced in Michigan and elsewhere, and since that time this court has followed the decisions which sustain the position hereinbefore stated, as shown by the case above cited.

Again, Herron, through his agent, Phillips, had actual notice of the Walsh mortgage, and knew that it was on record before the execution of the one under which Youngberg claims. Youngberg was a party to the transaction with Walsh, had full knowledge thereof, and was again duly notified at the time of the mortgage sale at which he purchased the goods. He is in no better position than Herron would be, and probably not so good. *Gagnon v. Brown*, 47 Kan. 83, 27 Pac. 104.

Finally, it is urged that Youngberg is entitled to the equitable protection of this court, because Walsh did not compel Lockwood to satisfy this lien upon the stock out of the proceeds of the sale of the homestead, when he might have done so. This claim for equitable protection is founded upon the idea that, as the debt of Walsh was secured by a mortgage upon the personal property in controversy and also upon the homestead of Lockwood, and the debt of Herron was secured by a junior lien upon the personal property only, Walsh ought to have paid himself in full out of the proceeds of the homestead, and, not having done so, should for that reason have been denied a recovery in the replevin suit. This is said to be a proper application of the general rule in equity which requires the holder of a mortgage upon several pieces of property, upon a part of which there is a junior mortgage, to protect the junior mortgage by first exhausting that portion of the property not covered by both mortgages. The case of *Bank v. Taylor*, 69 Kan. 37, 76 Pac. 425 is cited as an authority directly in point upon this proposition. In that case, however, the surplus in the hands of the senior mortgagee was not the proceeds of exempt property. Besides, the holder of that surplus expressly agreed with the junior mortgagee to satisfy his claim out of such surplus; but, in violation of this agreement, he failed to do so, and surrendered the surplus, whereby it passed beyond the reach of the junior mortgagee, who, except for his reliance upon the said promise, might have secured his debt. The bad faith of the senior mortgagee in this respect was the real ground upon which that case was decided. In this case the surplus was the proceeds of exempt property, and Lockwood, the owner, not being a party, the question of exemption could not be conclusively determined in that suit. No application was made by the junior mortgagee to Walsh to use the surplus in the way now suggested, and Walsh at no time agreed to do so.

At the time of the settlement of Walsh with Lockwood, this suit was pending in the district court, and the personal property in controversy at that time was worth \$600, while the aggregate of both liens thereon was only \$455. The practical effect of the action here invoked as ordinary equity would have compelled Lockwood to surrender to Walsh and Youngberg property and cash amounting to \$875 to satisfy an indebtedness of \$455; the only reason therefor being to enable Youngberg to retain and enjoy the unconscionable bargain which he had obtained as the result of the fraud and force of Phillips. It will be seen, therefore, that these cases are wholly dissimilar. The case cited was intended to prevent one person from acting in bad faith and in violation of his agreement, to the detriment of another; while the rule, if applied in this case, would enable one person to not only act in bad faith with another, but would sanction his wrongful and illegal conduct. This would be highly inequitable.

The judgment of the district court is affirmed. All the Justices concurring.

WILLIAMS v. MERRIAM et al. (No. 14,290.)

SAME v. LODGE et al. (No. 14,447.)

(Supreme Court of Kansas. Dec. 9, 1905.)

1. DOWER—PROCEEDS OF RELEASE—RIGHTS OF DOWRESS.

In 1879 a dowress sold and released her right of dower in her deceased husband's land in the state of Illinois to the then owner of the fee. *Held* that, the state having no statute relating thereto, the common-law rule applied, and the consideration received for such release became the absolute property of the dowress, and did not remain a part of the decedent's estate of which she had only a life use.

2. SAME—INVESTMENT OF FUND.

Where such dowress, pending an action to have her dower assigned, enters into a written agreement with her attorney in said action, believing and relying upon the honest, but mistaken, advice of her said attorney that she would only be entitled to the use of the amount received for such release during her lifetime, and at her death the same would go to the heirs of her deceased husband, and by such writing authorizes him to sell and release her dower right for \$6,000 and to invest said amount in improved lands or real estate mortgages, so that she shall receive therefrom \$400 annually, free of expense, and by such writing she further provides that upon her death the \$6,000 shall be paid to the sons of her deceased husband or their heirs, and where said attorney does sell and release her dower right for \$6,000, and receives and keeps the same invested for over 20 years, when he dies, leaving said sum invested in notes secured by real estate mortgages, and the dowress thereafter brings an action to have the written agreement set aside, *held*, that as to said sons of the deceased husband the provision is void.

3. SAME.

Where said attorney, after receiving the \$6,000, buys a large tract of land and takes deed to the same in his own name "as trustee," and pays the \$6,000 as a part of the purchase price and executes a mortgage "as trustee" to secure the remainder of purchase price, and thereafter contracts to sell said land to the sons of the deceased husband, making provision for the payment of \$400 annually to the dowress,

and after said sons have failed and the amount of the mortgages on said land has been increased to \$12,000 said attorney deeds said land as trustee to two of his own sons, who assume and agree to pay the mortgage, and who secure the payment of the \$6,000 and interest by note and mortgage on this and other lands, *held* that, as against the parties who have loaned money and taken mortgages on said land or have bought said lands without any knowledge of the mutual mistake of the dowress and her attorney, or other knowledge of the circumstances except such as the laws implies, the plaintiff is not in equity entitled to be adjudged the owner of the land free of incumbrances, except the amount of the mortgage for the remainder of the purchase price, especially as she makes no offer to account for the \$400 which she received annually from 1879 to the commencement of her action, and there is no showing that such income was derived from the use of the land.

4. SAME.

Under these circumstances the plaintiff should be adjudged to be the equitable owner of the notes and mortgages given to secure the payment of the \$6,000.

(Syllabus by the Court.)

Errors from District Court, Greenwood County; G. P. Alkman, Judge.

Separate actions by Susan M. Williams against C. B. Merriam and another and against James P. Lodge and others. From judgments for defendants in each case, plaintiff brings error. Reversed.

These two cases arise from one action commenced in the district court of Greenwood county, Kan. The plaintiff sued the defendants in error, in No. 14,447, to have set aside a certain agreement entered into December 18, 1879, between herself and William E. Lodge, deceased, the father of the defendants in said case, and to have certain lands in Greenwood county, which William Lodge had bought, in part, with money obtained under said agreement, adjudged to be her property free and clear of the mortgages of record thereon in favor of the defendants in error in case No. 14,290, who were made defendants in the district court for that purpose. The defendants Merriam and the National Life Insurance Company filed separate general demurrers to the petition, claiming it stated no cause of action as to them. The court sustained these demurrers, and to reverse this ruling the plaintiff has case No. 14,290 here. The defendants in error in No. 14,447, James P. Lodge and Charles V. Lodge also filed a general demurrer to plaintiff's petition below, which the court overruled; and those defendants answered, a trial was had to the court without a jury, and judgment was rendered in favor of the defendants. To reverse this judgment the plaintiff brings case No. 14,447 here. The petition failed to state that the defendants Merriam and the National Life Insurance Company had any knowledge of any fraudulent misrepresentations on the part of William E. Lodge or of any mistake of facts which induced the plaintiff to execute the agreement of 1878 and did allege in substance that said defendants paid a valuable consideration for the mortgages held by them. The

ruling of the court in sustaining the demurrers is affirmed.

On the trial of the case between the plaintiff and the defendants James P. Lodge and Charles V. Lodge, the court made the following findings of fact and conclusions of law, to wit:

"Findings of Fact.

"(1) Edward Williams and plaintiff, Susan M. Williams, were husband and wife, residing in Baltimore, Md., at the time of the death of the former in February, 1864. The deceased left surviving him his widow, Susan M. Williams, and two sons, Edward M. and John F. Williams, as his only legal heirs. Said Edward Williams died seised of certain real estate, among which was a large tract of land in Platt county, Ill.

"(2) At the time of the death of said Edward Williams the laws of Illinois provided that the widow should have dower in all lands of which her husband died seised; such dower being the one-third thereof for her use during her lifetime. Said laws provided for the assignment of dower, through commissioners appointed by the circuit court of the county in which the lands were situated, by setting apart to the widow one-third in value of the real estate; such assigned portion to be particularly described by metes and bounds. In case the property was not susceptible of division without great injury, the yearly value of the widow's dower should be ascertained, and judgment rendered that the value so assessed should be paid in lieu of dower, during her natural life. The law as to the widow's dower and the assignment thereof continued in force, without substantial change, at the times hereinafter stated.

"(3) Susan M. Williams continued a resident of Baltimore after her husband's death, and seems not to have been informed for several years thereafter so as to understand what were her legal rights in the Illinois lands. In January, 1878, a suit was commenced in the circuit court of Platt county, Ill., by Susan M. Williams, for an assignment of dower in the said lands situated in that county. In such suit William E. Lodge of Monticello, the county seat of Platt county, was her attorney. The defendants in that suit were Edward M. and John F. Williams, Richard Dempsey, and others who claimed an interest in the lands. September 4, 1879, Dempsey filed his answer setting up absolute title in himself under foreclosure of mortgage and trust deeds that had been executed by Edward M. and John F. Williams, and conveyances made pursuant thereto. He also pleaded the statute of limitations as a bar to the plaintiff's suit. On February 7, 1880, this suit was dismissed on motion of plaintiff's attorney; no proceedings having been had therein beyond the filing of the bill of complaint of the plaintiff and the answer of Dempsey. The dismissal was had because of the settlement made as hereinafter found.

"(4) About the year 1869, Edward M. and John F. Williams went to Illinois and took possession of those lands in Platt county. Edward M. Williams, some time prior to 1879, conveyed his interest in the lands to John F. Williams, who continued in the actual occupancy of the lands until 1880, part of the time as owner and part of the time under a lease from Richard Dempsey who had acquired the title of Edward M. and John F. Williams, as stated in the next following finding.

"(5) Some time prior to 1879, Richard Dempsey became the owner of certain mortgages and trust deeds on the Platt county lands, executed by John F. Williams after he had acquired the title of Edward M. Williams, to secure money loaned. Under foreclosure proceedings the Williams title, except such as might thereafter accrue to them on the death of plaintiff and the cessation of her dower interest or under the redemption law of Illinois, passed to Richard Dempsey, prior to December, 1879. The indebtedness due Dempsey, which was secured by such instruments, amounted to about \$36,000. After Dempsey had so acquired title, he agreed with John F. Williams that, if the latter found a purchaser for the lands, he (Williams) might have all of the purchase money over and above \$36,000. In the fore part of December, 1879, John F. Williams found a purchaser for said lands and contracted to sell them for \$50,000. The sale was afterward effected, a conveyance of the lands made, and the \$50,000 paid; \$36,000 going to Dempsey, and \$14,000 being deposited in a bank at Monticello in the name of William E. Lodge, trustee. These payments were made after the transaction stated in the next succeeding finding.

"(6) After a purchaser for the land had been procured, there were interviews between Dempsey's attorney, J. B. McKinley, and William E. Lodge and John F. Williams, with reference to the settlement of the plaintiff's dower claim against the lands. Pursuant to such interviews, and immediately thereafter, William E. Lodge and John F. Williams visited the plaintiff in Baltimore and had various talks with her, during the three or four days they were there, concerning her dower in the Illinois lands. As a result of this visit the agreement of December 18, 1879, was executed, authorizing William E. Lodge to sell plaintiff's dower right, for not less than \$6,000, and to release her dower right in said lands. A copy of this agreement is attached to plaintiff's petition herein and is made part of this finding.

"(7) Before said trust agreement was made, said Lodge, in the presence of John F. Williams, advised the plaintiff that she had only a life interest in the money which might be received for the sale of her dower right; that Edward M. and John F. Williams were entitled to the principal after her death; and that she could not use the principal.

and such was the law of Illinois at that time.

"(8) At the time said trust agreement was entered into, the plaintiff was ignorant of the laws of Illinois and of her dower right thereunder. She relied upon the statements made to her by William E. Lodge as to her legal rights, and, when said agreement was made, believed that her only legal right to the \$6,000 named therein was the use thereof for her natural life, and that the principal belonged to Edward M. and John F. Williams, to go to them at her death, and such was the law of Illinois at that time.

"(9) No assignment of dower in the Illinois lands was made there to the plaintiff. Under the law of that state assignments of a gross sum in lieu of dower could not be made except by agreement of the heir and all parties in interest.

"(10) When said trust agreement was made, plaintiff was not informed of the condition of the Illinois lands, or of the fact that a sale of them had been negotiated out of which \$13,000 or \$14,000 would be realized for John F. Williams, but understood that something over \$6,000 would be obtained for the settlement of her dower right. The sum of \$6,000 was agreed upon as sufficient to yield her an annual income of \$400, which amount she stated she wished. The plaintiff understood from what was said to her by Lodge and Williams that the latter had creditors who might seize upon any money he received, and, at Lodge's suggestion, the agreement provided for the payment to Rachel Estelle Williams, wife of John F. Williams, of any money received for the dower right in excess of \$6,000.

"(11) Said agreement authorizing William E. Lodge to sell the dower right and dispose of the \$6,000 and surplus money, as therein provided, was entered into on the part of Susan M. Williams upon the advice and at the suggestion of said Lodge. In that matter she did not have the advice of any other person.

"(12) After securing said written agreement of December 18, 1879, from plaintiff, William E. Lodge and John F. Williams returned to Monticello, the sale spoken of in the above finding was consummated, and the money paid. \$2,500 of this was paid to Rachael Estelle Williams, and the balance, after setting apart \$6,000, was paid out on various accounts for the benefit of John F. Williams.

"(13) The lands described in plaintiff's petition were purchased in 1880 by William E. Lodge, and in December, 1880, the same were conveyed to him by the former owner and the deeds duly recorded. In the deeds of conveyance, the grantee was named as 'William E. Lodge, trustee.' The consideration named in the deeds of conveyance is \$8,800, but the actual consideration was \$9,400. At the time of said purchase said

Lodge and Edward M. and John F. Williams made the agreement dated December 18, 1879, a copy of which is attached to plaintiff's petition as Exhibit B. Six thousand dollars of the purchase money of said land was paid by the \$6,000 received by Lodge for the plaintiff's dower right. Edward M. and John F. Williams did not pay anything thereon as they had agreed, and the balance of the purchase price, viz., \$3,400 and interest, was paid out of the proceeds of a loan secured by a mortgage on the land. Because objection was made by the loan company to accepting a mortgage from him, on account of his designation 'trustee,' and for the sole purpose of effecting a loan, on January 2, 1882, Lodge, describing himself as 'trustee' in the granting clause, deeded said lands to Edward M. and John F. Williams. On the same day last-named grantees executed a mortgage on said lands to T. B. Sweet, trustee, to secure the payment of \$5,000. The \$5,000 was thus obtained, the balance of the purchase money paid, and the surplus used for the personal benefit of the mortgagors. On January 2, 1882, Edward M. and John F. Williams reconveyed said lands, together with an additional quarter section which the Williams had purchased, to William E. Lodge, trustee. These deeds and the mortgage were duly recorded in the office of the register of deeds of Greenwood county, Kan. Subsequently Lodge made other loans, executing mortgages thereon on the lands described in the petition, until he had placed thereon an incumbrance of \$12,000. The money so obtained was used to pay off the prior mortgages, and to assist the Williams who were carrying on the stock and farming business on the land.

"(14) Edward M. and John F. Williams, not being able to successfully handle said lands, on November 15, 1892, William E. Lodge, trustee, conveyed said lands, including the additional quarter section conveyed to him by the Williams, to his sons, the defendants James P. and Charles V. Lodge. The consideration recited in their deeds of conveyance is \$18,000, the grantor is described as 'trustee,' and in the deed the grantees assumed the payment of the \$18,000 mortgage on the land. Said grantees, as a part of the consideration of said conveyances, also gave to William E. Lodge two nonnegotiable notes for \$3,000 each to cover said trust fund of \$6,000, agreeing to pay interest thereon at the rate of 7 per cent. per annum, and, at the death of Susan M. Williams, to pay the principal as provided in the trust agreement mentioned in the sixth finding. These notes were not secured. In December, 1895, two notes for \$3,000 each, similar to the first notes, were given in renewal, and a mortgage to secure them executed on the lands conveyed by Lodge to his sons and 160 acres in addition thereto. This mortgage was never filed for record, and, at the death of William E. Lodge, was found with the

notes among his papers, by his executors. Edward M. and John F. Williams also executed to James P. and Charles V. Lodge a quitclaim deed, releasing and assigning any interest they might have in the trust lands, and also executed a warranty deed conveying to the same grantees about 200 acres of other adjoining land which they owned. Said Edward M. and John F. Williams also, at the same time, sold and transferred to said James P. and Charles V. Lodge certain personal property on the farm on which William E. Lodge held a mortgage for \$4,000, which the Williams owed him for moneys he had advanced to them or paid out on their account. This debt of \$4,000 was assumed by the Lodges, the greater portion of it afterwards paid to their father and the balance donated by him to them. James P. and Charles V. Lodge took possession of said lands immediately after said conveyances to them, and have been in possession ever since. After said conveyance, James P. and Charles V. Lodge renewed the said \$12,000 mortgage, and since then have paid the interest thereon, and there remains on the lands described in the petition and the additional quarter section a lien for said sum.

"(15) When said conveyance was made to James P. and Charles V. Lodge, they had actual knowledge that the \$6,000 which had been set apart by the agreement of December 18, 1879, for Susan M. Williams, had been by their father invested in said lands, and they knew that such agreement had been made, but they had no knowledge of the circumstances under which it was made, or of the statements then made as to the plaintiff's right to said money or any advice given her by their father.

"(16) The plaintiff was not consulted about the purchase of the lands in question, but was informed soon after the purchase was made that the \$6,000 had been so invested. She had no actual knowledge of the subsequent conveyances and mortgages which were executed by Lodge, and did not know that the land had been conveyed to James P. and Charles V. Lodge until a short time before the commencement of this suit.

"(17) William E. Lodge died September 24, 1901. No trustee has been appointed to succeed him.

"(18) The plaintiff continued of the belief that, under the laws of Illinois, she had only a life interest in the money paid for the sale of her dower right, until some time subsequent to April, 1902, when she was informed that she had been misled as to her legal rights thereto, and was advised that the \$6,000 was, when paid, her absolute property to do with as she pleased.

"(19) Subsequent to the time when William E. Lodge obtained the \$6,000, as hereinbefore found, and down to the institution of this suit, the \$400, which said trust agreement provided should be paid annually to the plaintiff, was paid to her.

"(20) The defendants Edward M. Williams, John F. Williams, Jr., J. R. Williams, Jennie De Goy Reynolds, Nellie Williams, and Maude Williams are the children of John F. Williams. Edward M. Williams died a resident of the state of Missouri in November, 1901, having said John F. Williams his sole heir at law.

"(21) The lands described in plaintiff's petition, being the lands purchased with the trust fund, are now of the value of \$30 per acre and of the total sum of \$19,450, and the total land securing plaintiff's annuity of the value of \$28,620. The mortgage for \$12,000 is still held against said lands by the defendant the National Life Insurance Company.

"Conclusions of Law.

"(1) The plaintiff had a dower interest only in the sum of \$6,000, the subject of the trust agreement between herself and W. E. Lodge of date December 18, 1879.

"(2) The advice given by W. E. Lodge to the plaintiff prior to the execution of the trust agreement of December, 1879, as to the character of her interest in the moneys she had or might procure on account of her suit for the assignment of dower, was a correct statement of the law of Illinois, assuming the giving of said advice to have been proven by competent testimony.

"(3) The evidence of plaintiff, by which she sought to prove the conversations between herself and W. E. Lodge, which led up to the making of the trust agreement of December, 1879, is incompetent under the statute.

"(4) The evidence of the witness J. F. Williams as to conversations between plaintiff and W. E. Lodge, which led up to the making of the trust agreement of December, 1879, and the transactions which eventuated in said trust agreement, was evidence of a transaction and communication had between the assignor of a thing in action and a deceased person, and is incompetent under the statute.

"(5) The defendants J. P. and C. V. Lodge paid a valuable consideration for the purchase of the lands in question, without knowledge or notice leading to knowledge of any trust in plaintiff other than that disclosed by the agreement of December, 1879, and are therefore innocent purchasers of the land."

Garver & Larimer, for plaintiff in error.
Waggener, Doster & Orr and Wheeler & Switzer, for defendants in error.

SMITH, J. (after stating the facts). The court erred in the seventh and eighth so-called findings of fact, which were really conclusions of law, and in the first and second conclusions of law. The transaction detailed by the finding of fact was in no sense an assignment of dower. The plaintiff was entitled, as dower, to one-third of the use of the Illinois land during her lifetime

and commenced an action to have such dower assigned to her. The heirs to the fee had parted with their interest in the land, and it was desired to unite with the fee title the entire use and right of possession. She had a right in action for such dower, but, instead of pursuing her action and having her portion assigned and taking the annual income, she compromised. She released and sold to owner of the fee all her rights for a lump sum, as she would have sold a life lease or a mortgage upon the land. For this she received \$6,000 through her agent or trustee—not the use of \$6,000 during her life; neither did the amount she was to receive depend upon whether she lived 1 year or 50 years. No statute of the state of Illinois upon the subject was offered in evidence, and it is not to be presumed that it had any. By the common law, however, which was in force in that state, a dower right could not, at least before assignment, be sold or conveyed by deed. Neither could it be released to any one not the owner in whole or in part of the fee or not so related to the fee that the release thereof would unite it with the fee. Such release could be purchased by the fee owner or by any one so related thereto, and could be made by the dowress for any consideration agreed upon by the persons interested. *Hart v. Burch*, 130 Ill. 426, 22 N. E. 831, 6 L. R. A. 371; 10 Am. & E. Enc. L. (2d Ed.) 146 et seq. A release sold to one capable of purchasing was in no sense an assignment in bulk, and the purchase price did not remain a part of the deceased husband's estate, indeed, as in this case, the price frequently was paid by one who had no interest in such estate, and it became the absolute property of the dowress, as did the \$6,000 paid to plaintiff's agent in this case. The writing given by plaintiff to William E. Lodge authorized him to sell and release this dower right, and the court finds that he did sell it at a price authorized by her and to a person empowered by law to buy it.

The court also finds that William E. Lodge advised the plaintiff that she had only a life interest in the money to be obtained for such dower, that she was ignorant of the law, and that she believed and relied upon such advice in executing the writing of 1879. There is no suggestion of bad faith or of illegitimate personal gain on the part of William E. Lodge in giving this advice, nor in the subsequent handling of the \$6,000 for more than 20 years. It is impossible to tell, and idle to speculate, how far this mistake of the plaintiff and her attorney influenced her action in making the agreement of 1879—whether she would, otherwise, have sold her right for \$6,000, or what disposition she would have made of the proceeds. She received more than one-third of the selling price of one-third of the land. For the use of the \$6,000 she has received \$400 annually, free of all expenses, from 1879 to the commencement of this action. It seems to have been

no bad settlement, and certainly has resulted in a fair income on the amount received. But the trial court erred in its conclusions of law, and on the facts found the plaintiff is entitled to relief. The facts being found, it is the duty of this court to direct what judgment is to be rendered when the case is remanded. What should that judgment equitably be as between all parties in interest? The plaintiff asks that the contract between herself and William E. Lodge, made in 1879, be set aside, and that she be adjudged the owner of the land bought, in part, with the money which came into Lodge's hands by reason of said contract free of all incumbrances except sufficient of the mortgage lien to equal the purchase price of the land in excess of the \$6,000 cash which was paid. Would this be equitable?

The situation, briefly stated, is this: The written statement of 1879 was executed by plaintiff and William E. Lodge not through any intended fraud, but, under a mutual mistake of law and fact, he sold and released her dower and received the proceeds, \$6,000, and used and invested the same so that she received the amount of the income stipulated, \$400, annually, for over 20 years. Much of the time it was invested in the land in question. He is directed by the writing that at her death the \$6,000 is to go to the sons of her deceased husband. Lodge got these sons to go upon the land in question and tried, apparently without any self-seeking, to put them in position to pay the \$400 annuity and the mortgages and to become the absolute owners of the land on the death of plaintiff. They failed, as they failed to keep their father's estate in Illinois. The mortgage liens upon the land grew larger and larger. Lodge then, as "trustee," conveyed these lands to his own sons, the defendants in this action; they assuming and agreeing to pay the mortgages and also delivering to him their two unsecured non-negotiable promissory notes for \$3,000 each bearing interest at 7 per cent. annually, the principal to be paid at the death of the plaintiff to the Williams sons. This was a breach of the trust imposed in William E. Lodge and a violation of the agreement which authorized him to invest the \$6,000 "in improved lands or in real estate mortgages." His sons also knew this was a breach of the trust and participated in it. The interest was paid, and, about three years after this transfer, Lodge took from his sons a mortgage on the land in question, subject to the prior mortgage for \$12,000, and a first mortgage on another 160 acres of land to secure two other notes for \$3,000 given in lieu of the unsecured notes. A few years after William E. Lodge died, evidently unconscious, as was the plaintiff, that a mutual mistake had been made by them in 1879. His death in a sense ends the contract between him and the plaintiff. Assuming that the mortgagees, who took liens on the land

in question for moneys loaned, and Lodge's sons, who bought the land and assumed to pay the mortgage thereon, who gave their notes for \$6,000 and for years paid interest thereon and finally secured the payment of the \$6,000 and interest by mortgages on this and other lands owned by them, knew the conditions and provisions of the writing of 1879 but knew nothing of any mistake or mistaken advice, should they suffer by reason of such mistake for which they were in no wise responsible? The answer must be: "No." Neither must they profit by the mistake.

As to the Williams sons and their heirs, the provisions of the agreement was a gratuity. They have paid no consideration therefor, but have derived benefits rather than being placed in a worse position by reason thereof. The plaintiff by her petition has revoked such provisions as at all times she had a right to do. In the absence of proof or a finding that the \$400 paid annually to the plaintiff was derived from the rent of the land, and the circumstances indicate the contrary, she is not entitled to interest on her money invested in the land and to the advance in the value of the land also. Under certain circumstances she might take her choice either to reclaim her money with interest or to affirm the investment and take the land with its increased value. She cannot equitably be entitled to both. She has received the interest on her money up to the time she brought the action and repudiated the agreement of 1879, and has made no offer to repay or relinquish the money so received. Equity will now give her the principal and nothing more.

Case No. 14,447 is remanded, with instructions to the district court to render a decree that plaintiff is the equitable owner of the two \$3,000 notes executed by James P. Lodge and Charles V. Lodge in 1895 and of the mortgage given to secure the same, and that neither John F. Williams nor Edward M. Williams nor the heirs of either have any interest in the same; that judgment be rendered in favor of plaintiff against James P. Lodge and Charles V. Lodge for the amount of \$6,000 and interest thereon at the rate of 6 per cent. per annum from the commencement of the action and the judgment to bear six per cent till paid, and for costs; that the mortgage given to secure the payment of said notes be foreclosed and plaintiff adjudged a lien, subject only to the mortgage for \$12,000 and interest held by the National Life Insurance Company on the land covered by its mortgage and a first lien upon the other tract of 160 acres; that said lands be sold and the proceeds applied as above indicated. The costs in case No. 14,290 in this court will be taxed against the plaintiff in error, and in No. 14,447 against James P. Lodge and Charles V. Lodge, defendants in error. All the Justices concurring.

GIBSON v. HINCHMAN.

(Supreme Court of Kansas. Dec. 9, 1905.)

LIMITATION OF ACTIONS—EJECTMENT—CLAIM UNDER TAX TITLE.

An action of ejectment by a tax deed holder, out of possession, does not become barred by the two-year statute of limitation while the land is vacant and unoccupied, nor while in possession of and occupied by tenants, agents, or employes of a nonresident owner who is absent from the state.

(Syllabus by the Court.)

Error from District Court, Ford County; E. H. Madison, Judge.

Action by C. E. Gibson against Charles S. Hinchman. Judgment for defendant, and plaintiff brings error. Affirmed.

Sutton & Scates, for plaintiff in error. A. B. Reeves, for defendant in error.

GRAVES, J. This is an action of ejectment. The only question involved is whether or not the holder of the tax deed herein designated as the "Hinchman deed" has lost, by reason of the two-year statute of limitation, the right to a lien on the land for the taxes represented by such deed? The plaintiff owns the original title to the land, but has never been in possession. On November 20, 1902, he brought this suit. The defendant Bragg has been in possession since June 1, 1898, claiming ownership under a tax deed, dated and recorded January 8, 1898. Prior to the possession of Bragg the land was vacant and unoccupied. The possession of Bragg has been by tenants, agents, and employes only, and he has been personally a nonresident of and absent from the state at all times since the date of his deed. After this suit was commenced, but before time to answer, Bragg obtained the Hinchman deed, and set it up with his own in his answer. The Hinchman deed was executed and recorded March 13, 1893. Nothing was done by the holder thereof to enforce it or to obtain possession of the land under it, until the answer of Bragg was filed as aforesaid. Upon the trial the court held both deeds void, but the defendant was given a tax lien under each of them.

The plaintiff concedes the lien as to the Bragg deed, but claims that under the case of Corbin v. Bronson, 28 Kan. 532, the Hinchman deed is void for all purposes. It was held in that case that a tax deed holder out of possession, who for two years, during which the owner is in possession, fails to bring proceedings to recover the land, loses all rights under his deed, and cannot recover taxes thereunder. But the facts of this case are essentially different. Here the owner has never been in possession. As between the plaintiff and the holder of the Hinchman deed the land has been vacant and unoccupied. The two-year statute of limitation does not begin to run against a tax deed holder, not in possession, and in favor of a nonresident owner who is absent from the

state, nor while the land is vacant and unoccupied. *Case v. Frazier*, 30 Kan. 343, 2 Pac. 519; *Coale v. Campbell*, 58 Kan. 481, 49 Pac. 604. Possession, by tenants, agents, or employes only, will not start the statute in favor of a nonresident owner, who is absent from the state. *Ard v. Wilson* (Kan. Sup.) 56 Pac. 80. It follows that the statute has never started to run against the Hinchman deed in favor of any one. As to the plaintiff, the land has always been vacant and unoccupied. As to Bragg, it has been practically the same. He being a nonresident of and personally absent from the state, no judgment could be obtained against him which would be conclusive. The statute of limitation does not require a person to institute proceedings to enforce a right within a time limited, when such proceeding will not conclusively determine such right as to each party. It would have been a vain and useless proceeding upon the part of the holder of the Hinchman deed to have commenced an action thereon against any one. The tenants, agents, and employes of Bragg claimed no independent right to the land, and no judgment could have been obtained against them which would have been binding upon Bragg. Even if Bragg, in an action by the holder of the Hinchman deed, had submitted to the jurisdiction of the court, the judgment in such case would not have been binding against the plaintiff, who was not a party, and not being binding against him, it could not be used as conclusive in his favor. In any view, we think the tax lien under this deed was properly sustained.

The judgment of the district court is affirmed. All the Justices concurring.

(72 Kan. 405)

FREDONIA GAS CO. v. BAILEY et al.

(Supreme Court of Kansas. Dec. 9, 1905.)

APPEAL—JURISDICTIONAL AMOUNT.

In an action to recover \$1,349, where the defendant admits in the answer and upon the trial that there is due the plaintiff \$1,000, and the verdict and judgment is for \$1,094.60, the amount in controversy on appeal by defendant is \$94.60, and this court has no jurisdiction.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 236.]

(Syllabus by the Court.)

Error from District Court, Wilson County; L. Stillwell, Judge.

Action by W. A. Bailey and Joseph Kemerer against the Fredonia Gas Company. Judgment for plaintiffs. Defendant brings error. Dismissed.

S. S. Kirkpatrick, for plaintiff in error.
P. C. Young, for defendant in error.

PORTER, J. Action to recover money alleged to be due for services in drilling certain wells. Plaintiff in error was defendant below. The petition contained two causes of action, one upon a claim for \$2,852 for drilling three wells on the Muckey farm, and an-

other for \$1,349 for drilling and cleaning a well on another farm.

The answer set up a general denial and a defense of a settlement, by the terms of which it was averred defendant below had paid a part of the amount agreed upon, leaving a balance of \$1,000 which defendant admitted was due, and which defendant was ready and willing to pay. Upon the trial plaintiff below dismissed the first cause of action, and the trial proceeded upon the second. No amendment or change was made in the answer. Defendant below offered proof that the \$1,000 which was admitted to be due was still on hand, and that plaintiff could have it on demand. The jury found for plaintiff below in the sum of \$1,094.60, and in answer to special questions found that no settlement had been made. By its answer and its evidence plaintiff in error, upon the trial, admitted that there was \$1,000 due plaintiff below. This leaves but \$94.60 involved here, the difference between the amount of the judgment and the amount over which there is no controversy, and for that reason the motion to dismiss must be sustained. See the following authorities: *Jenness v. Nat. Bank*, 110 U. S. 52, 3 Sup. Ct. 425, 28 L. Ed. 87; 2 Cyc. 576; 2 Cent. Dig. tit. "Appeal and Error," § 236.

The case will be dismissed. All the Justices concurring.

(72 Kan. 406)

MAHONEY v. MARTIN et al.

(Supreme Court of Kansas. Dec. 9, 1905.)

GIFT—ACCEPTANCE—EVIDENCE.

Acceptance by the donee is necessary to constitute a gift. The presumption of acceptance on the part of the donee, sometimes indulged by the law, is a presumption of fact, and becomes effectual only in the absence of evidence. Where such acceptance is disputed, a question of fact arises, which must be determined upon the evidence presented.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gifts, § 18.]

(Syllabus by the Court.)

Error from District Court, Saline County; R. R. Rees, Judge.

Action by J. J. Mahoney against Peter Martin and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Z. C. Millikin, for plaintiff in error. C. W. Burch and R. A. Lovitt, for defendants in error.

GRAVES, J. The question involved in this case is whether or not the property in controversy was transferred to the plaintiff in error by virtue of a completed gift. Mary A. Martin, the alleged donor of the property, was at the time of her death the wife of Peter Martin, who was insane, and he would take by descent whatever property his wife might have at the time of her death. Peter Martin had property in his own right sufficient for his comfortable support, and his wife did

not want her property to go to the relatives of her husband, which result would follow if she did not outlive him. In the month of March, 1903, she was very sick, and expected to die. Her nearest relatives were a brother, the plaintiff in error, who lived in North Dakota, and a sister, who resided in Canada. The brother was present during her last sickness, and she desired to leave her property to him. She knew that she could not prevent one-half of it going to her husband, and at his death to his relatives, by a will, and she therefore sought the advice of a lawyer for some legal way to carry out her wish. Upon such advice she executed and delivered to her said brother the bill of sale hereinafter set forth. Soon afterwards she died. A controversy thereafter arose between her brother and the guardian of her insane husband concerning the ownership of the property, which resulted in the bringing of this suit by the brother. Among the assets of Mary A. Martin was a claim against the estate of her insane husband. The guardian of Peter Martin reduced all of the property of Mary A. Martin to possession, and claimed that his ward was the owner thereof. This action was brought for an accounting and for the value of the property.

Upon the trial, which was to the court without a jury, the court found and filed findings of fact and conclusions of law which read: "(1) That Mary A. Martin died intestate on the 26th day of March, 1903, without issue. (2) That at the time of her death said Mary A. Martin was the wife of Peter Martin, an insane person, and the guardian of his estate. (3) That said Mary A. Martin left surviving her, besides her husband, a brother, J. J. Mahoney, the plaintiff in this action, and one sister. (4) That for a long time prior to her death the said Mary A. Martin claimed that there was a large balance due her for services as guardian of such estate, a part of which was claimed had been allowed by the probate court. The validity of this claim, or the amount thereof, was not considered at this hearing, the case being tried upon the single issue as to whether the plaintiff was entitled to an accounting. (5) That on the 28th day of March, 1903, the defendant Joseph Martin was, by the probate court of Saline county, duly appointed guardian of the estate of Peter Martin, insane, to succeed said Mary A. Martin, deceased, and thereupon duly qualified and entered upon the discharge of his duties as such guardian. (6) That said Mary Martin was sick from January 1903, until the time of her death. (7) That the plaintiff lived in Langdon, N. D., and that he visited his sister in January, 1903, staying with her a few weeks and returned home, but came back again about the 25th of February, 1903, and remained with her until her death. (8) That during her last sickness, said Mary Martin sent the plaintiff, Mahoney, to consult her lawyer, Z. C. Millikin, for advice con-

cerning the manner of disposing of her estate; and, returning, Mahoney reported to her that Millikin had advised that she could dispose of all of her property by gift during her life, but that such gift must be unconditional and absolute, and have immediate effect, and that this communication was made to her a few days prior to the execution of the written instrument hereinafter set out. (9) That Mahoney had Millikin prepare an instrument, a copy of which is set out in finding No. 10, the name of the donee being left blank, and the date of the month appearing as February instead of March, and that afterwards, in the presence of William T. Greenwood, on the 5th day of March, 1903, after having inserted his name as donee, and after having changed the month from February to March, the plaintiff presented this instrument to Mary Martin while she was lying in bed, and told her that it was a bill of sale of all of her property to him; that Mary Martin took the instrument, and after looking at it for about two minutes said, 'It is all right,' and then signed it, and returned it to Mahoney, who handed it to Greenwood to witness it, and after Greenwood had witnessed the execution of this instrument, he returned the same to the plaintiff, who has had possession of it ever since. (10) That such instrument was in words and figures as follows, to wit: 'Bill of Sale of Personal Property. Know all men by these presents, that Mary A. Martin, in consideration of one dollar and other consideration dollars paid by J. J. Mahoney, the receipt whereof is hereby acknowledged, does hereby grant, sell, transfer, and deliver unto the said J. J. Mahoney the following goods and chattels, viz.: One promissory note for \$1,100, or more, secured by real estate mortgage, executed by Thos. Holmes and wife, and all property of every kind and description now owned by me or in which I am in any wise interested, and wherever situated to be held by him absolutely. To have and to hold, all and singular, the said goods and chattels, to the said J. J. Mahoney and his executors, administrators, and assigns, forever. And the said grantor hereby covenants with the said grantee that she is the lawful owner of said goods and chattels; that they are free from all incumbrances; that she has good right to sell the same as aforesaid, and that she will warrant and defend the same against the lawful claims and demands of all persons whomsoever. In witness whereof, the said grantor has hereunto set her hand this 5th day of March, A. D. 1903. Mary A. Martin. Signed and delivered in presence of W. T. Greenwood.' (11) That no consideration was paid to Mrs. Martin for such transfer, and that, if it operated at all, it was as a gift, and not a sale. (12) That at the time of the execution of said written instrument, Mary A. Martin was of sound mind and in the full use of her mental faculties, and was able to read the English language. (12½)

That at the time of the execution of such gift, said Mary Martin expected to die within a short time, and such gift was made by her in contemplation of approaching death. (13) That Mahoney did not fully make up his mind whether to accept such gift or not until after the death of Mrs. Martin; but it does not appear that he repudiated it or expressed any active dissent. (14) That finding No. 13 is based entirely on the testimony of J. J. Mahoney, viewed in the light of the surrounding circumstances, as disclosed by the other findings of fact. (15) That immediately after the gift, the plaintiff asserted a claim of ownership to a little mare by virtue of such gift, and visited the probate judge for the purpose of getting possession of the note described in such instrument, and to ascertain the balance due from the estate. (16) That after the death of Mary Martin, the plaintiff claiming under said written gift, attempted to take possession of a certain organ, claiming that it had formerly belonged to Mrs. Martin, but upon being informed that it had not belonged to her, made no further effort to take it. (17) That the supposed indebtedness from said estate to Mary Martin was not evidenced by anything capable of a manual delivery, and that no delivery of such property was made, except in so far as the delivery of such written gift operated as a constructive delivery."

"Conclusion of Law.

"That said written instrument purporting to be a gift of all her property from Mary Martin to J. J. Mahoney is void and of no effect, and that the judgment of this court should be for the defendant."

It is apparent from these findings of fact, that Mary A. Martin, felt that her death was at hand, and in contemplation of this fact, she wanted to dispose of her property so that her brother would have it after her death. In case of her death the brother intended to take the property. It is easy to deduce these conclusions from the findings of the court, but they do not constitute a completed gift. The court evidently based his conclusion of law upon finding of fact No. 13, which finding is vigorously attacked by the plaintiff in error. It is urged that this finding is not sustained by the evidence, is contrary to the evidence, and inconsistent with the other findings of fact. No gift can be complete without the acceptance thereof by the donee. *Calvin v. Free*, 66 Kan. 470, 71 Pac. 823; 14 Am. & Eng. Ency. of Law, 1015. The law presumes such acceptance in the absence of evidence to the contrary. When this fact is disputed its determination will depend like any other question of fact upon the evidence. In this case, the question of acceptance was one of the important points in dispute. The court found from the evidence that the donee did not accept the gift during the life of the donor.

The evidence upon this subject, as it ap-

pears in the record, seems to be strongly against this finding, and if it were an original question here depending upon the testimony presented to us, we would be inclined to decide otherwise. At the same time there is some reason for the conclusion that a gift *causa mortis*, only, was intended by both parties. There was no reason why Mrs. Martin should wish to part with all of her property, while living, and it seems probable that her brother did not expect to take it if she recovered. It appears more reasonable that they each intended the gift to become absolute, upon her death, and not before. It also appears from the record that the plaintiff, upon a former trial involving this same question, gave testimony inconsistent with his evidence at the trial of this case. In view of the fact that the witness was present in court during his examination and cross-examination, as to this discrepancy in his testimony, and the court had an opportunity to note his appearance and demeanor, on the witness stand, which at times furnishes strong evidence of the good faith and honesty of a witness, or the want of it, not discoverable from the written testimony given, we feel bound to adhere to the oft-repeated rule, that a finding of fact, resting upon conflicting or inconsistent evidence cannot be disturbed by this court, and therefore the finding will be sustained.

This conclusion makes it necessary to affirm the judgment. All the Justices concurring.

HARRISON NAT. BANK v. LESLIE.

(Supreme Court of Kansas. Dec. 9, 1905.)

CHATTEL MORTGAGE—SALE—ACCOUNTING BY MORTGAGEE.

In the absence of fraud or bad faith, when the holder of a chattel mortgage, after default, takes possession of the mortgaged property, and without any demand for an earlier sale from the mortgagor or subsequent mortgagee, but with the apparent acquiescence of all parties interested, holds it for several months and then sells it in accordance with the provisions of the mortgage, he is accountable for the amount received therefor at such sale, less the proper expenses of keeping and sale, and is not accountable for the market value of the property when taken, if such value should prove to be greater than the price obtained.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 525.]

(Syllabus by the Court.)

Error from District Court, Reno County; W. H. Lewis, Judge.

Action by J. F. Leslie against the Harrison National Bank. Judgment for plaintiff, and defendant brings error. Reversed.

This is an action brought by plaintiff in error in the district court of Reno county against the defendant in error on a separate guaranty of a promissory note executed by one Compton to the Zeb. F. Crider Commission Company and by said company indorsed and sold to the plaintiff bank. The

note was, when sold, also secured by a chattel mortgage on about 100 head of cattle, which mortgage was executed at the time the note was given. The separate guaranty is set forth in the petition as follows: "For value received, I hereby guarantee the payment of a certain promissory note wherein J. S. Compton promises to pay unto the Zeb. F. Crider Commission Company on April 24th, 1900, the sum of \$4130.33 said note being dated October 24th, 1899, and hereby waive demand notice of nonpayment and protest with privilege granted for any and all renewals and extensions and partial payments thereon. J. F. Leslie. Oct. 25, 1899." The answer admits the execution of this paper, but denies that it was executed October 25, 1899, and alleges it was long subsequent to the execution of the note which was dated October 24, 1899. Also, the answer avers that the guaranty was without consideration. Also that the plaintiff had taken possession of the cattle mortgaged to secure the debt, and that, when taken, they were worth in the market more than the amount of the debt, and, if they failed to bring enough to satisfy the debt, it was because of the negligence and mismanagement of the holder of the mortgage and the incurring of unnecessary expense. The reply was a general denial. On the trial the evidence on behalf of plaintiff was to the effect that the guaranty was required by the Crider Commission Company as a condition to the making of the loan to Compton and for the express purpose of enabling them to sell the note, and that the defendant agreed to give it at the time the note was given and did in fact execute it at that time or shortly thereafter, probably the next day, and before the sale of the note and mortgage to plaintiff. The defendant, Leslie, testified that he agreed with the Crider Company to guaranty the paper for the purpose of enabling Compton to secure the loan and the Crider Company to negotiate it, but that he did not execute the paper till November 28, 1899. Verdict and judgment was for the defendant. The plaintiff brings the case here, and the defendant makes no appearance. If any evidence or proceeding especially favorable to the defendant be overlooked, it may consequently be attributed to defendant's laches.

Fairchild & Lewis and Bottsford, Deatherage & Young, for plaintiff in error. Prigg & Williams, for defendant in error.

SMITH, J. (after stating the facts). The errors complained of relate to the giving of instructions excepted to by plaintiff and the refusal of others asked by plaintiff.

In the first instruction given by the court, which is complained of, the connective "and" was evidently omitted, which gives a very erroneous meaning to the sentence. Yet the omission is so apparent that an intelligent jury might be presumed to have supplied it, and we are reluctant to predicate a reversal

upon an error which appears to be a palpable clerical mistake. This instruction, however, authorizes the jury to find for the defendant upon a defense not pleaded in the answer, viz., "by holding them [the cattle] an unreasonable time before selling them on the market after taking possession." On this subject the court further instructed the jury as follows: "I instruct you that under the terms of the chattel mortgage, it was plaintiff's duty when he took possession of the property described therein, to proceed to sell the same within a reasonable time after taking possession thereof, either at public or private sale at the place where said cattle were situated or to ship the same to Kansas City, Kansas, or to Kansas City, Missouri, and sell the same upon the market; and if you believe from the evidence that the plaintiff failed to do that and it kept said cattle or a large portion thereof for several months after taking possession of the same, then in that event the plaintiff would be chargeable with the market value of said cattle described in the mortgage at the time that it took possession of the same and if you believe also from a preponderance of the evidence that at the time plaintiff took said cattle and that they were of sufficient market value to satisfy plaintiff's note and mortgage, then you will find for the defendant."

There is no allegation in the answer that the cattle were held an unreasonable time, no allegation of fraud or bad faith in holding them, and no allegation that the mortgagor or the defendant even demanded an earlier sale. From all that appears in the pleadings or evidence, the plaintiff might have held the cattle and put them on pasture at the request of both the mortgagor and the defendant. Yet the court by this instruction makes this the basis of a verdict in favor of the defendant, provided only that the jury finds the cattle were of sufficient value, when taken, to pay the debt. By the express provision of section 4253, Gen. St. 1901, the mortgagor could, at any time after the plaintiff took possession of the cattle, have demanded the sale of them, and could thereby have imposed the risk of holding them upon the plaintiff. If the defendant desired an earlier sale, he could have paid the debt and have been subrogated to all the rights of the plaintiff under the mortgage, including the possession of the cattle.

The court erred in its instruction regarding the consideration for the guaranty, and in refusing instructions relating thereto. As this question is not likely to recur under the same evidence, it would perhaps be fruitless to extend the discussion on this point. Suffice it to say that the true rule can be deduced from *Briggs v. Latham*, 36 Kan. 209, 18 Pac. 129, and *Anderson v. Burchett*, 48 Kan. 781, 30 Pac. 174.

The judgment of the district court is reversed and the case is remanded. All the Justices concurring.

CREAMERY PACKAGE MFG. CO. v. DANIELS.

(Supreme Court of Kansas. Dec. 9, 1905.)

MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

In an action brought by an employé to recover for personal injuries sustained through the negligent omission of the employer to remove or cover a circular saw when not in use, findings that the plaintiff knew that the saw was in motion and knew the effect of coming in contact with it will prevent his recovering judgment, when it is further found that the defendant was not negligent in any other respect.

(Syllabus by the Court.)

Error from District Court, Wyandotte County; J. McCabe Moore, Judge.

Action by Chester Daniels against the Creamery Package Manufacturing Company. Judgment for plaintiff. Defendant brings error. Reversed.

Harkless, Cryster & Histed, and A. L. Berger, for plaintiff in error. Chas. R. Cooksey and Bird & Pope, for defendant in error.

MASON, J. Chester Daniels, a boy not quite 18 years of age, was injured while in the employ of the Creamery Package Manufacturing Company. He brought an action against the company, alleging that his injury was due to its negligence, and recovered a judgment for \$600, from which the defendant prosecutes error.

The plaintiff worked near a small circular saw; his work requiring him to pass back and forth near it. Upon one occasion, while carrying some boards by it in the course of his employment, the floor being strewn with sawdust, he stepped upon a "cull head," or piece of waste board, slipped and fell, and in falling threw out one hand, which came in contact with the saw and was severely mangled. In his petition he alleged that the defendant was negligent in these respects: (1) In failing to provide sufficient light in the room where the machinery was; (2) in allowing the passage-way over which the plaintiff was required to go back and forth near the saw to become and remain obstructed; and (3) in failing either to remove or cover the saw whenever, as at the time of the injury, it was not in use. In response to a special question, however, asking the jury to state fully in what the negligence of the defendant consisted, the answer was returned: "For not removing saw from mandrel, or covering it up when not in use." This is, in effect, a finding that there was no negligence on the part of the company in respect to the lighting of the room or the obstruction of the passage, and that the company was not derelict toward the plaintiff in any matter other than that specifically named. The jury also found specially that the plaintiff had worked more than a week in this room, during which time he frequently saw the machinery in operation; that he knew of the practice of allowing the saw to run when not in actual use; that he knew and understood the result of

getting his fingers against the saw; that he knew the saw was running at the time he was walking toward it and before the time he was hurt.

The defendant contends that these findings compel a judgment against the plaintiff, for the reason that they show an assumption on his part of the risk occasioned by the negligence of which he complains. The contention must be sustained. The saw, while in motion, presented a peril that was obvious to the meanest intelligence. The mere fact that the plaintiff was a minor does not affect the matter. *Bess v. Railway Co.*, 62 Kan. 299, 62 Pac. 906. A boy practically 18 years of age was as capable as an older person of seeing and understanding such peril. It is true that, in order for him to be deemed to have assumed the risk, he must not only have been aware of the conditions that existed, but also of the danger that arose from such conditions. But whatever doubt there might otherwise have been upon this score is set at rest by the finding that he knew and understood the result of getting his fingers against the saw. This is, in substance, a finding that he knew the danger to which he was subjected by the omission of the company to remove the saw when not in use. It is not a sufficient answer to say that he did not know that he was likely to slip or stumble while he was walking by the saw. His fall, not having been occasioned by any negligence of the defendant, was a mere accident, the possibility of the happening of which at that particular place must have been known to him as well as to any one else. That the employé ordinarily assumes the open and obvious danger incidental to the operation of unguarded machinery is well settled. See 20 A. & E. Encycl. of L. (2d Ed.) 117. The only distinction in this regard between the present case and those there cited must be found in the fact that here the machinery was being operated unnecessarily, at a time when it might as well have been stopped or guarded. But this consideration goes only to the matter of the negligence of the master, and does not affect the attitude of the servant. It is important only because but for it there would be no ground of liability whatever. In most of the cases where a recovery is defeated upon the ground of an assumption of risk by the employé there is some form of negligence shown by the employer which would establish a liability except for the principle of assumption of risk; otherwise, there would have been no occasion for invoking that principle.

The findings exculpate the defendant from any negligence, except in permitting the saw to run uncovered when not in use. The only reason that could make this actionable negligence was that it needlessly exposed persons working about it to the danger of injury, if through accident or inadvertence they came in contact with it. This danger was obvious to any one who knew

that the saw was running and knew the effect of coming in contact with it. The fact that it was not necessary that it should have been running had no tendency to conceal the danger. The plaintiff, having continued to work in the vicinity of the dangerous saw, knowing of the practice of allowing it to run uncovered when not in use without making objection thereto, carried his own risk of sustaining any injury that might result to him in consequence thereof without further fault on the part of the plaintiff. He knew that the saw was in motion and unprotected, and would injure him if he came within its reach. In continuing his work under these circumstances he undertook to keep away from it, except as he might be prevented or hindered in doing so by some further negligent act or omission on the part of the company, and the finding of the jury that there was no such further negligence precludes his recovery.

The judgment is reversed, with direction to enter judgment for the defendant. All the Justices concurring.

HOOPES v. ATCHISON, T. & S. F. RY. CO.
(Supreme Court of Kansas. Dec. 9, 1905.)

RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Deceased was killed at a railway crossing in a public street. He had crossed two tracks and stood waiting for a freight train passing west on the third track directly in front of him, and while looking at the passing freight train was struck by a train coming from the west upon the second track, close to which he was standing. The clear space between the passing trains was six feet. Except for the rays of the setting sun, his view of the incoming train was unobstructed for half a mile, if he had looked west. He was familiar with the tracks and surroundings. These facts appeared by plaintiff's evidence. A demurrer to the evidence was properly sustained. The rule in *Railway Co. v. Withers*, 77 Pac. 542, 78 Pac. 451, 69 Kan. 620, governs, and the contributory negligence of deceased bars a recovery.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1022, 1043-1053.]

(Syllabus by the Court.)

Error from District Court, Lyon County; Dennis Madden, Judge.

Action by Mrs. Ella Hoopes against the Atchison, Topeka & Santa Fé Railway Company. There was judgment for defendant, and plaintiff brings error. Affirmed.

Kellogg & Madden, for plaintiff in error. W. R. Smith, O. J. Wood, and Alfred A. Scott, for defendant in error.

PORTER, J. Plaintiff's husband was killed at a railway crossing in the city of Emporia, where defendant company has three tracks extending east and west on Third avenue, one block west of the passenger station. The north track is for west-bound trains, the middle one for east-bound, and the south for trains in either direction

from the railway yards, which lie immediately west of the street crossing. The middle track extends straight west for more than half a mile. Mr. Hoopes was returning from his work in the evening to his home, which was south of the tracks. He came to the crossing on the east side of the street, and started diagonally to the southwest corner, in order to get upon the west side of the street and across the tracks. After passing over the north and middle tracks his further passage was obstructed by a freight train going west on the south track directly in front of him. While waiting for this to pass, he stepped between the middle and south tracks, but stood very near to the south rail of the middle track, and was struck by the steam chest of the engine of the fast mail going east on the middle track, hurled against the moving freight train, and by this thrown back under the wheels of the fast mail and killed. The trial court sustained a demurrer to plaintiff's evidence, and plaintiff brings error upon the ground that the case should have gone to the jury.

The train was running at the rate of 30 miles an hour without ringing the bell or sounding the whistle, and its negligence, as the case stood at the close of plaintiff's testimony, is conceded. The only question, however, is whether the contributory negligence of plaintiff's husband was such as to bar her right to recover. *U. P. Ry. Co. v. Adams*, 33 Kan. 427, 6 Pac. 529; *Dewald v. K. C., Ft. S. & G. R. Co.*, 44 Kan. 586, 24 Pac. 1101, and cases cited. It appears that the clear space between the tracks was about nine feet, and between the passing trains six feet. Mr. Hicks, who was a witness, attempted to cross the tracks from the same position in the street and at the same time, except that he stopped on the east side of the street, between the same tracks, waiting for the freight train to pass, and, when the fast mail came in from the west, was standing about 20 feet east of Hoopes, but not so close to the middle track. He likewise failed to observe the approach of the train from the west until about the instant it struck deceased, and barely saved himself by stepping away from the middle track and nearer the passing freight. He testified that the sun was low in the west at the time, and a person looking in that direction would be blinded by the sun and prevented from seeing the approaching train. Other witnesses testified that Mr. Hoopes walked a short distance west in the space between the tracks before the fast mail came in, but had turned and was looking at the passing freight when he was struck.

This case cannot be distinguished from that of *Railway Co. v. Withers*, 69 Kan. 620, 77 Pac. 542, 78 Pac. 451. In that case Withers, in company with another person, started along a sidewalk at a railway crossing, going to his home. As they came near one track,

they observed a train switching along another track, which obstructed their progress and caused them to halt on or near the first track. The court said: "Much evidence was introduced to show that the deceased men were standing upon track 4. It seems highly probable that they were, though the jury found that they were not; but whether they were exactly upon the track or not seems of small moment, for the fact is that, if they were not between the rails, they were in a place of equal danger. It was not necessary for them to stand in a place of danger, as they could have stopped west of track 4, or could have safely stood between tracks 3 and 4. We are of the opinion that the facts shown clearly prove the culpable negligence of the deceased, and that the company was thereby relieved from liability for their death. They knew the conditions which surrounded them. They were in the full possession of their faculties. They knew they were within the limits of the yards, with its many tracks. They saw one train occupying the track in front of them. They knew that the other tracks were in frequent use for a like purpose, and that at any moment any one of the other tracks might be occupied by moving cars. They knew that to stand upon a track, or near enough to one to be hit by a moving car, was a dangerous position. Knowing all these things, and being plainly warned that they were in and upon this network of tracks, it was their plainest duty to see to it that they did not halt in a place of danger. There was ample room for them to stop in a place of safety. Others did so."

Counsel for plaintiff in error contend that certain facts take this case out of the rule governing the Withers Case. It is urged that the rays of the setting sun shining directly in his face, if he looked to the west, prevented deceased from discovering the approach of the train, and that it is a fair inference from the evidence that he became momentarily confused by the noise of the passing freight, and that whether he was, under these circumstances, guilty of contributory negligence, was for the jury to determine. But it must be presumed that no one knew better than the deceased the fact that, by reason of the position of the sun in the west, he was prevented from seeing a train which might be coming from that direction; and it therefore became more than ever incumbent upon him to seek a place of safety—which was so plainly open to him—by either standing midway between the tracks upon which the trains actually passed, or by stepping back to the space between the middle track and the north track. He was familiar with the tracks and the conditions surrounding him, and in full possession of his senses at the time he took his position in a dangerous place, where it was not necessary for him to stand. *Railroad Co. v. Willey*, 60 Kan. 819, 58 Pac. 472. See, also, *Zirkle v. Railway Co.*, 67 Kan. 77, 72 Pac.

539; *Libbey v. Railway Co.*, 69 Kan. 869, 77 Pac. 541. The evidence hardly warrants the claim that Hoopes became momentarily confused and bewildered. It appears that when he was struck he was standing looking south toward the freight train, and, so far as the evidence discloses, knew nothing of the approach of the train which killed him. In a case where the person injured is placed in peril through the negligence of another, and there is evidence from which it might be inferred that he became confused and bewildered by the sudden and impending dangers, it is ordinarily for the jury to say whether, under the circumstances, he acted with reasonable care. But "when two ways are open to a person, one of which is obviously safe and the other plainly dangerous, and he voluntarily chooses the latter, he will ordinarily do so at his peril." *Railroad Co. v. Brock*, 60 Kan. 448, 450, 77 Pac. 86. The view taken by the trial court is sustained by so many rulings of this court that it seems unnecessary to refer to more of them.

The judgment will be affirmed. All the Justices concurring.

CINCINNATI PUNCH & SHEAR CO. v. THOMPSON.

(Supreme Court of Kansas. Dec. 9, 1905.)

1. SALE—REMEDIES OF SELLER—RECOVERY OF PROPERTY.

In an action of replevin of a machine by the vendor, whether the vendee had elected to affirm the contract of purchase and keep the machine, or disaffirm it, is a question of fact; and where the plaintiff's evidence tends to show a disaffirmance the question should be submitted to the jury.

2. SAME—DISAFFIRMANCE BY PURCHASER.

One who disaffirms a contract of purchase has no lien on the goods for damages resulting from a breach of the contract.

(Syllabus by the Court.)

Error from District Court, Atchison County; B. F. Hudson, Judge.

Action by the Cincinnati Punch & Shear Company against A. W. Thompson. Judgment for defendant, and plaintiff brings error. Reversed.

W. W. & W. F. Guthrie, for plaintiff in error. T. A. Moxey, for defendant in error.

GREENE, J. The plaintiff in this action sought by replevin to recover from the defendant a certain punch and shear machine, which it had previously delivered to him under a contract of sale. The court sustained a demurrer to the plaintiff's evidence, and rendered a judgment accordingly. This is alleged as error. It appears that the plaintiff contracted to sell and deliver to the defendant a certain punch and shear machine, for which the defendant agreed to pay \$300. A perfect machine was shipped and delivered to the defendant at his place of business in Atchison, and he paid the freight

thereon, amounting to \$17.50. Before bringing this action the plaintiff tendered to the defendant the amount of freight paid by him on the machine. The machine was never removed from the skids upon which it was shipped, and was not used by the defendant. The defendant refused to pay for the machine, alleging as reasons therefore that it was not the machine contracted for, and that it was wholly insufficient in size to do the work he required of such a machine.

So far as indicated by the evidence, the machine was perfect in all its parts; but, as stated by the defendant in one of his letters to the plaintiff, "it was a baby machine." After the machine arrived at the defendant's place of business he wrote the plaintiff, among other things, as follows: "You know the machine you shipped me is not the machine I ordered. You know you have utterly failed in every respect to fulfill your part of the agreement. * * * I know I am not under any obligations whatever to pay you one cent, and furthermore I don't propose to, so you may as well come up to the line now and let me know how you want to settle this matter, and what you want done with the machine. I have been damaged more than the machine is worth." Later he wrote a letter containing the following statements: "Gentlemen: Owing to your utter failure to ship me the machine and tools I ordered in my letter of December 31st, I have been delayed more than three months' use of a machine which is absolutely necessary in my business, and damaged double the amount of the value of the machine sent me. The machine you sent me is still here in my possession, skidded as you sent, unused, and will remain here until you are willing to settle this matter of damage on a reasonable basis. It is utterly useless for you to say, or attempt to prove, that you sent me the machine I ordered of you. * * * Now, I am out on this machine freight and drayage, some \$17.50, and already about three months' use, which will doubtless be four months before I am able to get another in, which I have already ordered, which loss of time I estimate at not less than \$300. But to settle the matter up without delay, if you will remit me the \$17.50 above mentioned, and \$100 as a part satisfaction of damages accrued, I will ship you the machine to any point you desire; otherwise, not." Oral evidence was also introduced tending to show that the defendant had rescinded the contract of purchase, and was only holding the machine to compel the plaintiff to pay him what he considered to be his damages resulting from a violation of its contract. One contracting for a machine for a particular purpose, which, upon delivery, he finds is not the machine contracted for, may either affirm the contract and keep the machine and recoup his damages, or disaffirm the contract and return or hold the machine subject to the order of his vendor. If he disaffirms

the contract, he may not hold the machine to satisfy a claim for damages. The law gives no such lien. In this case the contention of the plaintiff was that the defendant had disaffirmed the contract and that the machine was the property of the plaintiff, and it was therefore entitled to recover its immediate possession. The plaintiff's evidence tended to show that defendant had disaffirmed the contract. Whether or not he did so is a question of fact, and should have been submitted to the jury.

The judgment is therefore reversed, and the cause remanded for further proceedings. All the Justices concurring.

LANYON ZINC CO. v. BURTISS et al.

(Supreme Court of Kansas. Dec. 9, 1905.)

LANDLORD AND TENANT—EXTENSION OF TERM—EQUITABLE RELIEF.

The mere bringing of an action by a lessor against a lessee to have a lease declared void, unaccompanied by any restraining order or stay of judgment, even if the action is decided in favor of the lessee in the district court and affirmed in the Supreme Court, does not prevent the lessee from exercising at all times all his rights under the lease, and is no ground for invoking the equity powers of a court to extend the lease, after its term has elapsed, for a period equal to the time the action was pending, or for any time whatever.

(Syllabus by the Court.)

Error from District Court, Allen County.

Action by the Lanyon Zinc Company against H. M. Burtiss and H. E. Burtiss. Judgment for defendants, and plaintiff brings error. Affirmed.

Campbell & Goshorn and C. E. Benton, for plaintiff in error. Ewing, Gard & Gard, for defendants in error.

SMITH, J. In an action by a lessee to enjoin a lessor from interfering with the possession of the leased premises, and to extend the term of the lease for 3 years, 11 months, and 20 days (this being the time which it is alleged an action brought by one of the lessors to have the lease declared void, was pending before final decision), a petition which alleges that the lessees were licensed to operate for oil, gas, or minerals for 10 years, to be extended so long as oil or gas should be produced in paying quantities, where such petition showed that the term of the lease (10 years) had elapsed, and no well or wells had been drilled, and no oil or gas had been produced, but which alleges as an excuse therefor that the action brought to have the lease adjudged void was brought nearly six years after the execution of the lease, was pending in the district court about two years, when it was decided in favor of lessee, was then appealed to the Supreme Court, where it was pending nearly two years, and was affirmed, such petition, failing to allege the omission of any act required by the contract to be done by lessors,

or that during the term they did anything whatever to interfere with the operations of lessee other than bringing the action, and failing to allege that any restraining order or stay of judgment was procured, does not state facts sufficient to show that lessee was prevented from performance on its part, and is insufficient to invoke the equity powers of the court to extend the lease.

A general demurrer to such petition was properly sustained, and the order and judgment of the court is affirmed. All the Justices concurring.

KOLLEEN v. ATCHISON, T. & S. F. RY. CO.
(Supreme Court of Kansas. Dec. 9, 1905.)

TRIAL—VERDICT—SUFFICIENCY.

Where, in an action to recover damages for a personal injury, the defendant pleads a settlement thereof, and the only question submitted to the jury is whether or not the plaintiff was mentally responsible when he made such settlement, and all the evidence given on the trial and all the instructions given to the jury by the court are directed to this single question, and the jury return a verdict which reads: "We, the jury impaneled and sworn in the above-entitled case, do upon our oath find for the defendant that the plaintiff's claim sued upon has been settled." And no objection is made thereto, and no application is made to the court to have the same made more specific before the jury is discharged, and the court enters judgment therein on sustaining such settlement. *Held*, that in this court, such verdict must be deemed sufficient.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1315-1322.]

(Syllabus by the Court.)

Error from District Court, Cloud County; Hugh Alexander, Judge.

Action by Otto Kolleen against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

C. A. Kimball and C. R. Pence, for plaintiff in error. A. R. Smith, O. J. Wood, and Alfred A. Scott, for defendant in error.

GRAVES, J. The plaintiff, Otto Kolleen, was employed as a car cleaner by the Pullman Palace Car Company, and while engaged in his duties the defendant, the Atchison, Topeka & Santa Fé Railway Company, when moving and changing cars in making up a train, violently moved the car in which the plaintiff was at work, whereby he was injured. Afterwards plaintiff commenced this suit against the defendant to recover damages for such injury. Pending the suit the plaintiff's attorneys negotiated a settlement with the defendant, informed their client thereof, and requested him to authorize them in writing to make the settlement agreed upon. Afterwards plaintiff executed

and delivered to his attorneys written authority to make such settlement, which authority specifically stated the amount which the defendant should pay, how much the attorneys should retain for services, and the amount which the plaintiff should receive. Afterwards the attorneys completed the settlement, received the money, and sent to plaintiff the amount due him, which he refused to accept. As a part of the settlement it was stipulated that the case should be dismissed with prejudice. At the next term of court, when the application to dismiss was presented, the plaintiff was personally present, objected thereto, and repudiated the settlement. Thereupon the plaintiff's attorneys withdrew from the case, and it was continued to enable plaintiff to employ other counsel. The defendant filed an answer setting up the settlement. To this answer the plaintiff alleged in his reply ignorance thereof and mental incapacity when the settlement was made. At the January term, 1904, the case was tried upon the single issue as to whether or not a valid settlement had been made. A verdict was returned in favor of the defendant, and the plaintiff brings the case here.

The principal error of which the plaintiff complains is that the verdict does not justify the judgment. The verdict reads: "We, the jury impaneled and sworn in the above-entitled case, do upon our oath find for the defendant that the plaintiff's claim sued upon has been settled." It was practically conceded on the trial that the settlement was actually made and authorized by the plaintiff, and the jury in answer to special findings of fact so found. The only question inquired into at the trial was whether the plaintiff was mentally responsible or not at the time. All the evidence in the case and the instructions of the court were directed to this single question. When the verdict is construed in the light of these considerations, it appears to be sufficient; but, if it were doubtful, this court would be compelled to so construe it, for the reason that no objection was made to the verdict when it was returned, and when the court could have had it corrected. *Copeland v. Majors*, 9 Kan. 104; *Carlin v. Danegan*, 15 Kan. 495.

Complaint is made that nonprofessional expert evidence was admitted without sufficient foundation having been laid therefor. The foundation was not so full and complete as usual in such cases, but we cannot say that material error was committed in this respect. An instruction of the court upon the burden of proof is also criticised; but the instruction, while unnecessary, simply served to emphasize the proper rule in the case, and was not erroneous.

The judgment is affirmed. All the Justices concurring.

ST. LOUIS & S. F. R. CO. v. BURGESS.

(Supreme Court of Kansas. Dec. 9, 1905.)

1. MASTER AND SERVANT—INJURY TO RAILROAD EMPLOYEE—NOTICE.

The written notice to a railroad company of injuries sustained by an employé through the negligence of co-employés, before a liability for such injuries can be enforced against the railroad company, required by chapter 393, p. 599, of the Laws of 1903, may be served upon a ticket agent of the railroad company.

2. SAME—ASSUMPTION OF RISK—QUESTION FOR JURY.

Under the facts and circumstances of the case, it is held that the question whether an employé of a railroad company, who was injured, while digging a ditch, through the caving of a bank, assumed the risk of the employment, or was guilty of contributory negligence, was properly submitted to the jury for its determination, and that there is testimony fairly tending to support its finding.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1068-1132.]

(Syllabus by the Court.)

Error from District Court, Johnson County; W. H. Sheldon, Judge.

Action by T. H. Burgess against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Pratt, Dana & Black and L. F. Parker, for plaintiff in error. H. L. Burgess and A. Smith Devenney, for defendant in error.

JOHNSTON, C. J. In this action T. H. Burgess asked a recovery from the St. Louis & San Francisco Railroad Company for personal injuries sustained by him while working in the water service department of the company. He was employed as a day laborer in digging a ditch, and on the second day of his employment the bank caved upon him, inflicting severe injury. The work was done under the orders and direction of a foreman and subforeman, whose duties, it is alleged, were to see that the workmen had a reasonably safe place to work, to keep a careful lookout for the safety of the men while working in the ditch, and to give them timely warning of danger from a cave-in of the banks of the ditch. The jury found that when Burgess was ordered by the foreman to go into the ditch on the day of the injury there was a crack in one of the banks, but that Burgess did not know of it; that one of the workmen called the attention of the subforeman to it before Burgess was directed to go into the ditch, that when the foreman ordered Burgess to go to work he told the men there was no danger of a cave-in; and that Burgess relied upon his statement. It was found that the cave-in was caused by the crack in the banks, the allowing of water to run into and remain in the ditch, and by failing to properly shore and brace the banks with lumber. Burgess was awarded damages in the sum of \$1,650.

There was a contention that a proper pre-

liminary notice of a claimed liability for the injury was not given to the company. In the act making the railroad company liable for injuries to an employé in consequence of negligence of co-employés there is a prerequisite that "notice in writing of the injury so sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within 90 days after the occurrence of the accident." Laws 1903, p. 599, c. 393. In this instance the notice was sufficient if it was served upon the proper representative of the company. It was served upon the ticket agent of the company at Olathe, Kan., and, assuming that a notice was necessary in this case, the one given is deemed to be sufficient. The statute as it then stood did not in terms prescribe how service should be made. The notice was given as a summons is required to be served, and while the notice is not strictly a process, it is a preliminary and essential step to the institution of an action, and it would seem that in the absence of a provision as to the manner of service the kind required for the service of a summons would be sufficient. Reference is made to K. P. Railway Co. v. Thacher, 17 Kan. 92, and Railroad Co. v. Sage, 49 Kan. 524, 31 Pac. 140, as authority that notice to a ticket agent is not sufficient. Neither of these cases is controlling. The first holds that notice of an attorney's lien upon a judgment recovered against a railroad company could not be served upon a person in charge of the company's depot. As that was a notice in an action to fix a lien upon the amount recovered, it could be served upon the attorney of record, but not upon a depot agent. The second case relates to a notice in a pending proceeding, viz., a notice to take depositions. Under the Code it is contemplated that notice shall be given to some one connected with the litigation, and not to any agent of a railroad corporation who might be found in any part of the state. As the notice in question is practically an initiatory step in the bringing of an action, its object will be well subserved if such notice is given in the manner as is necessary for the service of process in the institution of an action. State v. O'Connor, 78 Wis. 282, 47 N. W. 433. In the last Legislature the statute fixing the liability of railroads in such cases was amended in several particulars, and, among them, as to service of notice as well as proof of service. It provides that service may be made upon the ticket agent as well as other named representatives of railroad companies. Laws 1905, p. 566, c. 341.

It is next contended that under the facts of the case, the danger of working in the ditch was obvious to Burgess and that he assumed the risk of the employment. In this connection it is argued that he knew of the instability of the soil in which he was digging; that it had already caved in places so that it was necessary to brace

and shore up the banks; that several inches of water had stood in the ditch and softened the banks; and that the crack in the ground indicating the danger of a cave-in was near the ditch and within his view. On the other hand, there is testimony that he was inexperienced, the injury having occurred on the second day of his employment; that he was told by the foreman, who had the bracing of the banks in charge, that it was all right; that it would not cave any more; that he saw no crack in the ground; that the subforeman did see the crack, but did not warn Burgess of its existence or of the danger; that when the subforeman's attention was called to the crack by another workman he responded that he was there to keep the workmen from being hurt; that, when Burgess was told to go to work and that the bank would not cave, he relied upon the judgment of the foreman; that he did not hear the conversation about the crack and did not see it; and that while down in the ditch it was not easy to see it. In view of the testimony as to his inexperience, his lack of knowledge of the crack in the ground, and his reliance upon the assurance of those in charge of the work that it was safe, the question whether he assumed the risk was fairly one for the jury. There is no question but that he assumed the ordinary and obvious dangers of the employment, but the unusual dangers of which the foreman had knowledge and of which he had not, were not assumed. When those in control of the work discovered the crack in the ground and the peril to Burgess, who was in the ditch, it was their duty to warn him of the danger and take some precautions for his safety. This duty was recognized by the subforeman when he informed one of the workmen that he would look out for their safety. The plaintiff in error relies upon *Walker v. Scott*, 67 Kan. 814, 64 Pac. 615, as authority for reversal, but that case is easily distinguish-

able from the present one. There the servant was fully informed as to the danger of the employment and place and had expressed a judgment and belief that a cave-in would occur. It appears that he had as great, if not greater, opportunity to know the conditions as the boss under whom he was working. Here the servant knew nothing of the crack and of the unusual danger, while the foreman did know, and notwithstanding this knowledge directed him to go into the ditch and proceed with the work.

Complaint is made of a part of the second instruction given by the court that "the burden is on the defendant to prove by preponderance of the evidence the material affirmative allegations of its answer, which are, in substance, that if plaintiff was injured his negligence contributed thereto, and that his injuries, if any, were the result of the ordinary dangers incident to or attendant upon his employment." It is argued that this quotation is similar to an instruction which was condemned in *Railway Co. v. Merrill*, 61 Kan. 671, 60 Pac. 819. That instruction was held to be faulty because it contained the implication that the testimony in behalf of Merrill showing him to be guilty of contributory negligence could not be considered, and that the contributory negligence of the plaintiff could only be established by the testimony of the railroad company. The one complained of here contains no such implication. It relates to the burden of proof, and, when the whole of the charge is taken together, it is made clear that the jury were instructed to consider any and all evidence that was submitted to it on the subject of contributory negligence. There are objections to other instructions, but they are not material, and we find nothing substantial in the objections made to the admission of testimony.

The judgment will therefore be affirmed. All the Justices concurring.

148 Cal. 564

PEOPLE v. LAMAR. (Cr. 1,218.)

(Supreme Court of California. Jan. 29, 1906.)

1. HOMICIDE—EVIDENCE—CHARACTER OF DECEASED—FOUNDATION.

Where, in a prosecution for homicide, it was proved that defendant and deceased had been well acquainted with each other for several years, that they lived in a small town and both frequented the same places, and that defendant, on the night of the homicide, knew that deceased had been drinking freely, a sufficient foundation was laid for the introduction of evidence of deceased's reputation for quarrelsomeness under such conditions.

2. WITNESSES—CROSS-EXAMINATION—CHARACTER OF DECEASED.

Where, in a prosecution for homicide, a witness testified on cross-examination by defendant, that deceased's general reputation for peace and quiet in the community where he lived was good, defendant was not thereby concluded from proving, on further cross-examination, if possible, that such reputation was not the same under all circumstances, and that deceased was violent and dangerous when intoxicated.

3. HOMICIDE—SELF-DEFENSE—EVIDENCE—CHARACTER OF DECEASED.

Where, in a prosecution for homicide, there was evidence to support defendant's claim that he acted in self-defense and the circumstances of the fatal encounter were equivocal, defendant was entitled to prove deceased's reputation as a quarrelsome and dangerous man when intoxicated, as he was on the occasion of his death, of which reputation defendant had knowledge.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 391-397.]

4. CRIMINAL LAW—EVIDENCE—OBJECTIONS—FOUNDATION.

An objection to an offer of evidence in a criminal case, because no proper foundation had been laid, without pointing out wherein the foundation was insufficient, was too general.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1636.]

In Bank. Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Charles H. Lamar was convicted of manslaughter, and he appeals. Reversed.

Smith & Allen, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Deputy Atty. Gen., for the People.

LORIGAN, J. The justices of the District Court of Appeal for the Second District, before whom this appeal was originally pending, being unable to agree on a judgment therein, the matter has been transferred to this court for disposition. The defendant was prosecuted for murder, convicted of manslaughter, and sentenced to imprisonment in the state prison for a term of 10 years. Upon the trial the killing by defendant was admitted, and he sought to justify it on the ground that it was done in necessary self-defense. Upon this appeal defendant presents several grounds for a reversal, only one of which, we think, requires discussion, and in order that this point may be clearly understood it will be necessary to give a general outline of the evidence in the case as it stood when it is claimed the

trial court committed error in rejecting testimony offered on behalf of defendant.

The defendant and the deceased, Tom Delaney, were both young men residing at Mojave, Kern county. Delaney was a bartender in one of the saloons of that town, and the defendant had occasionally tended bar in the same locality, though not so employed at the time of the homicide. They had been acquainted with each other for some time, and met frequently about the various saloons in Mojave, to which both were in the habit of resorting. For some two months prior to the homicide ill feeling had existed between them, springing from an altercation in the saloon where defendant was then employed, during which Delaney had fired a shot at him, for which defendant had had him arrested and prosecuted. The killing of Delaney occurred in a house of ill fame in the town of Mojave, a little after 3 o'clock in the morning of the 29th of January, 1904. It appears that both the defendant and deceased were familiar with this house and with its inmates. About 2 o'clock that morning defendant and Rose Givens, one of the inmates of the place, had retired to her room in the house for the night. Shortly before 3 o'clock Delaney, with several companions, visited the house. A little while after his arrival, Delaney left the room in which he and his companions and the mistress of the house were, for the declared purpose of calling some of the women from their rooms to join them in a drink. As to what subsequently occurred, the evidence is in radical conflict. Two of Delaney's companions, who followed him from the room, testified that when he went out into the hallway the first room he came to was that occupied by defendant and Rose Givens, and that he rapped on the door, called her by name, and said he wanted to see her. She declined to open the door or see him, saying she would see him in the morning. He insisted, however, on seeing her then—for what purpose he did not declare. After some parleying she at last consented to open the door, and immediately some one was heard to approach it from the inside and apparently endeavor to open it. At that moment Delaney, who had his hand on the knob, shook the door and it opened. As it did, shooting commenced from the inside and Delaney fell to the floor inside the room, just as the Givens woman rushed screaming past him into the hall. These witnesses testified that only three shots were fired, all by defendant in rapid succession; that there was no light in the room occupied by defendant and the woman, but a lantern in the hallway was lighted; that by it they could distinctly see Delaney as he stood at the door waiting for it to be opened, and that he had no weapon in his hand; that immediately after the shooting defendant hurried from the house, pistol in hand, attired only in his pantaloons; that they went into

the room where Delaney had fallen and found him breathing, but apparently unconscious, and he soon expired. He had received three wounds, a fatal one through the heart. They testified that no weapon was found on Delaney's person or in the room where he had fallen. This was the testimony on the part of the prosecution as to the immediate circumstances attending the killing.

The testimony on the part of the defense, as to what occurred at the time of the homicide, consisted of the testimony of Rose Givens and the defendant. The woman testified that when Delaney came to the door and knocked he called out that he wanted to come in—that he wanted to see her; that she told him he could not do so as she had company, but that she would see him in the morning; that he insisted on coming in and seeing her then, and upon her still refusing to open the door or see him he declared that if she did not he would kick the door in; that when he declared this intention she answered that she would come out into the hall and talk to him, and got out of bed for that purpose; that as she approached the door and had almost reached it, Delaney kicked it open with such force that it struck her in the head, staggering her back into the room, that when she recovered herself she ran out of the room past Delaney, who was standing in the hallway opposite the doorway with two others, and into the street; that when she reached the street, some 40 feet from the building, she heard the shooting.

The testimony of the defendant, as to what occurred up to the time Rose Givens ran out of the room, coincided with her testimony as to those occurrences. He testified, further, that, when Delaney came to the door and asked that it be opened, he recognized his voice, got out of bed and put on his pants, and took a position at the foot of the bed, where he was standing with his pistol in hand when Delaney kicked open the door; that after Rose Givens rushed out, Delaney walked into the room towards the defendant, saying, "You son of a bitch, what are you going to do now?" that as he spoke, Delaney drew his pistol, and each fired almost simultaneously; that as they fired the door swung around so as to leave them in the dark; that they then grappled with each other, and during the struggle two or three more shots were fired, one by Delaney; that in the struggle they fell to the floor, and while down the defendant pressed his pistol against Delaney's body and fired again; that upon this shot, as Delaney immediately ceased struggling, defendant arose from the floor and left the house. He had received no injury in the contest.

In addition to this evidence on both sides as to the circumstances immediately attending the killing of deceased, there was evidence in the case of other facts; that defendant had on several occasions, even on the

evening of the homicide, declared his intention of killing Delaney; and there was evidence from which the jury might also have found that Delaney on the same evening had expressed a similar intention toward defendant. There was also evidence from which the jury might have reasonably inferred that Delaney knew, or had strong reasons to believe, that the defendant and Rose Givens were together in her room when he approached it. As to the possession by Delaney of a pistol when he came to the house, there was evidence showing that he had one at 11 o'clock that night, and nothing to show that he had laid it aside before his appearance at the door of the room where he lost his life, and there was evidence in the case to the effect that one of the men who had accompanied Delaney to the scene of the tragedy, and who testified on the trial, had stated, upon the day of the shooting, that when he entered the room where the killing took place, immediately after the defendant left, he found Delaney's pistol on the floor of the room and had secreted it. It further appeared from the evidence that Delaney had spent the night, from 8 o'clock in the evening until he went to this house of ill fame, at about 3 o'clock in the morning, visiting various saloons in different parts of the town of Mojave and drinking therein, and that defendant, who had spent the earlier part of the night on which the homicide occurred in a saloon and dance hall in company with Rose Givens and others of her class, into which saloon Delaney came during the night, knew that he was drinking. As indicating the extent to which Delaney was drinking, one of his companions, who was with him all that night up to the time of his death, testified: "We did not visit any place except saloons that evening or night. We both had money and treated quite often. We spent the entire evening going about from saloon to saloon, having frequent drinks and a general good time. It was rather a convivial evening." It was also shown that on the night of the homicide, and some three hours prior to it, defendant was several times warned against remaining in the presence of, or meeting, Delaney, as he was drinking; that, if he did, trouble would probably ensue, a warning which defendant heeded by immediately leaving the saloon and dance hall where Delaney was drinking, and repairing with Rose Givens to her room.

The foregoing constitutes all the evidence adduced at the time (and was practically all the evidence in the case) when the defendant sought to introduce the testimony which the court struck out or refused to admit, and the rulings concerning which present the principle assignments of error that we shall now consider. That testimony was with reference to the general reputation of the deceased in Mojave for peace and quiet. One J. H. Underhill, having qualified himself to speak on the subject, on inquiry as to the reputa-

tion of the deceased for those traits, stated that it was good. He was then asked if this was true of deceased under all circumstances, and replied that it was not. He was asked to explain what he meant by that answer, but under objection of the prosecution, sustained by the court, he was not permitted to do so, and the answer of the witness that under all circumstances his reputation for these traits was not good, was, on motion, and on the ground that the answer was irrelevant, immaterial, and incompetent, stricken out; the defendant excepting to the ruling. In granting the motion the reason assigned by the court for granting it is contained in its declaration made at the time. The court said: "I do not think you had a right to an answer to the question at all after he answered that his reputation was good. I think you should stop right there. The motion is granted. Let it be stricken out." Upon further discussion between the court and counsel for defendant, the court held that the answer of the witness that the reputation of deceased for peace and quiet in Mojave was good utterly precluded defendant from asking the witness any further questions in the line that he was pursuing on the subject of that reputation. Notwithstanding the view expressed by the court, counsel for defendant further asked the witness (indicating by the inquiry the circumstances under which he was endeavoring to show that the reputation of deceased for peace and quiet was not good) whether he knew the reputation of deceased in the town of Mojave for peace and quiet when he was drunk; but on objection of the prosecution that no proper foundation had been laid for this inquiry, and on the further ground that the question was irrelevant, immaterial, and incompetent, the objection was sustained. The error complained of is predicated on these rulings.

While it is insisted by respondent that the defendant, under the circumstances of the case, had no right at all to prove the reputation of deceased for peace and quiet, it is further contended that, if he had, no proper foundation was laid to warrant its introduction, and that the ruling of the court should be sustained here on that ground. It is quite clear, however, that the ruling of the court striking out the answer of the witness relative to the circumstances under which the reputation of deceased for the traits involved was not good, was based on no such ground, as none such was urged by the people. It was stricken out solely upon the ground that the court was of the opinion that the general answer of the witness that the reputation of deceased was good absolutely precluded defendant from further particular inquiry upon the subject. It is quite evident, too, that the subsequent ruling was prompted by this view of the court as to the law. Waiving for a moment consideration of the question whether the evidence sought to be introduced was at all material or competent in the case, and

assuming that it would be our duty to sustain the general ruling of the court rejecting the same, if the particular objection that no proper foundation for its admission was well taken, even though the ruling of the court was evidently not based on that ground, we are, nevertheless, satisfied from the evidence that, if the ruling could be considered as predicated upon that objection, it cannot be sustained. It will be observed that the objection does not specify any particular foundation which defendant failed to lay; but it is now argued, dealing more directly with the last question asked the witness and sustained, that it was essential, before the defendant could be allowed to show what the reputation of deceased for peace and quiet was when he was drunk, that there should be evidence before the jury that the deceased was in fact drunk on the night of the homicide, that defendant knew it, and knew, further, what the reputation of deceased for those traits was when in that condition. But this particular objection, we think, has no force as, in our opinion, there was sufficient evidence before the jury not only tending to prove that defendant knew the reputation of deceased, but further tending to prove the other facts which, it is claimed by respondent, should have been proven in order to establish a proper foundation upon which to permit evidence to be introduced of the reputation of deceased for the traits involved. The obvious purpose of the testimony which defendant was endeavoring to elicit at this stage of the case was to prove that the deceased had the reputation of being a quarrelsome, violent, and dangerous man when intoxicated.

From the uncontradicted evidence in the case that deceased had spent at least seven hours of the night immediately preceding his death in visiting the various saloons in Mojave and frequently drinking therein, the jury had a right to infer, as a matter of common knowledge, that the deceased was intoxicated to such an extent as to have lost the normal control of his physical and mental faculties, and if, when intoxicated he was, as defendant was endeavoring to prove, a violent, quarrelsome, and dangerous man, that he was, when he entered the house of ill fame referred to, in such condition from liquor that these traits predominated him. As to defendant's knowledge that deceased was intoxicated, and that when in that condition he was a dangerous man, the evidence of the defendant himself, and the warnings given him of the danger of meeting Delaney that night because he was drinking, tend to support both facts. As to the knowledge of defendant of the reputation of deceased, it is further to be observed that the evidence tends to show defendant was well acquainted with deceased, had lived in the little town of Mojave several years, was familiar with the places—the saloons—which they both frequented, and generally with the persons who

owned or resorted to them. It would be in such places, and among such people, that the reputation of the deceased would be best known, and if the deceased had the general reputation which defendant sought to prove, it would naturally be matter of public notoriety there. And, under the circumstances, it must be presumed that defendant had knowledge of it. *Trabune v. Comm.* (Ky.) 17 S. W. 186; *Harrison v. Comm.*, 79 Va. 380, 52 Am. Rep. 634; *Reynolds v. People*, 17 Abb. Prac. (N. Y.) 417; *Horigan & Thompson, Cases of Self-Defense*, p. 696. From these considerations we are satisfied that when the excluded testimony was offered there was sufficient evidence tending to establish a foundation for its admission. And, if it were admissible, it was certainly no ground for striking out the first answer and sustaining an objection to the second, that the witness had preliminarily stated that the general reputation for peace and quiet of the deceased was good. The defendant was not concluded by that answer from showing, if he could, that this favorable reputation was not the same under all circumstances and conditions. A man may possess different characters, or different reputations, adapted to different localities, or different conditions of mind, and as applied to the inquiry at hand, the deceased may have had one reputation for peace and quiet when sober, and quite another for these same traits when drunk. The existence of these different reputations under different conditions of mind was what the defendant sought to show—the reputation of deceased for violence when intoxicated, as contradistinguished from his reputation for peace when sober—and the reason assigned by the court afforded no warrant of itself for rejecting it.

Neither can we accord with the further contention of respondent that upon no principle of law was the evidence admissible. On the contrary, under the circumstances of the case as presented to the jury, we think that the offer to show that the general reputation of deceased was that of a quarrelsome, violent, dangerous man when intoxicated was both proper and pertinent. We say, under the circumstances of the case, because it is undoubtedly true that, as an abstract proposition, the good or bad character of the deceased cannot be taken into consideration as an element influencing the jury in determining the guilt of a defendant. All men, independent of their character or reputation, are under the equal protection of the law, and it in no degree excuses or palliates the taking of human life that the person slain was of bad character or reputation; the offense is as great whether the life maliciously taken be that of a man of bad or of good character. But, while the general rule is that evidence of the bad reputation of deceased for peace and quiet cannot be given in evidence, still this rule has its exceptions applicable to cases where the facts and cir-

cumstances surrounding them are peculiar. Such an exception applies in cases of homicide where the plea of self-defense is interposed, and the evidence before the jury leaves it in doubt whether the deceased was the aggressor, or where the circumstances attending the homicide render it doubtful or equivocal whether the defendant was justified in believing himself in imminent danger at the hands of deceased. The conflicting evidence in the case at bar brought the case within the exception stated, as presenting a situation where the sufficiency of the plea of self-defense, made by the defendant, in the essential elements necessary to constitute it, was enveloped in doubt.

It was early laid down as the rule in this state, that under such circumstances, evidence of the reputation of the deceased for violence is admissible. In *People v. Murray*, 10 Cal. 310, this court says: "The other point is, the exclusion of evidence of the character of the deceased for turbulence, recklessness, and violence. The rule is well settled that the reputation of the deceased cannot be given in evidence, unless, at the least, the circumstances of the case raise a doubt in regard to the question whether the prisoner acted in self-defense. It is no excuse for a murder that the person murdered was a bad man; but it has been held that the reputation of the deceased may sometimes be given in proof to show that the defendant was justified in believing himself in danger, when the circumstances of the contest are equivocal." The case of *People v. Anderson*, 39 Cal. 704, also confirms this doctrine. These cases lay down the broad rule that in all cases of homicide, where the other evidence introduced raises a doubt whether defendant acted in self-defense, evidence of the reputation of the deceased is admissible, and this rule applies as to every essential issue in the case upon which that plea is founded. It is always a vital issue before the jury, when such a plea is interposed, as to who was the aggressor in the contest. In the case at bar this issue, under the evidence, was involved in doubt, and any fact which would, under such circumstances, serve to illustrate who was the assailant in the encounter, where the death of one of the parties ensued, would be admissible. In such equivocal condition of the evidence the reputation of the deceased as a violent, turbulent, dangerous man would be a legitimate subject of inquiry, illustrating the animus with which he encountered the defendant. It would be a circumstance immediately connected with the quarrel tending to illustrate the true intent or motive which characterized the conduct of deceased therein, to be taken into consideration by the jury, in connection with the other facts and circumstances in the case, in determining who was the aggressor in the fatal contest.

It is the rule in this state that threats of hostile intention made by a deceased, whether communicated or uncommunicated, are

admissible evidence for the said purpose when the evidence is equivocal. *People v. Scoggins*, 37 Cal. 686; *People v. Travis*, 56 Cal. 251; *People v. Tamkin*, 62 Cal. 408; *People v. Thomson*, 92 Cal. 506, 28 Pac. 589. The philosophy which supports this rule as to the admissibility of evidence of such threats, where it is otherwise in doubt from the evidence who was the assailant, is that it is more probable that one who has made threats of hostile intention towards another would, when opportunity permits, attempt to carry such threats into execution and become the assailant, than would one who has made no such threats, or declared no such intention. So, too, with reference to the admissibility of evidence of the reputation of deceased as being a violent, turbulent, dangerous man, such proof, when the evidence as to who was the assailant is in doubt, for a similar philosophic reason should be permitted; it being more probable that one bearing such a reputation would precipitate a deadly contest than would one having no such reputation. Hence we think the rule should be that whenever the circumstances of a case permit of the admission of evidence of threats made by the deceased against the defendant, either communicated or uncommunicated, evidence of the reputation of the deceased as being a violent, quarrelsome, dangerous man, either known or unknown to the defendant, is equally admissible, the consideration of the jury to be limited by proper instructions of the court, where the reputation is unknown to defendant, to the same extent that the law limits the consideration by them of uncommunicated threats—to the question solely as to who was the assailant in the fatal encounter. The rule as to such limitation when applied to uncommunicated threats is declared in *People v. Scoggins*, 37 Cal. 686.

Our consideration has thus far been addressed to the admissibility of the offered testimony as bearing upon the question of who was the aggressor in the contest, and which the evidence left in doubt. The evidence was, however, not only equivocal on this point, but as to all the other circumstances immediately attending the fatal encounter. In such state of the evidence there can be no doubt, under the authorities heretofore cited (*People v. Murray*, supra; *People v. Anderson*, supra; and *People v. Tamkin*, supra), that evidence of the reputation of deceased, known to defendant at the time of the contest, was admissible as bearing on the question whether defendant was justified in believing himself in imminent danger from deceased; whether his knowledge of the reputation of deceased, taken into consideration with all the other circumstances in the case, was sufficient to excite the fears of defendant, as a reasonable man, that deceased intended to inflict great bodily harm upon him, or to slay him. The general rule on this point is already clearly stated in the fore-

going authorities, and any extended discussion of it is unnecessary. The purpose of allowing such evidence when the plea is self-defense is to put the jury in possession, as nearly as possible, of all the facts attending the homicide, and upon a knowledge or observation of which the defendant acted. It is familiar law that where a defendant claims to have acted in self-defense, a danger which is apparently imminent, and which a reasonable man, situated as the defendant was, knowing what he knew and seeing what he saw, would deem so, is to be considered, for the purposes of supporting such plea, as actually and really imminent. In this view of the law it is quite evident that, where a defendant has knowledge of the reputation of his adversary as a violent and dangerous man, the apparent peril in which he is placed must necessarily appear to him more imminent than if he possessed no such knowledge. Hence, when there is evidence in a case tending to support the claim of a defendant that he acted upon an honest apprehension of imminent peril from some overt act on the part of the deceased, and the circumstances of the fatal contest are equivocal, the reputation of the deceased as a violent and dangerous man is proper and competent evidence to present to the jury for consideration in determining whether defendant acted upon a reasonable apprehension that he was in imminent peril. It is obvious that under such circumstances, as the known reputation of the deceased for the traits involved would necessarily operate upon the mind of the defendant, such reputation is a matter of proper and legitimate consideration for the jury. In the case at bar we are satisfied that in the doubtful state of the evidence as it stood when the testimony to prove the reputation of the deceased as a violent, quarrelsome, and dangerous man when intoxicated was offered, the testimony, for the reasons we have indicated, should have been permitted to go before the jury.

Some other points are made for a reversal. It is claimed that no sufficient preliminary proof was made to warrant the admission in evidence of the deposition of a witness taken at the preliminary examination in the justice's court, and who was absent from the state at the time of the trial. The objection of defendant was that no proper foundation was laid. This objection was too general. It should have pointed out wherein there was a failure to lay a proper foundation. There are several matters necessary to be proven to warrant the admission in evidence of a deposition taken at a preliminary examination, and counsel should have specified the particular deficiency in the proof which he claimed existed. As the particular proof, which for the first time it is urged here that the prosecution should have made, can be readily supplied on a new trial, it is unnecessary to pursue the matter further. None

of the other points urged by defendant have any merit.

The order denying the motion of defendant for a new trial and the judgment are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.

148 Cal. 555

WEBB et al. v. CARLON et al. (Sac. 1,208.)
(Supreme Court of California. Jan. 27, 1906.)

MINES AND MINERALS—CLAIMS—LOCATION—NOTICE—DATE.

Where the location of a mining claim in controversy by defendant's grantor was in fact made before plaintiff's entry on the land, the location notice being there visible and the boundaries of the claim properly marked, defendants were not bound by an erroneous date in the location notice; Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], providing that all records of mining claims shall contain the name or names of the locators, the date of the location, etc., and the date recited in the location being only prima facie evidence of the actual date of the location.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 37.]

Department 2. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by T. W. Webb and another against Sylvester Carlon, as administrator, and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

F. W. Street, for appellants. J. B. Curtin and J. F. Rooney, for respondents.

HENSHAW, J. Plaintiffs' action was to quiet their title to a piece of mining ground to which defendants claim the possessory right by prior location of one Cleveland. The court found that Cleveland, in 1899, being duly qualified to locate and hold mineral lands, made a discovery of a lode of quartz carrying gold in sufficient quantities to justify exploration, and duly located his claim, and then, in accordance and in conformity with the mining rules and regulations of Tuolumne county regarding recordation, placed the fee for such recordation (\$5 in gold coin) with a copy of his notice, in an envelope, addressed to mining recorder of Tuolumne mining district, in Sonora, Tuolumne county, Cal., with postage prepaid thereon, and deposited the envelope in the United States post office at Groveland. This letter never reached the mining recorder, and consequently no recordation was made of his claim. Cleveland did not discover this fact until shortly before the 20th day of October, 1900. He then went upon the claim, relocated it in all respects as required by the laws of the United States and the mining rules and regulations of Tuolumne county, and caused recordation to be made, as the rules required, within 30 days thereafter. The only irregularity in these proceedings is, as the court

finds, that while the location was actually made upon October 20th, the notice of the location was dated October 23d. The court upon this says that Cleveland dated the notice of location as of October 23d, for the reason that one Conwell, whose name is signed to the notice of location as a witness thereof, had previously promised and agreed with Cleveland to be on the land on October 23d and witness the location. Plaintiffs Webb and Curley entered upon the land and made their location upon October 22d, and their location likewise complied with the statutes of the United States and the local mining regulations. The court, upon these facts, found that the Cleveland location of October 20th, being prior in time, was better in right, and rendered judgment accordingly. The single question presented upon this appeal is whether, as appellant contends, Cleveland is bound by the date which he gave in his notice and is estopped from denying that October 23d was the true date of his relocation. If he is, then plaintiffs' location of October 22d takes precedence.

Section 2324 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1426] provides that all records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, etc. It is upon this language that the appellant insists that the date of location as fixed by the locator upon his notice must absolutely govern and control. Such a rule, however, would deprive an innocent party of any relief for fraud, ignorance, or mistake. The truth is that these rights are defined by the fact of location, of which the written date of the notice, at the most, is but evidence. The error in the notice of location, however caused, must give way to the proved fact. The Land Department of the United States has always been liberal in its rulings in these matters, and properly so, since it is not to be supposed that pioneers and settlers upon the government lands, and mineral prospectors following their vocation in mountain wilds, are men either versed in the intricacies of the law or with experience and knowledge sufficient to warrant their being charged with a rigid and technical compliance with all its requirements. Indeed, they may often have lost track of the date, and, as is said by Commissioner McFarland (1 Land Dec. Dep. Int. 453): "The date of settlement is not only a question of fact, but one of mixed law and fact. Many settlers, through ignorance of what constitutes valid settlement, allege a date anterior or subsequent to the actual date, such allegation being on their part to a large extent a conclusion of law, and the uniform practice of this office has been in contested and ex parte cases, to find the date of settlement from the evidence in the case, and that date so found must control the adjudication of their right without regard to the alleged date." In Zinkand v. Brown, 3 Land Dec. Dep. Int. 380, the Secretary of the In-

terior lays down the same rule. In *Campbell v. Rankin*, 99 U. S. 264, 25 L. Ed. 435, the Supreme Court, speaking of the rules and customs of a mining community, says: "Such rules and customs no more determine who was the first locator or where he located, than any other competent evidence of that fact." The location of Cleveland having been made before plaintiffs entered upon the land, and the notice being there visible and the boundaries marked, they could not have been misled by the erroneous date. They must have known that a location had been made prior to their own attempted one, and they certainly cannot be heard to say that they were, in any way, injured by Cleveland's error.

The judgment appealed from is therefore affirmed.

We concur: **McFARLAND, J.; LORIGAN, J.**

148 Cal. 548

SCHOONOVER v. BIRNBAUM.
(L. A. 1,428.)

(Supreme Court of California. Jan. 28, 1906.)

1. COURTS—RULES OF DECISION—STARE DECISIS.

Decisions of the Supreme Court construing the homestead statutes, which have stood unquestioned and without legislative change for 10 years, and on the faith of which investments and contracts have presumably been made, will be sustained under the rule of stare decisis.

2. HOMESTEAD—LAND SUBJECT TO CLAIM—CO-TENANCY.

A homestead may not be selected or created on land to which the claimant has no title otherwise than as tenant in common or joint tenant.

3. PLEADING—CONCLUSIONS OF LAW.

An allegation of a complaint that at the time of his qualification as trustee in bankruptcy of the estate of defendant plaintiff succeeded to and became the owner of a half interest in land previously owned by defendant, and has ever since been, and is now, the owner thereof, is a mere conclusion of law.

4. SAME—ANSWER—DENIAL OF LEGAL CONCLUSION.

A denial in the answer of a conclusion of law stated in the complaint raises no issue of fact.

5. SAME—MOTIONS—JUDGMENT ON PLEADINGS.

Where the pleadings raised no material issue of fact, a motion for judgment on the pleadings is properly granted.

In Bank. Appeal from Superior Court, Santa Barbara County; W. S. Day, Judge.

Action by Ralph W. Schoonover, trustee of the estate of Mary E. Birnbaum, bankrupt, against Mary E. Birnbaum. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

B. F. Thomas, for appellant. Richards & Carrier, for respondent.

SHAW, J. The defendant was the owner of an undivided one-half interest in a lot in Santa Barbara, which in the year 1897 she selected as a homestead by declaration to

that effect duly executed and recorded. Subsequently she was adjudged a bankrupt under the provisions of the bankruptcy law of the United States, and the plaintiff was duly appointed as trustee in bankruptcy of her estate. The suit was instituted by the plaintiff to declare the so-called homestead invalid, and is based solely upon the ground that under the laws of this state a valid homestead cannot be selected or created upon land to which the claimant has no title other than as a tenant in common or joint tenant. The court gave judgment in favor of the plaintiff, and the defendant appeals.

In two decisions, *In re Carriger*, 107 Cal. 618, 40 Pac. 1032, and *Rosenthal v. Merced Bank*, 110 Cal. 198, 42 Pac. 640, this court, in department, held that lands held by tenancy in common or joint tenancy could not be selected or claimed as a homestead by the owner, or by his or her spouse, in his lifetime, under the provisions of the Civil Code relating to homesteads, nor set off to the widow or surviving husband as a homestead by the court sitting in probate, under the provisions of the Code of Civil Procedure. We are now earnestly requested by the appellant to overrule these decisions. The court in these decisions followed the precedents established on the subject under the law existing prior to the adoption of the Codes, consisting of the original case of *Wolf v. Fleischacker*, 5 Cal. 244, 63 Am. Dec. 121, and the cases of *Giblin v. Jordan*, 6 Cal. 416, *Seaton v. Son*, 32 Cal. 481, *Cameto v. Dupuy*, 47 Cal. 79, *First Nat. Bank v. De La Guerra*, 61 Cal. 109, and *Fitzgerald v. Fernandez*, 71 Cal. 504, 12 Pac. 562, following it. The argument of the appellant is that the original case was made upon a misapprehension of the nature of the homestead claim and a belief that the setting apart of a homestead by the sheriff, which the law at that time required, would in some way interfere with the rights of the co-tenant or deprive him thereof, and hence that the law should not be construed to include such estates; that by subsequent decisions it has been established that the homestead interest, whatever its nature may be, does not affect the rights, interest, or estate of persons holding adversely, or collaterally, but only serves to protect the title or interest of the claimant, of whatever nature, in the land, against the demands of creditors, and to affect the rights of heirs and others as successors of the homestead claimant; that there is nothing in the language of the present provisions of the Code which makes the nature or quantity of the estate or title of the claimant in or to the land claimed as a homestead a test or limit of the right to make the selection and claim the exemption following therefrom; and, therefore, that there is no foundation in reason for the doctrine that the homestead cannot, under the Code, be selected of lands held in co-tenancy.

The cases of *In re Carriger* and *Rosenthal*

v. Merced Bank, supra, were decided in 1895. In the former a petition for rehearing was filed and was denied by the court in bank, the Chief Justice dissenting. It must be assumed that these decisions have been, since their rendition, taken as the law of the state upon the subject, and that persons contracting with respect to lands held in co-tenancy, affected or claimed to be affected by such homestead declarations, have acted upon that belief and made investments and contracts accordingly. In the 10 years that have intervened it may be presumed that many such investments and contracts have been made. The rule of stare decisis is consequently applicable. Upon this subject the following language of the opinion in *Ploche v. Paul*, 22 Cal. 110, a case not as strong in many respects as the case at bar, is peculiarly applicable. "Under such circumstances, none but the strongest reasons would justify the court in taking such action as is asked by the appellant. Fickleness in courts is always to be deprecated, but especially in matters relating to titles to real estate. Stability is required in such cases above all others. One of the greatest evils the people of this state have suffered has been the uncertainty of its land titles, and the greater the precision and certainty of the rules of law upon the subject of titles to real estate, the more security will all classes feel in their transactions and dealings in land. Therefore, no well considered decision ought to be overruled unless it clearly violates some well-established rule of law, and great evils are likely to flow from suffering it to stand as a rule of property. * * * In this case the Legislature has had abundant opportunities, had it so desired, or had they deemed it for the interest of the people, to have enacted a law upon the subject, clear in its terms." The decision which was thus allowed to stand was in regard to the construction of a statute. See, also, *Vassault v. Austin*, 36 Cal. 601; *Smith v. McDonald*, 42 Cal. 487; *In re Dorris*, 93 Cal. 612, 20 Pac. 244.

The decisions under the present and former laws holding that a homestead cannot be created out of lands held in co-tenancy, violate no well-established rule of law. They merely construe statutory provisions conferring upon householders rights of exemption not otherwise enjoyed. Five sessions of the Legislature have been held since the decisions were promulgated. If the legislative department had not been satisfied with the judicial interpretation as to the extent of the right conferred, there has been ample opportunity to amend the statute so as to give in unmistakable language the right withheld by the decisions. In view of these circumstances, and without expressing any opinion concerning the soundness or unsoundness of the decisions in question, we are of the opinion that they should be adhered to, leaving it to the Legislature to extend the right of the homestead to co-tenants if it shall see fit.

The statement in the complaint that at the time of his qualification as trustee in bankruptcy of the estate of the defendant the plaintiff succeeded to and became the owner of the undivided one-half interest in the land in question previously owned by the defendant, and has ever since been and is now the owner thereof, is, in the form in which it is pleaded, a mere conclusion of law arising from the facts previously stated. The denial of this conclusion in the answer raised no issue of fact, and, there being no other material issue of fact made by the answer, the motion for judgment on the pleading was properly granted.

The judgment is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; MCFARLAND, J.; LORIGAN, J.; HENSHAW, J.

148 Cal. 539

McGUE v. ROMMEL et al. (L. A. 1,484.)

(Supreme Court of California. Jan. 28, 1906.
Rehearing Denied Feb. 23, 1906.)

1. FRANCHISES—CONSTRUCTION—TRANSFER.

A concession by the republic of Mexico, conferring upon the concessionary the right to construct a railroad "for his account or that of the company or companies which he is at present organizing," and providing that the "contract may not be transferred without previous authority" of the government, prohibits the concessionary from transferring the contract as a whole, but does not preclude him from transferring interests in the concession for the purpose of organizing the company referred to therein.

2. SAME—PROHIBITED TRANSFER.

Although a government concession provided that the same might not be transferred without previous authority of the government, the concessionary could sell an undivided part interest in the concession, subject to the contingency of the government's refusing to recognize the right of the vendee, and such sale would convey a valuable equitable interest, such as to provide a consideration for a promise to pay money as the price thereof.

3. CORPORATIONS—TRANSFER OF STOCK—ABSENCE OF CERTIFICATE—EFFECT.

An interest in the capital stock of a corporation constitutes a property right which may be transferred, and affords a consideration for a contract of sale, although no certificates have been issued.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 463.]

4. SALES—PERFORMANCE BY SELLER—TENDER.

Where a contract of sale binds the seller to transfer his "right, title, and interest" in a corporation which has issued no certificate of stock and in government concessions, he is required only to tender a deed or assignment transferring and conveying all his right, title, and interest in the property in question, and he need not tender a perfect legal title to some specific undivided part of the concession for certificates of stock in the corporation.

5. MORTGAGES—ACTION ON NOTES SECURED.

Code Civ. Proc. § 726, providing that there may be but one action for the recovery of a debt secured by mortgage, and that that must be an action of foreclosure, refers solely to debts secured by mortgages on property situated within the state, and has no application to mortgages of property situated in another state

or country, and in such cases a personal action on the note may be maintained, notwithstanding the mortgage.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 568.]

6. APPEAL—REVIEW OF FACTS—CONCLUSIVE-NESS OF VERDICT.

A verdict supported by substantial evidence is conclusive on appeal.

7. BILLS AND NOTES—ACTIONS—PLEADING.

A complaint on a note given in consideration of a sale need not allege the agreement of sale and a compliance with its conditions.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 1477.]

8. SAME—FAILURE OF CONSIDERATION—EVIDENCE.

In an action on a note given in consideration of a transfer of an interest in government concessions, evidence of a forfeiture of the concessions by the government long after the date fixed in the contract of sale for the transfer, and long after a tender of conveyance by plaintiff to defendants, did not show a partial failure of consideration.

9. CONTRACTS—RESCISSION—ESSENTIALS.

Where a defense is based on a rescission in pais already accomplished, and is not pleaded in the form of an equitable counterclaim asking the court to grant the affirmative relief of adjudging a rescission, as authorized by Civ. Code, §§ 3406-3408, the rules of equity applicable to such an action are without application, but it must be shown, as provided by Civ. Code, § 1691, that the rescission was made promptly upon discovering the facts authorizing such action, and that some kind of notice of the rescission was conveyed to plaintiff.

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by A. L. McGue against John Rommel and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

E. C. Bower, for appellants. Stephens & Stephens, for respondent.

SHAW, J. The defendants appeal from a judgment in favor of the plaintiff, and from an order denying their motion for a new trial.

The action was upon a promissory note for \$2,500 executed by the defendants to the plaintiff on March 10, 1900, and due four months after date, the complaint being in the usual form. The answer averred as affirmative defenses that the note was without consideration; that it was secured by mortgage on real estate, which mortgage had not been foreclosed; that the note was executed under a mutual mistake of fact whereby a part of the property for which it was given was believed to be held by a good title, whereas in truth the title was worthless; and that the note was given for the purchase price of certain real and personal property upon a contract that a deed was to be executed upon payment of the note, and that plaintiff had not conveyed and delivered the property in accordance with the contract, or offered so to do. The evidence does not establish either of these defenses. The consideration of the note was the "right, title, and

interest" of McGue in the stock of an Arizona corporation known as the Mexican Coast Steamship Company, and in two concessions granted by the republic of Mexico to Alphonso B. Smith, one for the right to construct a railroad in Mexico, and the other an obligation of Mexico to sell a large body of the public lands of that republic. These grants of concessions were made in the latter part of the year 1898, and about the same time Smith in writing assigned or transferred to McGue a one-sixteenth interest therein and in the stock of said steamship company, and a like interest to each of the defendants. By the land concession the republic of Mexico agreed to sell to Smith, "or to the company he may organize," 195,000 hectares of the national lands, at a fixed price to be thereafter paid, and upon certain conditions to be thereafter performed by Smith, or the company he should organize, and it provided that upon a failure to perform the conditions the concession should lapse. The railroad concession was of similar character, and conferred upon Smith the right to construct the road on the conditions stated, "for his account, or that of the company or companies which he is at present organizing"; but it provided that the "contract may not be transferred without previous authority of the Mexican government," and that a lapse would be officially declared upon failure to perform the conditions.

The contention seems to be that the assignment from Smith to McGue was made without the previous authority or subsequent or concurrent consent of the Mexican government, and that it was consequently void, and that at the time of the agreement of sale from McGue to the defendants, which was made March 10, 1900, McGue had no interest, right, or title to the property he thereby agreed to sell. This claim is manifestly untenable. By the terms of the concessions there was implied authority given to Smith to transfer to other persons such interests in the concessions as should be necessary to enable him to form the "company" which it was contemplated he should organize for the purpose of performing the conditions precedent specified in the grant. The only prohibition of an assignment is that contained in the railroad concession which prohibited the transfer of the contract. This, we think, refers to a transfer of the contract as a whole, and not to such transfers of interests in the concessions as might be made for the purpose of organizing the contemplated company which Smith was then organizing in order that such company might build the road for him, or in his stead. And, whether this is the correct interpretation of the grant or not, there can be no doubt that Smith had the right to sell an undivided part interest in the concessions, subject to the contingency that the Mexican government might refuse to recognize the right of the vendee. Such transfer would convey a valuable equitable

interest, which would constitute property, sufficient to form the consideration of a promise to pay money as the price of a sale thereof. There was evidence to show that McGue had an interest in the capital stock of the steamship company, although it appears that no certificates therefor had ever been issued to him. Such an interest in corporation stock may be transferred and constitutes a right in property. This alone would be some consideration for the contract of sale, and would be sufficient to defeat the plea of total want of consideration. At the time the agreement of sale and note for the price were executed there had been no forfeiture of the concessions. It does not appear when the breach of the conditions took place. The forfeiture did not take place until the latter part of the year 1901, which was at least 18 months after the defendants bought the plaintiff's interest. It is fairly apparent from the evidence that the sale of the interests by Smith to the plaintiff and defendants was made for the purpose of forming the company or companies referred to in the concessions, and that these parties, with Smith and possibly others, constituted such companies. For some 18 months after the purchase of plaintiff's interest they had the right to proceed with the performance of the conditions prescribed in the concessions and by that means secure the properties thereby granted. There was no want of consideration.

The tender by the plaintiff to the defendants of a deed or assignment purporting to transfer and convey to the defendants "all the right, title, and interest" of the plaintiff in and to the property in question, was a sufficient compliance with the terms of the agreement of sale and entitled the plaintiff to payment of the note and to maintain this action upon nonpayment thereof. It was not necessary to plaintiff's performance of the conditions of the sale that he should have a perfect legal title to some specific undivided part of the concessions. The agreement bound him to transfer only such "right, title and interest" as he then had. An equitable title or right would comply with the agreement. He had such a title, and the instrument tendered was sufficient to transfer it to the defendants.

No tender of certificates of stock was necessary. The evidence showed that no certificates had ever been issued and, in the absence of evidence to the contrary, we must presume that the plaintiff had an interest in the stock as subscriber, or as assignee of Smith, who was a subscriber thereto. The burden was on the defendant to prove that plaintiff had no title. The assignment offered was sufficient to transfer this interest to the defendants and nothing more was required. The interest he sold was the interest he possessed on March 10, 1900, when he made the agreement to sell such interest. His agreement did not require him to obtain

or tender a perfect title to the interest he then had.

Conceding that the terms of the agreement of sale made it, in effect, a mortgage from defendants to the plaintiff of the property described as security for the payment of the note sued on, it by no means follows that the plaintiff could not maintain a personal action on the note without foreclosing the mortgage. The real property, which was the subject of the mortgage, was all situated in the republic of Mexico, beyond the jurisdiction of the courts of California. The provisions of section 726 of the Code of Civil Procedure that there can be but one action for the recovery of a debt secured by mortgage, and that that must be an action of foreclosure, refers solely to debts secured by mortgages of property situated in the state of California, and has no application to mortgages of property situated in another state or country. *Felton v. West*, 102 Cal. 268, 36 Pac. 676. The present action can therefore be maintained notwithstanding such mortgage.

The mutual mistake, under which it is claimed the parties executed the agreement of sale and the note, was a belief, alleged to have existed in the minds of all the parties, that the assignment by Smith to the plaintiff of an interest in the concessions had been recognized by the Mexican government and entered of record in the archives thereof. The evidence on the subject of the existence of the mistake was conflicting. There was evidence of a substantial character to support a finding that all the parties at the time fully understood that there had been no formal consent to, or record of, such assignment. The verdict being for the plaintiff, this evidence is conclusive upon this court.

On the authority of *Naftzger v. Gregg*, 99 Cal. 83, 33 Pac. 757, 37 Am. St. Rep. 23, it is said that the complaint is defective because it contains no averment of the agreement of sale and tender of a deed in compliance with its conditions. Some expressions in the opinion in that case imply that a complaint upon a promissory note in the usual form, good upon its face, can be rendered defective by reference to affirmative allegations in the answer. If this were correct, the defendant in such a case would logically be entitled to judgment upon the pleadings by reason of allegations in the answer, which by law are deemed controverted (Code Civ. Proc. § 462), and of the truth of which there is no evidence. This would be contrary to long-established rules of pleading and evidence. The decision cannot be given such effect. The course of pleading and procedure in such cases is well established, and it was followed in the case at bar. The defendants in their answer alleged the execution of the agreement showing the concurrent conditions necessary to be performed and alleged nonperformance by plaintiff. Upon the trial plaintiff introduced in evidence the note sued on. This estab-

lished all the allegations of the complaint upon which issue was taken, and he thereupon rested his case. Without further evidence he would have been clearly entitled to judgment for the amount of the note. The defendant, in support of the affirmative allegations of the answer, then introduced the agreement and proved that the note was given as evidence of the debt for the price of the property. Naftzger v. Gregg is perhaps authority for the proposition that, upon this being shown, the burden lay upon the plaintiff to prove an offer to perform by tendering a conveyance sufficient to transfer the interest agreed to be sold. This we need not determine, for, as above stated, the evidence of such tender was sufficient, and upon this appeal it is immaterial which party introduced it.

There was no error in the refusal of the court, after the evidence was closed, to permit the defendants to amend their answer by averring a partial failure of the consideration of the note. The evidence did not justify or authorize such amendment. The defendants obtained the agreement for the sale of McGue's interest in the concessions in March, 1900, and they were offered a transfer of such interest by McGue in July, 1900. The failure of consideration which they desired to plead was the forfeiture of the concessions of lands and of the right to construct a railroad, referred to in the agreement, and of a certain other concession to operate a line of steamers, which, it is alleged, was the line of steamers which the steamship company intended to operate. It was proposed to plead that these concessions were, by the fault of the plaintiff, forfeited to the Mexican government prior to July 10, 1900, the date fixed in the agreement for the payment of the price and transfer of the plaintiff's interest to the defendants. The evidence failed to show any such forfeiture, but, on the contrary, showed that the forfeitures occurred and were declared in the latter part of the year 1901 and later, which was more than a year after defendants were entitled to a deed under the agreement, during all of which intervening period, by performing the terms and conditions of the concessions, they might have prevented the forfeiture. And there is a total failure to prove that after the tender of a conveyance to defendants in July, 1900, the plaintiff was, so far as the defendants were concerned, under any obligation to perform such conditions to prevent such forfeiture. Under these circumstances, the court properly refused to allow the proposed amendment.

Exceptions were taken on the trial to a number of rulings admitting or rejecting evidence. None of them demands discussion or special notice. The evidence admitted was either properly allowed, or not of an injurious character, and that refused was either inadmissible or substantially allowed in the subsequent course of the trial.

There was no error in instructing the jury

that in order to accomplish a rescission of the contract, and thereby evade payment of the note, it must be found that the defendants, properly upon the discovery of the mistake upon which the right to rescind is claimed, notified plaintiff of their election to rescind, and offered to restore to plaintiff everything of value received by them under the contract. The defense was that the defendants had rescinded the contract for a good cause, under section 1691 of the Civil Code. It was not pleaded in the form of an equitable counterclaim, asking the court to give the affirmative relief of compelling and adjudging a rescission as provided in sections 3406 to 3408 of the Civil Code, and the rules of equity applicable to such an action do not apply. While it is true that, where a rescission in pais under section 1691 is relied on, the party rescinding need not show that he has restored that which is worthless, yet he must always show that he has complied with the requirement to "rescind promptly," and this implies some notice to the other party of such determination to extinguish the contract. *Collins v. Townsend*, 58 Cal. 608, 615; *Kelley v. Owens*, 120 Cal. 511, 47 Pac. 369, 52 Pac. 797; 24 Am. & Eng. Ency. of Law, 645.

There are no other points which require special mention. We find no error in the record.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; McFARLAND, J.

148 Cal. 457

RIVERSIDE HEIGHTS WATER CO. et al.
v. RIVERSIDE TRUST CO., Limited
et al. (L. A. 1,467.)

(Supreme Court of California. Jan. 16, 1906.)

1. WATERS—IRRIGATION—CHARGES FOR WATER—EVIDENCE.

On an issue as to the amount to which the owner of an irrigation canal was entitled from parties using water therefrom, under contracts that they should pay the proportion of the expense of maintaining and repairing the canal that the amount of water they used bore to the total amount flowing in the canal, evidence held to sustain a finding that the canal referred to was the canal originally planned and constructed, and did not include a subsequent extension of it.

2. SAME—EXTENSION OF CANAL.

Where the owner of an irrigation canal between certain points and others using water therefrom agreed to bear their proportionate share of the expense of maintaining and repairing it, and the owner made an extension of the canal, the owner or the persons served by the extension were liable for such proportion of the expense of maintaining the original canal as the water supplied through the extension bore to the whole amount flowing in the canal.

3. SAME—RESERVATION IN CONTRACT.

Where the owner of an irrigation canal, in contracts giving the right to use water therefrom, the users to pay a proportionate share of the expense of maintaining the canal, reserved the right to develop and procure, by means of artesian wells and otherwise, waters in addition to the amount provided for, to be

conveyed in the canal to his own or other lands, this did not bind them to pay any part of the operating expenses of an extension of the canal.

4. SAME—ESTOPPEL.

Where the users of water from an irrigation canal, under contracts to bear their proportion of the expense of maintaining the canal between certain points, paid certain sums claimed by the owner as their share of the expense of an extension of the canal, this did not estop them from denying that the contract bound them to such payment, nor did it constitute a conclusive construction of the contract.

5. SAME—JUDGMENT.

Where a contract provided that each of the parties should pay a share of the expense of maintaining an irrigation canal in proportion to the amount of water to which he was entitled, a judgment fixing their rights on an extension of the canal was not erroneous because it based the rights on the amount flowing in the canal instead of the amount used.

6. SAME.

A judgment fixing the rights of users of water from an irrigation canal with reference to the amount of water flowing in the canal is not indefinite for failure to fix the place of measurement of the water, but means the amount received at its head for use below.

7. APPEAL—HARMLESS ERROR.

Where a water company agreed to pay its share of the expense of maintaining an irrigation canal, while the contracts of other users from the canal did not call for such payment, any error in a judgment requiring them to pay a share does not injure the water company.

8. SAME—PRESENTATION OF QUESTION IN LOWER COURT.

Where a party appeared to a cross-complaint, filed a demurrer and answer thereto, went to trial without objection to its propriety as a pleading, and stipulated to submit a particular question arising out of its allegations, it is too late to object on appeal that it is not within the provisions of Code Civ. Proc. § 442, providing when a cross-complaint may be filed.

Department 1. Appeal from Superior Court, San Bernardino County; John L. Campbell, Judge.

Action by the Riverside Heights Water Company and another against the Riverside Trust Company, Limited, and another. Cross-complaint by the East Riverside Water Company against the Riverside Trust Company, Limited. From a judgment in favor of the cross-complainant, and from an order denying a new trial, the cross-defendant appeals. Affirmed.

Rehearing denied February 15, 1906.

M. B. Kellogg and Fox, Kellogg & King, for appellant. Collier & Carnahan and Collier & Evans, for respondent.

SHAW, J. The record presents appeals by the defendant Riverside Trust Company, Limited, from the judgment, and from an order denying its motion for a new trial. The only parties to the appeal are the said Riverside Trust Company, Limited, and East Riverside Water Company, both of which corporations were made defendants to the original action. The East Riverside Water Company filed a cross-complaint, which was answered separately by the Riverside Trust Company, Limited. Upon the trial it was stipulated that the court should hear and determine but

one question, a question involving only the respective rights of the two last-named corporations. The other parties to the action are not interested in this appeal. The court was asked to determine the amount which the East Riverside Water Company should pay as its proportion of the expenses of maintenance and taxes of a canal managed and controlled by the Riverside Trust Company. For the sake of brevity, the East Riverside Water Company is hereinafter designated as the "Water Company" and the Riverside Trust Company, Limited, as the "Trust Company."

In order to give a clear understanding of the issue and the questions arising thereon, it is necessary to state the history of the case as disclosed in the evidence. In the year 1884 Matthew Gage was the owner of section 30, township 2 S., range 4 W., S. B. M., which lay adjacent to and immediately north of a large ravine known as the "Arroyo Tequesquite," and near the colony which afterwards became the city of Riverside. This land was in need of water for irrigation in order to make it productive. He also owned a supply of water situated some 12 or 15 miles northerly of the aforesaid section, in the valley of the Santa Ana river. A large body of land, also in need of water for irrigation, lay between the aforesaid section and the location of the said water supply. In this condition of affairs Gage conceived the plan of constructing from the water supply to his land a canal of sufficient capacity to carry water for the irrigation of his own land and a large part of the other land of a lower elevation than the line of the proposed canal, and of securing the co-operation and assistance of the owners of such other lands in the building and maintenance of said canal. In pursuance of this plan he made a preliminary survey of the route of the canal from the water supply to the south line of section 30 aforesaid, which bordered upon or close to the said arroyo, and during the years 1884, 1885, and 1886, he made separate contracts with a considerable number of the owners of land lying along the line of the proposed canal. These contracts were of similar form, though varying in some of the details. In general, they contained an agreement upon the part of Gage to build the canal and to deliver therein water for the irrigation of the particular tract of land at the rate of one inch continuous flow under four-inch pressure for each five acres of the land, and an agreement on the part of the landowner that, after the completion of the canal and the delivery of the water therein, he would pay the expense of maintaining and repairing the canal in the same proportion as the amount of water to which he was entitled under the contract would bear to the whole amount of water flowing in the canal. This canal was completed from the source of supply down to the Arroyo Tequesquite some time in the year 1886, and from that time forward water was delivered therein to the several

parties who had contracted therefor. About that time the East Riverside Water Company was incorporated, and subsequently, by contract with some of these adjoining landowners, it became a trustee of such owners for the purpose of receiving from the canal the water to which such owners were entitled, making distribution thereof through side canals to such landowners, according to their respective interests and rights in and to the water, and paying to the person in the control and management of the canal the proportion of the expenses of maintaining and repairing the same which should be justly due from such owners by virtue of the contracts aforesaid. Some two years or more after the completion of this canal, as thus laid out, Gage made an addition to the canal by extending the same from its terminus on the north bank of the Arroyo Tequesquite, across said arroyo, southerly for some 10 miles, and thereafter used the original canal and this extension as a conduit to carry water from said source of supply to and upon a large body of other lands several miles below the original terminal point. On March 11, 1890, Gage sold and conveyed to the Trust Company all his rights and interests in the entire canal, including the extension, and in and under the various contracts with the respective landowners along the original canal. It does not appear to be expressly alleged anywhere, but it seems to be true, and it is practically admitted by both parties, that Gage, while he held it, and the Trust Company thereafter, had the control and management of the canal and of the running of the water therein, and paid, in the first instance, all expenses, taxes, and repairs thereon, collecting from the other parties their due proportion, according to the terms of the contracts. The cross-complaint alleges, in general terms, the inception of the enterprise and the original plan of building the canal down to the Arroyo Tequesquite, the terms of the contracts between Gage and the other landowners, the subsequent arrangement by which the Water Company became the agent and trustee for a large number of the owners for the purpose of receiving and distributing the water to which they were entitled, and paying the charges for repairs and maintenance on account thereof, the transfer by Gage to the Trust Company, and that the Trust Company claimed of the Water Company, as its proportion of the expenses, a large sum, more than was actually due under the contracts represented by the Water Company, and that upon this point the parties could not agree, and among other things, asked the court to adjudge and determine the amount and proportion of such expenses that should be paid by the Water Company to the Trust Company. The cause of this dispute was a claim on the part of the Trust Company that the persons making the original contracts with Gage, and represented by the Water Company, were, by the original

contracts, bound to contribute to the payment of the expenses of the extension of the canal below the Arroyo Tequesquite. In other words, that the said extension was a part of the canal referred to in the respective contracts of the other parties, and the expense of which they thereby bound themselves to pay in proportion to their interests in the water. The Water Company, on the other hand, contended that the contracts of the parties whom it represented did not refer at all to the extension of the canal below the Arroyo Tequesquite, but contemplated only the building of the canal down to that point, and the contribution on the part of each landowner of his proportionate part of the expenses of this original canal. It further contended that the persons obtaining water through the subsequent extension of the canal were not only bound to pay all expenses of operating the extension, but were also bound to pay their due proportion of the maintenance of the original canal in the same manner as the other landowners; that is, in such proportion as the water taken by them bore to the whole amount of water flowing in the original canal. As before stated, upon the trial all other issues were eliminated, and it was agreed that this was to be the sole question submitted to and decided by the court.

The court made findings covering the allegations of the cross-complaint, and, among other things, found specifically that the Water Company received from the Trust Company through said canal, and distributed and was entitled to receive and distribute, 718.3 inches of water, which was appurtenant to and was distributed for the irrigation of 3,591.50 acres of land, all of which was situated above the said arroyo, except a small portion thereof which, although situated below the arroyo, received its water from a reservoir supplied by a side ditch leading out of said canal above the arroyo. The following paragraphs of the findings show more particularly the facts upon which the rights of the parties depend:

"(8) That the Gage canal, as originally contemplated and constructed by Matthew Gage, * * * extended from the north bank of the Tequesquite arroyo in a northerly direction through the county of Riverside to the water sources supplying the said canal. * * *

"(9) That said canal was so constructed in the year 1886, and preceding years, and was completed to the north bank of said Tequesquite arroyo in 1886.

"(10) That in the years 1888 and 1889 an extension of said canal was constructed by Matthew Gage, extending from the north bank of the Tequesquite arroyo in a southerly direction a distance of about ten miles.

"(11) That the canal mentioned in and referred to in each and every of said contracts set out and mentioned in the schedule hereinabove given, and in all other deeds and con-

tracts in evidence relating to the same water rights, and which contracted or conveyed said 718.3 inches of water, was and is the said canal extending from the north bank of the Tequesquite arroyo northerly through Riverside and San Bernardino counties to the water sources of said canal.

"(12) That by the said contracts and deeds the parties securing said 718.3 inches of water from said canal, and their successors in interest, agreed with Matthew Gage, and his successor in interest, the Riverside Trust Company, Limited, to pay their proportionate share of the taxes and expenses of operating said canal as constructed from the north bank of the Tequesquite arroyo to the water sources in San Bernardino county."

"(14) That the defendant Water Company is not liable to defendant Trust Company under the contracts, deeds or agreements, or any of them, by which such 718.3 inches of water as it distributes is held, for any part or portion of the taxes or operating expenses of said canal as constructed southerly from the north bank of the Tequesquite arroyo.

"(15) That by the contracts, deeds, and agreements, and each of them, under which said 718.3 inches of water is held and distributed, the Water Company is obligated to pay, and should pay, to the Trust Company such proportion of said taxes and expenses of operating said canal, as constructed northerly from the north bank of said arroyo, as the said 718.3 inches of water, so distributed by the Water Company, bears to the whole number of inches of water flowing through that portion of the said canal north of the north bank of said arroyo, whether intended for use either above or below the north bank of said arroyo." The conclusion of law and judgment was to the same effect.

The appellant questions the sufficiency of the evidence to support these findings. A determination of this question requires a construction of the various contracts with the parties now represented by the Water Company. These contracts, though similar in form, and all made apparently for the same purpose and object, do not all express the purposes in the same language. Each one of them is more or less indefinite in the description of the canal to the expense of operating which the particular purchaser of water agreed to contribute. In five of them, executed in 1884 and 1885, the agreement of Gage is said to be to "construct a canal from a point on the Arroyo Tequesquite in sec. 31 Tp. 2, S. R. 4, W. S. B. M. to the west boundary of J. A. Carit, according to a survey by C. C. Miller." Other two described the canal to be built by him as extending "from a point on the Santa Ana river to the mesa land on the east of the colony of Riverside." Some twenty, executed in 1886 and 1887, declare that Gage thereby sells and conveys "a water right in the Gage canal system", and two others omit the word "system" from this form of description. The evidence shows

that at the time these several contracts were made, the canal then known as the Gage canal extended, or was proposed to be constructed, only from the source of supply on the Santa Ana river southerly to the said arroyo, and that at that time no further extension had been made, nor was it then generally known or understood that any extension was to be made, or was in contemplation. Many of them were made before the canal was made or begun. For the purpose of aiding in the interpretation of the contracts, and showing what canal was intended by the several descriptions thereof, the court admitted evidence to the effect that the phrase "mesa lands to the east of the colony of Riverside" was understood in that locality, at the time these several contracts were executed, to embrace only the lands lying northerly of the said Arroyo Tequesquite and easterly of the lands then known as the colony of Riverside, and now constituting the city of Riverside, and extending between said colony and the foothills, northerly a distance of several miles towards the Santa Ana river, from which the water in question was obtained; that this tract was not theretofore supplied with water; that the Arroyo Tequesquite was a very large ravine, from 100 to 150 feet deep, and 800 to 1,000 feet across; that in the various negotiations between Gage and the respective parties entering into these contracts, the canal referred to by him, and which he then proposed to build, or was building, was the canal extending from the place of supply down to the said arroyo; that Gage at that time owned section 30, all of which was north of said arroyo; that one of his purposes in building said canal was to obtain water with which to irrigate the said tract of land; and that there was no intimation by him that he expected, intended, or desired to extend the canal below the said arroyo. This testimony was properly admitted for the purpose for which it was offered. The language of the contracts being uncertain in respect to the identity of the canal to be constructed by Gage, it was proper to admit evidence of the circumstances surrounding the parties at the time, the size and length of the canal then made or contemplated by him, and of the physical character of things mentioned in the contract, as well as the names by which they were then generally known. The objections of the appellant to this evidence were properly overruled.

We are of the opinion, also, that in view of the evidence, and of the language of the contracts, the court was justified in finding, as it did, that the canal contemplated by the said contracts, and to the expense of operating which the parties thereto agreed thereby to contribute, was the original canal extending from the Santa Ana river to the north bank of the Arroyo Tequesquite, and that they did not agree thereby to contribute anything to the expenses of the subsequent extension of the canal below that point. In

addition to the evidence above mentioned, it was shown that the contract of Gage with Townsend in September, 1886, for building a canal, described it as a canal "to commence at the Santa Ana river at the flume on Orange Grove Homestead, and end on the north bank of the Tesquesquite arroyo in section 31"; that in 1890, after the extension had been made, or at least begun, and prior to his conveyance to the Trust Company, Gage made several agreements with landowners who held contracts made in 1884 and 1885, explaining and modifying the previous contracts, and that each of said explanatory agreements contained the following recital: "Whereas the said Matthew Gage is the owner of a canal known as the 'Gage Canal' constructed for irrigation and other purposes from a point on the Santa Ana river to the mesa on the east of the colony of Riverside, and is now supplying ——— inches of water under" the previous agreement. This, in connection with the other evidence, sufficiently shows the meaning of the contracts to be as found by the court. The rights of the parties being thus fixed by the contracts at the time they were made, Gage could not add to the burdens of the other parties by extending the canal further south so as to irrigate other lands and charging the other parties with the expenses of operating such extension. The parties served by such extension, if by their agreements they acquired any rights in the original canal, would be, to that extent, tenants in common in the original canal, and as such would be bound to contribute their just share of the common expense of maintaining that canal. If they acquired no such right, and the right to use the original canal to carry the additional water to the extension was retained, or acquired and held, by Gage, and the Trust Company as his successor, then the Trust Company would be to that extent a tenant in common in the original canal with the other persons having rights therein, and as such would be bound to contribute a just share of the common expense. This just share obviously is such proportion of the expense of the original canal as the water carried in that canal, for the purpose of serving the use of those obtaining water from the extension, bears to the whole amount of water of right flowing in the original canal. With respect to the expenses of the extension, the Trust Company would stand in the same position as that of each of the other common owners of the original canal with respect to the expense of his own particular canal or conduit; that is, each must bear the expenses of his own canal, and contribute in equal proportion to the common burden of maintaining the common canal. We do not see that there is anything unreasonable in this view of the rights of the respective parties.

Many of the contracts, especially the explanatory contracts of 1890, contain a clause as follows: "The said Matthew Gage re-

serves the right to develop and procure by means of artesian wells and otherwise, water from the sources above mentioned and elsewhere, in addition to the said ——— inches aforesaid, and to convey the same in said canal for the use of his own and other lands." This provision is not inconsistent with the findings of the court, nor does it bind the parties to such contract to pay any part of the operating expenses of any side canal, or extension of the original canal, that he might find it necessary to make to carry such additional water from the original canal to the lands to be irrigated with the additional water developed by him. In view of the covenant in the same and other contracts to the effect that ultimately, when the final development of the water obtainable from the sources of supply should be completed, the canal should "be held in ownership by the owners of water supplied therefrom," in the same proportion as their interest in the water, it was a proper reservation to make, although, perhaps, he would have had this right without a special reservation to that effect in the contract. It is clearly equitable and just that all persons having the right to use the original canal as a common conduit with others, whether they belong to the class whose rights were obtained prior to the extension, or whether they derive their right from the extension of the canal and the development of additional water by Gage, should each, directly or indirectly, pay his proper share of the expenses of the operation of such original canal. It is claimed that the respondent, by making payments of the amounts claimed by the appellant, and by other acts which are said to show a recognition of, or acquiescence in, the claim of an obligation so to do, has, by estoppel or otherwise, bound itself to a construction of the contracts in accordance with appellant's claims and contrary to the findings. We think this claim is untenable. There are no circumstances from which an estoppel could arise. And while, in the case of an ambiguous contract, the conduct of the parties may be proved to aid in its interpretation, yet it is not conclusive evidence thereof, and it may be disregarded in favor of more satisfactory evidence to the contrary. With the conclusion of the lower court on such conflicting evidence we cannot interfere.

Objection is made to the judgment on the ground that the proportion of expense for which the respondent is adjudged liable is, as to one of its terms, based on the amount of water flowing in the canal, whereas it should have been upon the amount used. It is said that the flow is necessarily larger than the use because in the distribution of water for use to different persons receiving it at different points there must inevitably be some water wasted, and this will form part of the water flowing in the canal. If such waste is inevitable, then it is necessary to the use, and we can perceive no injustice

in decreeing payment according to the flow thus made necessary, particularly as the incidental waste will be, so far as appears, in substantially the same proportion to each party. The judgment cannot be interpreted so as to justify a charge for or against either party for expenses caused by water carried through the canal by the other party and purposely or knowingly suffered to run to waste unnecessarily. For the expenses caused by such waste the party responsible therefor would be exclusively liable with respect to the other parties, notwithstanding anything that is said in the judgment. It does not purport to declare the rights or liabilities growing out of such misconduct. It is urged that the place of measurement of the water "flowing" in the canal is not fixed, and that, as there must be considerable loss by evaporation and seepage in the course of the passage of the water through its entire length to the respective places of delivery to the users, the judgment is, for that reason, uncertain. In answer to this it is to be said that the true meaning of the judgment is that the amount of water received in the canal at its head for use below, is to be taken as the amount "flowing" therein, for the purpose of adjusting the shares of the expense, and whatever necessary loss occurs in transmission, by evaporation or otherwise, will then be divided among the parties according to their interests. This is fair and just, and no more practicable method of adjusting such losses seems possible or desirable.

A few of the contracts purport to be grants by Gage of water rights in the "Gage Canal" and to be made for valuable considerations, but contain no covenant by the vendee to pay any part of the operating expenses, or any agreement relating thereto; and it is contended that as to these the findings and judgment are erroneous. The vendee, in such a case, either becomes the owner of some common interest in the canal which entitles him to carry, or have carried for him therein, the water for his use, and as such common owner, liable for his proper share of its operating expenses, or he becomes the owner of the right to receive water from the canal, as an appurtenance to his land, or otherwise, without further contribution to the expenses of operation than that made by the price he paid. In the former alternative the judgment is correct. In the latter, it is too favorable to the appellant, in that it requires payment on behalf of these owners which they are under no obligation to make. But this does not injure the appellant, and it cannot complain.

The appellant appeared to the cross-complaint, filed a demurrer and answer thereto, and afterward went to trial, not only without objection to the propriety of the cross-complaint as a pleading in the action, but in pursuance of a stipulation to submit for decision a particular question arising out of its allegations. It is too late to object in this court for the first time that the cross-com-

plaint was improperly filed and did not come within the scope of the provisions of section 442, Code of Civil Procedure. The court had jurisdiction of the subject-matter, and, by the appearance, obtained personal jurisdiction of the parties. All other objections to the manner in which the issue was brought before the court were waived by this conduct of the parties. *Santa Barbara v. Eldred*, 95 Cal. 381, 30 Pac. 562; *Hart v. Carnall Co.*, 101 Cal. 163, 35 Pac. 633; *Id.* 103 Cal. 140, 37 Pac. 196; *De Jarnatt v. Marquez*, 132 Cal. 702, 64 Pac. 1090; *Power v. Fairbanks*, 146 Cal. 611, 613, 80 Pac. 1075.

Other objections are made by the appellant, but we do not consider them of sufficient importance to require special mention. They are without substantial merit.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; McFARLAND, J.

148 Cal. 431

BOTSFORD v. EYRAUD et al. (L. A. 1,456.)
(Supreme Court of California. Jan. 13, 1906.)

1. ADVERSE POSSESSION—WHAT CONSTITUTES.

Code Civ. Proc. §§ 318, 319, provide that no action arising out of title to real property can be maintained, unless plaintiff or his predecessor in title was seized or possessed of the property within five years before the commencement of the action. Section 323 provides that for the purpose of constituting an adverse possession by a person claiming title founded upon a written instrument, land is deemed to have been possessed: (1) Where it has been usually cultivated or improved; (2) where it has been protected by a substantial inclosure. In an action to quiet title, brought in 1901, it appeared that defendant and his predecessors had claimed title under a written instrument since 1882, had paid taxes since that time, had inclosed the property with other adjoining property by a substantial fence, had cultivated the same by a lessee for a time, had constructed a dwelling house thereon and lived in it for some years, had held it for sale as town lots, and generally exercised acts of ownership during the whole period. *Held*, that plaintiff's action was barred by limitations.

2. SAME—INCLOSURE OF LAND.

Under Code Civ. Proc. § 323, subd. 2, providing that, for the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, land is deemed to have been possessed where it has been protected by a substantial inclosure, it is not necessary that the particular premises claimed by adverse possession be segregated and protected by a separate fence; but it is sufficient if such premises be included within an inclosure together with other lands held by the claimant under a claim of title.

3. SAME—CONTINUITY OF POSSESSION—INTERUPTION.

The conveyance of land by one in adverse possession under color of title and the failure of the grantee to enter into physical possession of the land for a year after the conveyance does not constitute an interruption of the continuity of possession, in the absence of any physical abandonment of possession, and where the claim of those in adverse possession is indicated by a substantial inclosure of the land and the withholding of possession from the rest of the world.

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by G. A. Botsford against A. P. Eyraud and another. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Charles G. Lamberson, for appellant. Houghton & Houghton and E. J. Emmons, for respondents.

ANGELLOTTI, J. This is an action to quiet title. Defendants had judgment, and plaintiff appeals from such judgment and an order denying his motion for a new trial. The trial court found that plaintiff's cause of action is barred by the provisions of section 318 and 319, Code of Civil Procedure. The only point made by appellant upon this appeal is that the evidence was insufficient to sustain these findings.

The property in controversy is a block of land in the city of Bakersfield, described as block 269, and formerly known as "Block 2 N. R. 5 E." Title thereto has been continuously claimed by defendants and their predecessors ever since April, 1882, under, and by virtue of, a written instrument executed at that time, purporting to convey the premises to Charles Lux. Lux conveyed a half interest therein to Henry Miller. Miller and Lux, in the spring of 1883, inclosed the property, with other adjoining property held by them, constructing a substantial fence on the north, south, and west sides, which, with fences surrounding the remainder of the property held by them, entirely inclosed and protected the property in controversy. Until March 25, 1887, Miller and Lux continued to so hold possession of the property, claiming to own it as aforesaid. The evidence warrants the inference that, during all of said time, it was to some extent used for the cultivation of corn by a Chinaman, under lease from Miller and Lux. On March 25, 1887, Miller and Lux, for the expressed consideration of \$1,500, executed a conveyance of this block to one Seidt. Seidt refused to allow the property to be further occupied by the Chinaman, and did not himself personally occupy it or do any work thereon for about a year. During all of this time it continued to be inclosed, with the other property of Miller and Lux, by the fence already spoken of, but, so far as appears, was not used in any way. According to the plan of the city, the block was bounded on the east by O street, which had never been opened. In the spring of the year 1888, Seidt removed the portions of the north and south fences that were on such street, and thus opened the street on the east side of the block. This left the east side of the block open, and he did not construct any fence on the east line. At the same time, however, he cleared some brush and trees from the land, and leveled up a ditch running across it. He then constructed a dwelling house on the block. The land, according to the map of the city, is

laid off in eight lots, and this house was built on lot 4. Whether there was any map or plan showing such lots prior to November, 1888, does not appear. In November, 1888, he sold said lot 4 to defendant Smith, who resided thereon until the year 1901, when the house was destroyed by fire. The remainder of the property Seidt continued to use to the extent that town property purchased to hold and sell as town lots is ordinarily used, until he sold the remainder of the land in 1895. He grubbed out the block, cleared off the brush and trees, did something in connection with keeping up the fences, and had a man living on it for over a year. His grantees and their successors continued to treat the property in the same way, until finally several houses were constructed by them on the land. There was never any pretense of interference with such possession as was had by defendants and their predecessors until, in the fall of 1901, this action was commenced. Defendants and their grantors have paid all taxes levied on said property ever since the year 1882. These facts fully warranted the trial court in holding that there was such an adverse possession of the land by defendants' predecessors for five years, commencing in the spring of 1883, as would bar plaintiff's action.

There can be no question that a sufficient adverse possession was initiated by Miller and Lux under a claim of title, founded on a written instrument, in the spring of 1883, and continued by them until March 25, 1887. Not only did the evidence warrant the trial court in holding that the block was cultivated and a crop of corn raised thereon every year by their tenant, during the whole of said period (Code Civ. Proc. § 323, subd. 1); but it was also during the whole of said time protected by a substantial inclosure. Subdivision 2 of same section. There is nothing in the point made by appellant that the particular land in controversy was not so protected, because it was not separately entirely inclosed by a fence, but was contained in an inclosure with other lands on the east also held by Miller and Lux under claim of title. There could be no good reason for requiring the claimant to subdivide the land claimed, and make subinclosures therein, and no such requirement is evidenced by the statute. The precise point appears to have been decided against the contention of appellant, in *Hall v. Gittings*, 2 Har. & J. (Md.) 390, and was not involved in any of the cases cited by him. It is, of course, true, that the adverse possession must be continuous for the full period of five years, and it is urged that the continuity was broken when Miller and Lux made the conveyance to Seidt on March 25, 1887, and Seidt did not for one year openly do any act indicating that he had taken physical possession of the land. It is said that by the mere making of such conveyance, Miller and Lux entirely abandoned their possession, and that Seidt did not at once take

possession, and that the running of the statute was therefore interrupted, and that it follows, under the well-settled rule as to the effect of an interruption of such possession, that the possession of the true owner constructively intervened and rendered all previous possession invalid. It must be borne in mind that during this year there was no visible abandonment of possession. The land in controversy continued to be protected with the lands on the east still claimed by Miller and Lux, by a substantial inclosure. The notice as to an adverse claim to this land, and actual, open, and exclusive possession thereof by such adverse claimant, was the same in effect after as before the deed.

Under the facts of this case we are of the opinion that there was no interruption of the possession. The contention of plaintiff in this regard is based solely upon the execution of the deed by Miller and Lux to Seidt. There was not the slightest evidence of any intention on the part of Miller and Lux to abandon the actual possession held by them for four years, except in so far as their deed indicated their intention to yield that possession to their grantee for a valuable consideration. By such deed they simply transferred their claim of title and whatever right of possession they had to such grantee, and if actual possession of the land was not at once personally taken by Seidt under his deed, it continued to be held by Miller and Lux for him, and as his agents, for the land certainly continued to be openly and notoriously withheld from all others in the same manner that it had previously been withheld, and it is very clear that there was no intention on the part of Seidt to abandon the property he had purchased. No particular formality was necessary for the transfer of possession to Seidt, or the taking of possession by him, and it was not essential to a continuance of the already inaugurated and maintained possession that he should at once personally go upon the land, or perform any act of occupancy thereon. If his subsequent acts in regard to the property, taking into consideration the nature and condition of the property, and the uses to which it was adapted, were such as to indicate a continuously existing intention to retain possession of the property, that fact, coupled with the fact of possession actually and notoriously withheld from all others except his grantors, is sufficient to show a continuance in him of the possession previously held under the claim of title by his grantors. There can be no question that, taking into consideration the nature and condition of this property, the uses to which it was adapted, and the purposes for which Seidt acquired it, the evidence warranted a conclusion that the subsequent conduct of Seidt was such as to show a continued existing intent to retain possession. It is said in 1 Cyc., at page 1021, and the statement is amply sustained by authorities there cited: "Periods of vacancy in-

cident to or occasioned by change of possession, or by the substitution of one tenant for another, and which are not of longer duration than is reasonable, in view of the character of the land and the uses to which it is adapted and devoted, do not constitute interruptions of possession, destroying its continuity in legal contemplation, when there is no intention to abandon the possession. They are but incidents of that continuous possession which the land, inherently, and in relation to the manner of its use, admits of. This rule proceeds upon the theory that notwithstanding such interruptions of actual occupancy, there is in fact no actual interruption of such acts of possession as the land is reasonably susceptible of."

There was ample evidence to warrant the court in holding that the adverse possession continued for the full period of five years. Whatever doubt there may be as to the precise time in the spring of 1888 when Seidt commenced doing work on and about the land, the evidence as to what was done by him in the way of opening O street on the east side, clearing the land of its incumbent growth, leveling the ditch on the same and the construction of a house on a portion thereof, was sufficient to show, considering the nature of the property, a continuous adverse possession of the whole block, extending beyond the five years commencing with the "spring" of 1883.

The judgment and order are affirmed.

We concur: SHAW, J.; McFARLAND, J.

(35 Colo. 83)

TRASK v. PEOPLE.

(Supreme Court of Colorado. Dec. 4, 1905.)

INDICTMENT AND INFORMATION—DUPLICITY—SEPARATE OFFENSES.

Mills' Ann. St. § 1439, requires offenses to be prosecuted as prescribed by statute, and section 1452 provides that, when there are several charges against any person for the same act or for connected acts which may be properly joined, the whole may be joined in one indictment in separate counts. An information, containing but one count, charged defendant with larceny as a bailee of certain household articles, clothes, a diamond ring, and money. The state's evidence showed that the various articles specified were delivered to defendant at different times and for different purposes. *Held*, that the offenses charged in the information were separate and distinct, and the court should have quashed the information on motion interposed at the close of the state's case.

Steele, J., dissenting.

In Banc. Error to District Court, El Paso County; Robert E. Lewis, Judge.

Harlan Trask was convicted of larceny, and brings error. Reversed.

Goddard & Warner, McAllister & Gandy, and N. M. Campbell, for plaintiff in error. N. O. Miller, Atty. Gen., and I. B. Melville, Asst. Atty. Gen., for the People.

MAXWELL, J. Plaintiff in error was convicted of larceny as bailee and sentenced to a

term of not less than seven or more than eight years in the penitentiary. The information upon which he was tried and convicted contained one count, and was as follows: "Henry Trowbridge, district attorney within and for the Fourth judicial district of the state of Colorado, in the county of El Paso, in the state aforesaid, in the name and by the authority of the people of the state of Colorado, informs the court that Harlan Trask, on the 5th day of April, A. D. 1903, at the said county of El Paso, being then and there the bailee of (here follows a description of certain household articles, clothes, including a white dress and black hat, a diamond ring, and certain moneys, stating the value thereof), all of said property being then and there the personal property of one Mrs. A. L. Brown and having been theretofore delivered to him, the said Harlan Trask, by her, the said Mrs. A. L. Brown, did then and there fraudulently and feloniously steal, take, and carry away and convert said property to his own use, with intent to steal the same, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said the people of the state of Colorado." Eighty-five assignments of error are presented, many of which are based upon exceptions reserved to the rulings of the court in the admission and rejection of evidence. In the printed briefs and at the oral argument six propositions presented by counsel are relied upon to reverse the judgment. This discussion will be limited to this one proposition presented by counsel: (3) Several offenses charged in one count." With deference to eminent counsel representing plaintiff in error, we are constrained to state that a more accurate statement of their position, as shown by their argument upon this proposition, would be that it appeared from the evidence at the trial that defendant was being tried for more than one separate and distinct crime, and upon this statement we will consider the record.

The information charged that plaintiff in error on April 5, 1903, being bailee of all the articles mentioned in the information, by one act, did convert them, etc. For the purposes of this discussion the articles described in the information will be divided into four classes: (1) Household articles and clothes; (2) a white dress and black hat; (3) a diamond ring; (4) certain moneys. The evidence of the prosecution was to the following general effect: That the household goods and clothes were delivered April 4, 1903, for safe-keeping; that the white dress and black hat were delivered about April 15th under a separate bailment, not for safe-keeping, but for delivery to one Wilbur; that the diamond ring was delivered about April 14th for the purpose of pawning and raising money for the use of the prosecuting witness; that certain moneys were delivered about April 20th for the purpose of safe-keeping, and for the payment of the expenses of a trip of the pros-

ecuting witness to Kansas City—all of the foregoing deliveries having been made to plaintiff in error by the prosecuting witness. To the introduction of all testimony relating to the white dress and black hat, the diamond ring, and the certain moneys, counsel for plaintiff in error objected, assigning as grounds of objection that the same was incompetent, and that it appeared that such testimony related to other, separate, and distinct transactions. At the close of the state's case counsel for plaintiff in error moved to quash the information, and for an instruction to the jury to return a verdict in favor of the defendant, upon the grounds that it appeared from the evidence that several distinct transactions had been embodied in the one count of the information and that the information was bad for duplicity, and that it appeared from the evidence that the defendant was now on trial for more than one violation of law, involving separate and distinct transactions. In this motion particular attention was called to the evidence relating to the white dress and black hat and the diamond ring. At the close of all the testimony counsel for plaintiff in error requested an instruction to the jury to return a verdict of not guilty, also instructions to entirely disregard all testimony as to the certain moneys, the diamond ring, and the white dress and black hat, all of which requests were refused. Throughout the trial counsel for plaintiff in error, even to the point of appearing contumacious, sought to protect his client, along the lines indicated, by objections to the testimony, by the motion to quash, the request for a verdict, and by the requests for instructions, and at all times was met by adverse rulings of the court, to which rulings exception were duly preserved.

It is beyond question that the evidence objected to disclosed that there were several separate and distinct bailments for different purposes, and that as many separate and distinct conversions with intent to steal had been committed, and, as conversion with intent to steal is the gravamen of the crime of larceny as bailee, it is clear that the plaintiff in error, upon an information charging one offense, under the rulings of the court, was forced to stand trial for several separate and distinct offenses. That the trial court finally became convinced of this fact is manifest from an instruction given to the jury, wherein it was charged that in no event could the defendant be found guilty for failure to turn over to one Bernard certain household furniture, for failure to turn over to Wilbur the effects turned over by Mrs. Brown to plaintiff in error for that purpose, meaning thereby the white dress and black hat, or for failure to turn over the certain moneys. In *White v. People*, 8 Colo. App. 289, 45 Pac. 539, the information consisted of three counts. The first charged defendant with larceny March 1, 1893, of two head of neat cattle, the property of Emanuel C. Tolle.

The second charged larceny by the defendant May 20, 1893, of eight head of neat cattle, the property of Emanuel C. Tolle. The third charged larceny by the defendant July 3, 1893, of eight head of neat cattle, the property of Emanuel C. Tolle. It appears from a statement in the opinion that the defendant was tried upon the second and third counts only, found guilty upon both counts, and the court adjudged a separate punishment upon each count. Judge Thomson said (at page 293 of 8 Colo. App., at page 540 of 45 Pac.): "The authorities are practically unanimous that it is improper to include distinct offenses in the same indictment, and that either in the case of duplicity, or of misjoinder of counts, if objection is made in apt time, the court will in the one case quash the indictment, and in the other compel the prosecutor to elect on which count he will proceed; but that neither duplicity nor misjoinder is a ground for arrest of judgment [cited authorities]. It may not appear upon the face of the indictment whether the offenses charged are or are not distinct. The same crime may be charged as having been committed at different times, or the language of the indictment whether the offenses charged are or are not distinct. The same crime may be charged as having been committed at different times, or the language of the indictment may be such that it appears to charge separate offenses; but the several counts may nevertheless relate to the same transaction, and it may therefore be impossible to determine, before the evidence is in, whether the prisoner is being prosecuted for one offense or for several unconnected offenses, so that a motion before trial might properly be disallowed; but, whenever it does appear that different transactions are combined, the objection is in order. * * * Now, the very fact of the prosecution of a prisoner at one time for several different crimes must have a tendency to prejudice the jury against him. He is presented to them, not as charged with the commission of one offense, but as a habitual criminal, and so an impression may be produced upon them, unfavorable to him, difficult to remove, and which has a tendency to make his conviction easy." We are not in accord with that portion of the opinion just quoted from which announces that it is the duty of the court to interpose for the protection of the defendant, without motion from him.

In the case in hand it is not necessary to take such position, as counsel for plaintiff in error, at all stages of the trial, by every possible means, except, possibly, a motion to compel the state to elect, objected to and moved the court to exclude and take from the consideration of the jury the objectionable evidence, the force and effect of which was to compel the prosecution to elect upon which defense it would proceed. The following authorities support the doctrine announced by Judge Thomson in the White

Case, *supra*: *Heineman v. State*, 22 Tex. App. 44, 2 S. W. 619; *State v. Well*, 89 Ind. 286; *Joslyn v. State*, 128 Ind. 161, 27 N. E. 492, 25 Am. St. Rep. 425; *Edelhoff v. State*, 5 Wyo. 19, 36 Pac. 627. The following sections of the Criminal Code of this state warrant the statement that in view of the testimony allowed to be introduced on behalf of the state, over the objection of plaintiff in error, this proceeding was unauthorized: "All offenses herein defined shall be prosecuted and punished as herein prescribed, and not otherwise." 1 Mills' Ann. St. § 1439. "Whenever there are or shall be several charges against any person or persons for the same act or transaction, or for one or more acts or transactions connected together, or for one or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts, and if two or more indictments are found in such cases the court may order them consolidated." 1 Mills' Ann. St. § 1452. If the actions or transactions covered by the information in this case were so connected together as to bring them within the provisions of the last-quoted section of the Criminal Code, the same should have been charged in separate counts of the information. If, on the other hand, they were separate, distinct, and disconnected acts and transactions, they should have been charged in separate and distinct informations or indictments.

The Attorney General practically concedes the correctness of the proposition contended for by plaintiff in error, but urges that proper objection was not made at the trial. We quote from his brief: "It is undoubtedly true that but one offense can be included in a single count, but in the case at bar such fact could not be determined on the face of the information, nor at the time that the evidence was objected to by the defendant could the court determine which evidence should be received and which rejected, and, as there was no motion made, at any time, requiring the prosecution to elect upon which of these charges it would rely, nor any motion made to take the evidence of other facts from the jury, counsel are not now in position to complain." If we understand the above, it seems to mean that one may be placed upon trial under an information similar to the one in this case, evidence introduced of a number of separate and distinct acts and transactions, offenses under the law, and at the close of the testimony the court may, *sua sponte*, determine which one of the several separate and distinct crimes charged has, in its judgment, been proven, and by instruction submit that crime only to the determination of the jury. The mere statement of the proposition carries with it its own refutation. *White v. People*, *supra*, is a complete answer to this contention. Furthermore, the position of the Attorney Gen-

eral is not supported by the record, for the reason that instructions to the jury were requested entirely eliminating from their consideration all testimony relating to the white dress and black hat, the diamond ring, and the certain moneys, the object and intent of which requests was to take from the jury all evidence relating to the separate and distinct offenses. All of these requests were refused.

Mitchell v. People, 24 Colo. 532, 52 Pac. 671, is cited by the Attorney General in support of his position, and this quotation made therefrom: "The evidence of different acts was not objected to, nor was any motion made requiring the prosecution to elect upon which of them it would rely for conviction. Counsel are not in a position to now complain that an actual election was not made, and that testimony as to more than one offense was permitted to go to the jury." In the case under consideration the evidence of different acts, transactions, and offenses was objected to at the time of its introduction. At the close of the state's case motion to quash the information was interposed upon the ground that the evidence disclosed that several distinct transactions had been embodied in one count of the information, and, furthermore, at the close of all the testimony requests were made for instructions to the jury to disregard all objectionable testimony for any purpose whatever, all of which were ruled against plaintiff in error, so that upon the record here presented the case cited is not in point. There is nothing in this opinion contrary to the rule that mere non-direction by the court is not ground for a reversal, unless specific instructions, good in point of law, are requested and refused; announced by this court in *Brown v. People*, 20 Colo. 161, 36 Pac. 1040, and approved in *Mow v. People*, 31 Colo. 351, 72 Pac. 1069. The fundamental error committed by the court was the adverse ruling upon the motion to quash the information interposed at the close of the state's case, at which time it appeared from the evidence that several offenses had been charged in one count.

It is also urged by the Attorney General that, as soon as the fact that testimony as to more than one separate offense had been admitted, the court of its own motion instructed the jury in that regard as follows: "Instruction No. 4. In no event can the defendant be found guilty in this case for failure on his part to deliver the furniture in the house to George Bernard, nor for failure to deliver any of the effects turned over to him by Mrs. Brown to the witness Wilbur, nor for failure, if any, to account to and turn over to Mrs. Brown any moneys at Kansas City; but these transactions may be considered by you for the purpose of explaining and throwing light on the inquiry as to what was the intent of the defendant in retaining the personal property mentioned in instruction No. 1, or so much thereof as may be retained and to aid

you in deciding whether or not the defendant feloniously converted said property to his own use, with intent to steal the same." It is needless to say that this instruction was not given to the jury until the close of the testimony. In none of the rulings upon the objections to the introduction of testimony as to separate and distinct offenses was it intimated that such testimony was admitted solely for the purpose of proving the intent of plaintiff in error. It is said that the character of evidence objected to is within the rule announced by this court in *Housh v. People*, 24 Colo. 262-264, 50 Pac. 1036, and *Chipman v. People*, 24 Colo. 520-522, 52 Pac. 677. The rule announced in the cases cited relates to evidence of an entirely different character from the evidence admitted in the case under consideration, in that the evidence there admitted was of offenses other than the one complained of. The evidence here objected to was not of an offense other than the one charged, but was of substantive offenses of which defendant was charged by the information, and for which he was then and there on trial.

That the errors complained of were highly prejudicial to the plaintiff in error cannot admit of doubt, for which reason the judgment must be reversed.

Reversed.

STEELE, J., dissents. CAMPBELL and GODDARD, JJ., not sitting.

35 Colo. 19

PREFERRED ACC. INS. CO. v. FIELDING.
(Supreme Court of Colorado. Dec. 4, 1905.)

1. INSURANCE — ACCIDENT POLICY — ACTION — BURDEN OF PROOF.

In an action on an accident policy, binding the insurer to pay a specified sum on the death of the insured in consequence of external, violent, and accidental means, plaintiff has the burden of proving that the death of insured was caused by external violence and by accidental means.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1664.]

2. SAME.

The burden of proof resting on plaintiff, in an action on an accident policy binding the insurer to pay a specified sum on the death of the insured in consequence of external, violent, and accidental means, to show that the death of the insured was caused by external, violent, and accidental means, is discharged on his establishing the death by unexplained violent external means.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1664.]

3. SAME—EVIDENCE—SUFFICIENCY.

Evidence, in an action on an accident policy binding the insurer to pay a specified sum on the death of the insured in consequence of external, violent, and accidental means, examined, and held to warrant a finding that the death of the insured was caused by violent, external, and accidental means.

4. SAME—PROXIMATE CAUSE OF DEATH.

Where, in an action on an accident policy stipulating that the insurer would not be liable for the death of the insured, except where

the death resulted proximately and solely from accidental causes, testimony which showed that the results which followed an external injury received by the insured as its necessary consequence, and which would not have taken place had it not been for the injury, caused the death of insured, was sufficient to warrant a finding that the injury was the proximate and sole cause of death.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1186.]

5. SAME—FORFEITURE OF POLICY—FAILURE TO GIVE NOTICE OF ACCIDENT.

An accident policy required the giving of immediate notice to the insurer of any accident on account of which claim would be made. There was no suggestion of forfeiture for failure to give the notice, but it was provided that on the failure to furnish proof of death within the time specified, the claim should be forfeited to the insurer. *Held*, that the failure to give immediate notice of an accident did not work a forfeiture of the policy.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1333-1336.]

6. SAME—PROOF OF DEATH—SUFFICIENCY.

An insurer, in an accident policy requiring proof of death of insured within a specified time, can only require proofs of death necessary to establish a prima facie case, and cannot require the affidavits of persons having personal knowledge of the injuries resulting in insured's death.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1347.]

7. SAME—WAIVER.

Where an insurer, in an accident policy, returned the preliminary proofs of death of insured with the statement that, as neither of the affiants had personal knowledge of the circumstances connected with the alleged injury and death of insured, they did not afford any proof that the death resulted proximately and solely from accidental causes, and thereby in effect demanded proofs which the policy did not require, it waived the preliminary proofs which the policy called for.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1380, 1386.]

8. SAME—STIPULATION AS TO TIME TO SUE—WAIVER.

Where an insurer refused the preliminary proofs of death of insured and demanded proof which the policy did not call for, it waived the right to insist on the expiration of the period provided for in the policy, after furnishing preliminary proofs of death, before an action could be maintained on the policy.

Appeal from District Court, Arapahoe County; Booth M. Malone, Judge.

Action by Thomas Fielding, administrator of William H. Emanuel, deceased, against the Preferred Accident Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Sylvester G. Williams, for appellant. Fred W. Parks and Waldron & Thompson, for appellee.

GABBERT, C. J. Plaintiff claimed that the death of deceased was caused by injuries accidentally received. The first question we shall consider is the contention on behalf of counsel for the defendant that the testimony on the part of the plaintiff failed to establish that these injuries were the result of an accident. A witness testified that he met

the deceased about 5 o'clock of the afternoon of April 10, 1901, at a hotel in New York City; that they sat down and talked about half an hour; that he felt badly over his father's death, which had recently occurred, but seemed in perfect health, and was cheerful over his business prospects; that deceased left him about 6 o'clock, saying that he had to meet his brother. About 10:30 that evening his brother found him in bed, sick, at a hotel, claiming that he was ill from natural causes. His brother slept that night in a room adjoining his, and left him next morning about 6:30 for the purpose of meeting the vessel which was to arrive from England, bearing the remains of their father. The deceased was too sick to go with him, subsequently went to the home of their deceased father, reaching there about 7 o'clock that evening. From that time up to the hour of his death he was confined to the house, except for a short time on the day of his arrival he visited a nearby club, and again on Friday, April 12th, visited the club and a drug store a few blocks distant. His actions from the time of his arrival indicated that he was suffering intense pain. On Sunday, April 14th, burns were discovered on his body, which according to the testimony of a physician were then two or three day old and were caused or produced either by acids, molten iron, or direct contact with a red-hot object. The deceased claimed that he had not been injured in any way, but rather that what was designated burns upon his body were the result of natural causes. He probably procured a lotion at the drug store which he applied to his injuries prior to the date when a physician was called, but his hands were not injured or discolored.

The policy sued upon provides that the defendant company "doth insure * * * against the effects of bodily injuries caused solely by external violent, and accidental means, to wit: * * * (d) If death shall result solely from such injuries, * * * the said company will pay the sum of five thousand dollars (\$5,000.00). * * *" In actions on policies of insurance of this character the burden of proof is upon the plaintiff to show that the death of the assured was caused by external violence, and by accidental means. But when is this burden discharged, in making a prima facie case? When death by unexplained violent external means is established. The law does not presume suicide or murder; it does not presume that injuries are inflicted intentionally by the deceased, or by some third person; and hence, with the proof indicated, by reason of the presumption which attaches against self-destruction or the violation of the law, prima facie proof is also made of the fact that the injuries were accidental, without direct or positive testimony on that point. *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; *Lampkin v. Travelers' Ins.*

Co., 11 Colo. App. 249, 52 Pac. 1040; Cronkhite v. Travelers' Ins. Co., 75 Wis. 116, 43 N. W. 731, 17 Am. St. Rep. 184; Jones v. Accident Ass'n, 92 Iowa, 652, 61 N. W. 485; Stephenson v. Bankers' Life Ass'n (Iowa) 79 N. W. 459; Insurance Co. v. Bennett, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685; Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 802, 12 S. E. 18; 1 Beach on Insurance, § 259; Mallory v. Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410; Couadeau v. American Accident Co., 95 Ky. 280, 25 S. W. 6.

But it is urged by counsel for defendant that from the testimony the inference might be drawn that the injuries were not the result of an accident. In support of this contention our attention is directed to the fact that the deceased claimed that he had not been injured, but that what was said to be burns upon his body resulted from natural causes; that in attempting to treat himself he may have applied lotions which caused what was afterwards denominated burns upon his body; and that the injuries may have been inflicted intentionally by some one in circumstances which the deceased did not care to disclose. If it be conceded that the statements of the deceased that he had not been injured are material (a question, however, which we do not determine), we are of the opinion that none of the inferences which counsel attempt to deduce from the testimony will justify the conclusion that the verdict of the jury to the effect that the injuries to deceased were accidentally received, is not supported by the evidence. We think the testimony is conclusive that deceased had been burned or injured in one of the ways indicated by the physician. It must be inferred from the testimony that he received his injuries either between 6 and 10:30 p. m. April 10th, or between 6:30 a. m. and 7:30 p. m. of the next day. A short time prior to the first date he was in good health. It is not rational to presume that he would intentionally cause the injuries inflicted, nor is there any testimony tending to prove that these injuries were inflicted by some third person. Giving the testimony and the inferences which might be drawn the widest scope, the most that can be said is that it is possible the injuries were not accidentally received; but it falls far short of establishing conclusively that they were intentionally inflicted by the deceased or some third person. On the contrary, under the rules which obtain in cases of this character, it at least supports the presumption that the deceased was accidentally injured. In such circumstances it was, therefore, the province of the jury under the settled rules of evidence, from the testimony, the facts, and circumstances, to determine whether or not the injuries were accidental, when the testimony elicited on that subject was consistent with the theory of an accident. *Travelers' Ins. Co. v. McConkey*, supra; *Stephenson v. Bankers' Life Ass'n*, supra; *Standard Life & Acc.*

L. & S. Co. v. Thornton, 40 C. C. A. 564, 100 Fed. 582, 49 L. R. A. 116; *Fidelity & Cas. Co. v. Love*, 111 Fed. 773, 49 C. C. A. 602; *Jenkins v. Pac., etc., Ins. Co.*, 131 Cal. 121, 63 Pac. 180; *Guldenkrich v. U. S. Mut. Acc. Ass'n (City Ct. N. Y.)* 5 N. Y. Supp. 429. Each individual case must be judged by its own facts and circumstances. Had deceased been shot or stabbed, it might have been said, in the absence of an eyewitness, that possibly he intentionally wounded himself, or that some one else intentionally did so; but these possibilities would not, of themselves, be sufficient to overcome the presumption against self-destruction or murder. Such a case might be stronger in favor of the theory of accident than the case at bar, but in principle it is no different on the subject of what is *prima facie* established upon proof of death from violent external injuries.

The policy of insurance also provided that the defendant should not be liable for the death of the insured, except his death "resulted proximately and solely from accidental causes." The testimony on the subject that the injuries of deceased were the sole and proximate cause of his death was conflicting. It can be of no particular benefit to undertake to state in substance what the testimony was on this subject. The jury were the judges of the credibility of the witnesses and the weight to be given their statements. There was testimony to the effect that the results which followed the injury as its necessary consequence, and which would not have taken place had it not been for the injury, caused the death of deceased. Testimony of this character is sufficient to support the conclusion that his injuries were the proximate and sole cause of his death. *Mutual Acc. Ass'n v. Barry*, 131 U. S. 100, 112, 9 Sup. Ct. 755, 33 L. Ed. 60.

The policy sued upon provided as follows: "Immediate notice in writing of any accident and injury on account of which claim is to be made, shall be given the secretary of said company at New York City, New York, with full particulars and full name and address of the insured." The deceased was injured about April 10th. He died May 8th following. Plaintiff was appointed administrator shortly after Emanuel's death, and on the 19th day of July, following his decease, gave the defendant notice of the accident. Under this state of facts, in connection with the provisions of the policy quoted, counsel for defendant contend that the failure to give notice of the accident to the deceased prior to the date it was given debars the plaintiff from recovering in this action. In other words, the contention of counsel is that the failure to give notice of the accident in the circumstances of this case resulted in a forfeiture of the policy. This question or others of a similar import have been before the courts of last resort many times, with the result that it has been often de-

clared that, while notice is a condition precedent to maintaining an action, a failure on the part of the insured or beneficiary under a policy of insurance to comply with its terms with respect to notice after loss, will not result in a forfeiture of the policy unless, by the express terms thereof, or by necessary implication, such was the contract of the parties. *Orient Ins. Co. v. Clark* (Ky.) 50 S. W. 863; *Flatley v. Phenix Ins. Co.* (Wis.) 70 N. W. 828; *Woodman's Acc. Ass'n v. Byers* (Neb.) 87 N. W. 546, 55 L. R. A. 291; *Tabor v. Royal Ins. Co.* (Ala.) 26 South. 252; *Vangindertaelen v. Phoenix Ins. Co.* (Wis.) 51 N. W. 1122, 33 Am. St. Rep. 29; *Rynalski v. Insurance Co.* (Mich.) 55 N. W. 981; *Hall v. Concordia F. Ins. Co.* (Mich.) 51 N. W. 524; *Mason v. St. Paul F. & Marine Ins. Co.* (Minn.) 85 N. W. 13, 83 Am. St. Rep. 433; *Sun Mut. Ins. Co. v. Mattingly* (Tex. Sup.) 18 S. W. 1016; *Lion Fire Ins. Co. v. Starr* (Tex. Sup.) 12 S. W. 45.

There is no suggestion of forfeiture, for failure to give immediate notice in writing of accident to the insured, in the paragraph of the policy in which that requirement is found, nor is there any general clause to the effect that a failure on the part of the insured or beneficiary to comply with the terms and conditions of the policy shall work a forfeiture thereof. In another clause of the policy relating to proofs of death, it is provided that unless such proof is furnished within a specified time from the date of accidental injury, "then and in that case any claim made by the insured or his beneficiary on account thereof shall be forfeited to the company." This would indicate that it was the intention of the parties to limit forfeiture to those particular matters which, according to the terms of the policy, it is said will work that result. 13 Enc. Law (2d Ed.) 328; *Steele v. German Ins. Co.* (Mich.) 53 N. W. 514, 18 L. R. A. 85; *Continental F. Ins. Co. v. Whitaker* (Tenn. Sup.) 79 S. W. 119; *Hartford F. Ins. Co. v. Redding* (Fla.) 37 South. 62, 67 L. R. A. 518; *Gerringer v. N. C. Home Ins. Co.* (N. C.) 45 S. E. 773. At least, the policy is fairly susceptible of that construction, and it is now a well recognized rule that where the terms of a policy of insurance are not clear, or are capable of two constructions, the one which is most favorable to the insured will be adopted. *Travelers' Ins. Co. v. Murray*, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267; *Strauss v. Phoenix Ins. Co.*, 9 Colo. App. 386, 48 Pac. 822; *Atlantic Ins. Co. v. Manning*, 3 Colo. 224; *Queen Ins. Co. v. Excelsior M. Co.* (Kan.) 76 Pac. 423.

On behalf of the defendant it is insisted that the requisite preliminary proof of death required by the terms of the policy was not furnished, and that the action was prematurely brought. Within the time required by the policy the company received the preliminary proofs of death offered by the administrator. These were returned by the

company, with the statement that as neither of the affiants "has any personal knowledge relating to the circumstances connected with the alleged injury and death of William H. Emanuel, the affidavits do not afford any proof whatever that the death of the insured resulted proximately and solely from accidental causes. * * * The affidavits enclosed in your letter of the first instant are, therefore, returned herewith, as the company declines to regard them as proofs within the terms of the policy." Whether or not these affidavits were sufficient is immaterial. The plaintiff was not required to furnish the company in the way of preliminary proofs on the subject of the death of the insured and the cause thereof, more than was necessary to establish a prima facie case in an action on the policy. *Ætna Life Ins. Co. v. Milward* (Ky.) 82 S. W. 364, 68 L. R. A. 285. In other words, it could not require the plaintiff to furnish affidavits of persons having personal knowledge of the injuries which resulted in the death of the deceased, and, when it declined to accept preliminary proofs unless they were of that character, or, rather, demanded preliminary proofs which the policy did not obligate the plaintiff to furnish, it waived the preliminary proofs which the policy did require. The stipulation in the policy that the company should have a certain period within which to pay the claim, after the proof of death was received, was for its benefit. The object of this provision is two-fold: (1) To enable the company to investigate and verify the proofs submitted; and (2) to enable it to make financial arrangements to discharge its obligation—*Cal. Ins. Co. v. Gracey*, 15 Colo. 70, 24 Pac. 577, 22 Am. St. Rep. 376. When, however, as in this instance, it refuses the preliminary proofs tendered, and demands proofs which the plaintiff was not required to furnish, it waived the right to insist on the expiration of the period provided in the policy after preliminary proofs of death were furnished before an action can be maintained on the policy by those who have the legal right to enforce it.

Errors are assigned on instructions requested by the defendant and refused. There is no merit in either of these contentions. The court, of its own motion, either gave substantially the instructions refused on the part of the defendant, or those given were in harmony with the views already expressed on the different propositions discussed and determined, or the instructions requested by the defendant and refused were contrary to the law of the case on these several propositions, or they related to matters not in issue.

The judgment of the district court is affirmed.

Affirmed.

GODDARD and BAILEY, JJ., concur.

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CAMPLIN et al. v. JACKSON et al.

(Supreme Court of Colorado. Dec. 4, 1905.)

1. APPEAL—HARMLESS ERROR—SETTING ASIDE JUDGMENT.

There can be no prejudicial error in setting aside an absolutely void decree.

2. WILLS—DECREE ADMITTING TO PROBATE—VACATION.

Where the county court had jurisdiction of the subject-matter and the parties, it was error, in a proceeding started in such court more than six months after the rendition of a decree admitting a will to probate, to vacate the previous judgment of probate.

3. SAME—APPEAL.

Where a decree admitting a will to probate was erroneously vacated by the county court in a proceeding instituted therein more than six months after the rendition of the decree, the judgment of the district court on appeal in such proceeding annulling the previous decree of probate was also error, notwithstanding the error of the probate court in admitting the will to probate was such as would have worked a reversal of the decree on appeal or error.

4. APPEARANCE—JURISDICTION ACQUIRED.

Where, in proceedings to probate a will, the heirs at law enter a personal appearance and expressly consent to the admission of the instrument to probate as the last will of testator, the county court acquires jurisdiction of such parties.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appearance, § 79.]

5. WILLS—PROBATE PROCEEDINGS—JURISDICTION OF SUBJECT-MATTER.

In adjudicating the question whether an instrument proposed was the last will and testament of testator, the county court has power to determine all facts pertinent, including the question whether or not the will was a forgery and whether it was executed with essential formalities and properly attested.

6. SAME—ERROR IN EXERCISE OF JURISDICTION.

In adjudicating the question whether an instrument was the last will and testament of a testator, error of the county court in deciding any pertinent fact, including the question whether or not such will was a forgery and whether or not it was executed with essential formalities, including proper attestation, was an error in the exercise of jurisdiction, and not in the assumption thereof.

7. SAME—SETTING ASIDE JUDGMENT.

Heirs at law expressly consenting to a decree probating a will, the court, having jurisdiction of the subject-matter and of the person, cannot thereafter, without any showing of fraud, have such decree set aside.

Appeal from District Court, Boulder County; Christian A. Bennett, Judge.

Action by Robert Jackson and another against Caroline J. Camplin and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Talbot, Denison & Wadley, Geo. F. Dunklee, and O. E. Jackson, for appellants. S. S. Downer, Prince A. Hawkins, and C. M. Campbell, for appellees.

GUNTER, J. January 15, 1893, Mary C. Moore died leaving an instrument in her handwriting, signed by herself and attested by one witness, purporting to be her last will and testament. The estate devised consisted

of real and personal property, situate in Boulder county, Colo. In September, 1895, the will was admitted to probate in the county court of Boulder county, Colo. In July, 1897, one of the heirs at law of Mary C. Moore, Robert Jackson, one of appellees, filed in the said county court his petition to have the decree admitting the will to probate annulled. Later a petition in intervention in the same proceeding was filed by another of the heirs at law of said deceased, Albert Culter, one of appellees, joining in the application of Robert Jackson, to have the decree probating the will vacated. A decree of the county court was entered June 29, 1900, pursuant to such proceeding by Robert Jackson and Albert Culter annulling the will. The judgment so rendered was taken on appeal to the district court, where a judgment was also entered annulling said decree admitting said will to probate, to review which last-mentioned judgment is this appeal.

The will devised to Caroline J. Camplin, one of appellants, a niece of the testatrix, one-third of her estate, and to her brothers, John and Robert Jackson, and to her sister-in-law, Elizabeth Carman, and to her niece, Mary Alice Wolff, and to her nephew, Walter Jackson, each \$100. The remainder of her estate was devised to Clara Ellen Wolff and Oscar E. Jackson. Mary Adella Webb claimed to be an adopted child and heir at law of deceased. Oscar E. Jackson agreed with the other heirs at law to institute and conduct litigation to determine whether Mary Adella Webb was an heir at law, provided such heirs would agree that the above instrument should be admitted of record as the last will. Without any fraudulent representation upon the part of Oscar E. Jackson, the heirs at law consented to have the will admitted to probate, among whom were appellees Robert Jackson and Albert Culter. Litigation was instituted by Oscar E. Jackson, and carried on by him through the county court and the Court of Appeals of this state at his expense, and resulted in a judgment declaring that Mary Adella Webb was not an heir at law of deceased. About two months after the final disposition of the proceedings to determine the alleged heirship of Mary Adella Webb the will of Mary C. Moore was filed for probate, and shortly thereafter admitted to probate. The heirs at law entered their appearance in the proceeding, and in writing expressly agreed that the will should be admitted to probate, and a decree was entered as heretofore stated in September, 1895, admitting the said instrument to probate as the last will and testament of Mary C. Moore, deceased.

If the judgment of the county court admitting this will to probate is a nullity, then there was no prejudicial error committed in the subsequent proceeding of the county court and the district court entering decrees setting aside the judgment of the county court admitting the will to probate, because there could be no prejudicial error in setting aside

an absolutely void decree. If, on the other hand, the judgment of the county court admitting this will to probate was a judgment reached in a case in which that court had jurisdiction of the subject-matter and the parties, then it was error in the county court, in a proceeding started in that court more than six months after the rendition of the decree admitting the will to probate, to make an order vacating the previous judgment of probate. Likewise the judgment of the district court was error, which in that same proceeding, upon appeal, annulled the previous decree of probate. This is true, notwithstanding such serious error was committed by the probate court in admitting the will to probate as would have worked a reversal of such decree on appeal or error. Let it be borne in mind that it is not contended that any fraud was practiced in procuring the decree admitting the will to probate.

In order to sustain the judgment of the lower court annulling the decree probating the will, appellees must show that the decree admitting the will to probate was absolutely void. Decisive of this question is whether the lower court, in admitting the will to probate, had jurisdiction of the subject-matter and the parties. It had jurisdiction of the parties through the heirs at law entering a personal appearance in the proceeding to probate the will, and in their by writing expressly consenting that said instrument should be admitted to probate as the last will and testament of Mary C. Moore. Now, as to the jurisdiction of the subject-matter: By the Constitution and laws of this state the county court was given jurisdiction of determining whether the instrument offered for probate was the last will and testament of said deceased. Const. art. 6, § 23; 1 Mills' Ann. St. p. 272, § 395; Id. p. 845, § 1095. "Jurisdiction is authority to hear and determine a cause. Since jurisdiction is the power to hear and determine, it is not, as will be pointed out later, dependent either upon the regularity of the exercise of that power or upon the rightfulness of the decision made." 17 Am. & Eng. Ency. of Law, 1041. "When there is jurisdiction of the person and subject-matter, the decisions of all other questions arising in the case are but an exercise of that jurisdiction." Id. 1042. The county court had the power to hear and determine whether the instrument proposed was the last will and testament of Mary C. Moore. In adjudicating this question it had the power to determine all facts pertinent. It had the power to determine whether or not the will was a forgery, and whether or not it was executed with the formalities essential to the validity of a will. This would include whether or not it was properly attested. An error committed in deciding upon any one of these questions would be an error, not in assuming jurisdiction, but in the

exercise of jurisdiction. *Powell v. National Bank of Commerce*, 19 Colo. App. 57, 58, 74 Pac. 536; *People ex rel. Lindsay, Dist. Atty., v. District Court*, 30 Colo. 488, 71 Pac. 388.

The principle upon which the conclusion rests that the judgment in this case is not a void one, and can only be attacked by appeal or error, is the same which sustains the validity of a judgment against attack, except by appeal or error, in case of a judgment rendered upon a complaint which fails to state a cause of action. 17 Am. & Eng. Ency. of Law, p. 1067. A judgment is not void because of the failure of the complaint to state a cause of action, because the error there is one of irregularity in procedure, and not one of jurisdiction. Jurisdiction "is the power to act upon the general, and, so to speak, abstract, question, and to determine and adjudge whether the particular facts presented called for the exercise of the abstract power. Jurisdiction of the subject-matter is the power lawfully conferred to deal with the subject involved in the action." *Bailey on Jurisdiction*, vol. 1 (Ed. 1899) p. 3, § 4. "Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action; but it includes every issue within the scope of the general power vested in the court, by the law of its organization, to deal with the abstract question. Nor is this jurisdiction limited to making correct decisions. It empowers the court to determine every issue within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties to it, unless reversed by writ of error or appeal, or impeached for fraud." *Foltz v. St. Louis & S. F. Ry. Co.*, 19 U. S. App. 576, 8 C. C. A. 635, 60 Fed. 316, approved in *Board of Commissioners v. Platt*, 79 Fed. 567, 570, 25 C. C. A. 87.

This proceeding by appellee was, as stated, by a petition filed in the probate court more than six months after the decree was rendered probating the will for the purpose of setting aside the will. The findings of the trial court, which are not questioned, exclude the question of fraud in procuring the probating of the will. The present action is not an attempt to review the alleged error in the probate court by error or appeal. Stripped of details, the county court upon the express consent of appellees, heirs at law of deceased, entered a judgment admitting the will to probate; such court then having jurisdiction of the subject-matter and of the person. Appellees, who thus expressly consented to the decree probating the will, are now attempting in this particular procedure,

without any showing of fraud, to set aside a judgment which they expressly consented to be rendered. This, we think, cannot be done. We conclude that the judgment in this case admitting the will to probate was not void, and that the error committed by the court, if it were one, in admitting the will to probate, was not an error in the assumption of jurisdiction, but in the exercise of jurisdiction which it had assumed and had. If there was error in admitting the will to probate, it was reviewable only on error or appeal. Such was not the character of this proceeding.

The judgment of the lower court will be reversed, with instructions to dismiss the action.

Reversed.

The CHIEF JUSTICE and MAXWELL, J., concur.

HOPKINS et al. v. NORTHWESTERN NAT. LIFE INS. CO.

(Supreme Court of Washington. Feb. 9, 1906.)

1. INSURANCE—LIFE AND ENDOWMENT POLICY—WAIVER OF ENDOWMENT.

A certificate of insurance provided for payment of \$2,000 at death of insured, or that if he should keep it good for 10 years he could then surrender it, and receive \$1,000 from the endowment fund, to be supplied by assessments as provided in the certificate. At the end of 10 years insured surrendered it, and demanded the \$1,000; but the insurance company immediately returned it, and requested insured to keep it till notified by the company that the proper assessment had been made on certificate holders, and a sufficient sum raised thereby to pay insured's certificate. Several times during the succeeding two years insured demanded payment of the \$1,000, and each time the insurer represented that the funds had not been raised, but that steps were being taken therefor, and that it would notify insured when the funds had been raised. Insured relied on such representations, and therefore delayed action, but the company never gave notice that it was ready. The company also thereafter demanded payments of premiums from insured, stating that they were necessary to keep the policy from becoming void, and insured, who was old and inexperienced in business, and did not understand the policy, made the payments relying on such representations. *Held*, that insured had not waived his right to payment of the endowment.

2. SAME—PREMIUMS—PAYMENT UNDER MIS-TAKE.

Where, after insured has become entitled under his policy to payment of an endowment, he being inexperienced in business, continues to make payments of premiums, relying on the representations of the insurer that it was necessary to keep the policy alive while funds for payment of the endowment were being raised, he may recover them as payments made under a mistake of material facts.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 457.]

3. SAME—ESTOPPEL.

Where insured at the time provided by his policy surrenders it, and demands payment of the \$1,000 endowment to which he is then entitled under the policy, but the insurance company returns it, and requests him to keep

it till notified by it that a sum has been raised for payment of the endowment, and it never gives him such notice, but for two years demands payments of him of premiums, which insured in his ignorance makes on its representation that they are necessary to keep the policy alive, it is estopped to claim that later payments of premiums made after demands therefor had ceased, were not made by reason of such representations.

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Action by Thomas C. Hopkins and another against the Northwestern National Life Insurance Company. Judgment for defendant. Plaintiffs appeal. Reversed.

Wardell & Wardell and Frank C. Park, for appellants. Rufus J. Burglehaus and Emmett N. Parker, for respondent.

DUNBAR, J. The complaint alleges, in substance, that Thomas C. Hopkins, one of the appellants in this case, entered into a contract of life insurance with the defendant corporation, by the terms of which plaintiff agreed to pay promptly all dues and assessments which should be levied by defendant, and at the end of 10 years, to wit, on March 18, 1898, he was, in the event of his survival, to surrender his certificate and receive \$1,000 upon an endowment policy; that a clause in the contract provided that, in the event of the death of the insured, before the 10 years had elapsed, Carrie Hopkins, one of the appellants here, was to receive \$2,000; that the plaintiff performed all and every condition of his contract, etc., and at the termination of the period of 10 years, surrendered to the defendant his policy, and demanded the sum due thereon; that the defendant at once returned the contract to plaintiff, requesting him to keep it until notified by defendant that the proper assessment had been made upon the certificate holders, and a sufficient sum had been raised by such assessment to pay said plaintiff's certificate; that a number of times after said first demand, covering a period of more than two years thereafter, the plaintiff demanded that defendant pay said sum of \$1,000; that at each of such times said defendant held out and represented to plaintiff that the funds had not been raised therefor, and that defendant would notify plaintiff when sufficient funds had been raised by such assessments, and when it would be ready to pay such certificate; that the necessary steps were being taken, and had by defendant for the collection of the assessments necessary to pay plaintiff; that defendant has never notified plaintiff that it had completed the assessment for the payment of said policy, and was ready to pay the same; that plaintiffs relied upon such representations of defendant that it was taking the necessary steps to collect the funds to pay said policy, and that it would notify plaintiffs when the funds had been collected on the assessments; and that by reason of the holding out of such promises of

an amicable settlement, plaintiffs delayed the bringing of suit on said policy till this time; that defendant has not paid said sum of \$1,000, or any part thereof, and that the same is now due and owing to these plaintiffs; that on or about the 1st day of May, 1898, the defendant demanded, in writing, of these plaintiffs the sum of \$8.45, as and for a payment to it for the purpose of keeping said policy in force, and such written demand required plaintiffs to make such payment to defendant on or before the 1st day of May, 1898, and stated that in default of such payment the said policy would become void, and all payments theretofore made thereon would become forfeited to defendant; that at such times these plaintiffs were old people, and were then visiting at the city of Dawson, Yukon Territory; that they were inexperienced in business affairs; that they were ignorant of and did not understand the purport and meaning of the terms of their said policy and their rights thereunder; that they were also ignorant of the manner of levying assessments by defendant upon the holders of policies, and knew nothing of the internal management of insurance companies; that they were ignorant and unacquainted with the amount of proceeds on hand with said company at the time said demand was made, and also the amount necessary to be raised in addition thereto to cover their policy; but that the defendant, well knowing the facts in regard to these plaintiffs, and the policy which they held, unlawfully demanded, extorted, charged, took, and received from these plaintiffs the sum of \$8.45, on the pretense that it would cancel and forfeit such policy if such payment was not made; and believing, on account of such representations, that the policy would become forfeited and lost to these plaintiffs if said payment was not made, and in order to avoid the expense of litigation and save themselves from unnecessary charges and expenses, they were coerced by the said defendant to make such payment; that under the same circumstances other payments were made (which are set forth in the complaint); that none of such sums were ever justly due or owing to said defendant at any time, or at all, but that all such sums were unlawfully extorted and exacted from plaintiffs. The prayer is for judgment against the defendant, on their first cause of action, in the sum of \$1,000, with interest thereon, at the rate of 6 per cent. per annum from the 18th day of March, 1898, together with costs and disbursements. On the second cause of action, judgment is prayed for the different sums paid to the defendant, as alleged in the first cause of action, up to the time of the commencement of this suit. Demurrers were interposed to both causes of action, and were sustained, on the ground that no cause of action was stated in the complaint.

The policy, which is the basis of the complaint, and made a part thereof, provides un-

equivocally for an endowment policy, and for an endowment fund, expressly providing that if the holder of the certificate shall keep the same good by promptly paying all the dues and assessments, and survive until the 18th day of March, 1898, he shall at said date surrender the certificate to the association, and receive the sum of \$1,000 from the endowment fund. It then proceeds to state how the endowment fund shall be supplied, by assessments at certain rates, etc., which explains the allegation made in the complaint that the plaintiffs' right of payment under the endowment provision was postponed until the endowment fund should be supplied by assessment. Whether the contract provides for any other character of payment, it is not necessary in this case to determine; but, conceding that there was a choice of two rights given by the terms of the contract, we think there was no waiver of the right to receive the \$1,000 provided for in the policy at the expiration of 10 years, and which was demanded by the appellants. The case is argued here on the proposition alone that the complaint did not state facts sufficient to constitute a cause of action, and the action of the court in sustaining the demurrer must have been upon the theory of waiver or estoppel, that the appellants, by proceeding after the 10 years had expired, to pay the regular premiums on the policy, had elected to accept the conditions of the policy, which provided for the payment of \$2,000 at the death of the assured. But we are of the opinion that the court did not place a proper construction upon this complaint. A waiver is defined to be the intentional relinquishment of a known right, and there can be no waiver unless the person against whom the waiver is claimed had a full knowledge of his rights. 29 Am. & Eng. Enc. of Law, 1093, and cases cited. It was held, in *Hamilton v. Home Ins. Co.*, 42 Neb. 883, 61 N. W. 93, that knowledge of the existence of a right and the intention to relinquish it must concur to create an estoppel by waiver. In this case, if the allegations of the complaint are true, and they must be taken to be so—those which are well pleaded, the assured did not have a full knowledge of his rights; for according to the representations made to him by the insurance company, it was necessary for him to make these payments during the time the company was making arrangements to pay him the amount of the policy, in order that the policy should not become void. It was upon this representation that he acted. Neither will waiver be implied from slight circumstances, but must be evidenced by an unequivocal and decisive act clearly proven. 29 Am. & Eng. Enc. of Law, 1105. These people were old, inexperienced in business affairs, and anxious to keep their policy from becoming void; and this state of ignorance, together with the representations which were made to them by the company's agent, was the cause of the payments, which were relied upon as a waiver

of their rights under the endowment provision of the contract, and an acceptance of the other provisions of the policy. It was held, in *Fulton v. Insurance Co.* (Com. Pl.) 19 N. Y. Supp. 660, that the failure to read a contract would not bar relief when, if relief was afforded, no injury would happen to others, and particularly when the person to whom money was paid by mistake knew, or ought to have known, that he was not entitled to receive it. How much stronger is this case, where the insurance company not only knew that it was not entitled to receive this money, but did receive it through its affirmative misrepresentation of facts. Neither can it be inferred that a party waives his right under a contract by making a payment thereunder, while at the same time making demand for his rights. *Griffith v. Newell* (S. C.) 48 S. E. 259. It is also announced in 29 Am. & Eng. Enc. of Law, 1095, that the validity of a waiver requires that it shall have been made intentionally and voluntarily; that voluntary choice is of the essence of waiver, and the view that waiver is a legal result operating upon a certain state of facts, independent of intent, has been declared to be without foundation. The same authority, on page 1096, further declares, in accordance with the authorities cited, that the existence of an intent to waive is a question of fact, and must be made clearly to appear.

It was said by this court in *David v. Oakland Home Ins. Co.*, 11 Wash. 181, 39 Pac. 443, where the parties were endeavoring to adjust a loss, that so long as the insured was given the right to suppose that the question of adjustment was an open one, he had the right to assume that the condition of the policy as to the time for the commencement of an action thereon had been waived by the company, and such waiver would continue until, by some definite action on its part, the company had notified the insured of the rejection of its claim, after which he would have a reasonable time in which to commence an action upon the policy. As sustaining this contention, see, also: *Birge v. Browning*, 11 Wash. 249, 39 Pac. 643; *Elliott v. Puget Sound, etc.*, S. S. Co., 22 Wash. 220, 60 Pac. 410; *Huntington v. Lombard*, 22 Wash. 202, 60 Pac. 414. Waiver as applied to insurance is identical with estoppel. May on Insurance, § 505, says that "estoppel" and "waiver," though not technically identical, are so nearly allied, and, as applied in the law of insurance, so like in the consequences which follow their successful application, that they are used indiscriminately by the courts. A waiver to be an estoppel must be voluntary, and it is settled that a voluntary payment is only made with full knowledge of the circumstances upon which it is demanded, and without artifice, deception, or fraud." According to the allegations of the complaint, these payments were not made with knowledge of all the circumstances, but upon the representation that they were necessary to keep the

policy from lapsing or becoming void. It was a mistake, if mistake at all, of material facts, and it is a general rule that money paid under a mistake of material facts can be recovered back, although there was negligence on the part of the person making the payment, and especially if the payee was in any way responsible for the mistake.

But the principle of estoppel should be applied in this case to the respondent. It is one of the fundamental principles of law, based upon a universally recognized principle of morals, that one should not be allowed to take advantage of his own wrong, and according to the complaint, the payments were made by reason of false representations made by the respondent, inducing the fear on the part of the appellants that their policy would be rendered void if such payments were not made; and although some years have elapsed since the demand for these payments was made, during which time they have continued, yet they were induced in the first instance by the wrongful act of the respondent, at which time it informed the appellants that it would notify them when it was ready to pay the policy, and not having so notified, and having by its wrongful acts compelled them to commence making these payments, the law will not too closely compute the time within which the payments should cease, but will presume that the later payments were made with the same understanding, and by reason of the same representations, that the earlier ones were made.

The complaint, in our judgment, stating a cause of action, both as for the recovery of the endowment and of the money paid through mistake and misrepresentations, the judgment will be reversed, and the cause remanded, with instructions to the lower court to overrule the demurrer to the complaint.

MOUNT, C. J., and CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

CAPITAL NAT. BANK v. ROBINSON.

(Supreme Court of Washington. Jan. 19, 1906.)

BILLS AND NOTES—PAYMENT.

Defendant and M. executed a joint note to plaintiff bank, and on maturity M., claiming to be a surety, notified the bank to sue defendant alone, and to induce it so to do executed an agreement with the bank by which a certain amount was deposited with the bank's president in escrow as trustee, to be applied to the purchase of any judgment which the bank might recover against defendant on the note, in case he should not pay the same; the bank agreeing to assign such judgment to whomsoever M. should appoint. It was also agreed that such escrow funds should be deposited in the general funds of the bank, represented by a certificate of deposit payable to the president as trustee, and that any surplus remaining over the amount of judgment, costs, and attorney's fees, should be repaid to M. Held, that such agreement did not amount to a payment of the note by M., so as to preclude the bank from maintaining an action thereon against defendant alone.

Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

Action by the Capital National Bank against J. W. Robinson. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Vance & Mitchell, for appellant. G. C. Israel, for respondent.

PER CURIAM. The plaintiff, the Capital National Bank, a corporation, brought this action on a promissory note against the defendant J. W. Robinson. A demurrer was interposed to the complaint, which was overruled, whereupon the defendant made application to have George A. Mottman, who had signed the note sued upon jointly with the defendant, made a defendant in the action, which application was denied. Thereupon the defendant answered, denying certain allegations of the complaint, and averring that the plaintiff was not at the date of the institution of the suit, and was not then, the owner of said promissory note sued upon; but that said note had been paid in full to the plaintiff, and that such payment was made by George A. Mottman, the party who signed said note jointly with defendant. The reply denied this allegation, and the cause went to trial, and judgment was entered in favor of plaintiff, the respondent here. From such judgment this appeal is taken.

The main contention of the appellant is that a certain written agreement, which was offered in evidence, and the testimony in the case show that the suit had not been commenced by the real party in interest, and that the debt had actually been paid by Mottman to the bank. Prior to the commencement of the action Mottman, who had signed the note with appellant Robinson, gave notice to the bank, under the provisions of the statute, to forwrit institute action upon said note, alleging that he was a surety upon said note; and the following agreement was entered into between Mottman and the Capital National Bank, by C. J. Lord, its president:

"And whereas, the said second party is desirous of having said note collected without suit or action against him upon the same; and, whereas, the said second party does not desire to pay the said note, or discharge the obligation of himself and the said J. W. Robinson thereon: Now therefore for the purpose of enabling the first party to proceed to the collection of said note without the necessity of making the second party a party defendant to an action on said note, the said second party has this day deposited with C. J. Lord, of Olympia, Thurston county, state of Washington, the president of said first party, as trustee for the carrying into effect of this escrow, the sum of seventeen hundred dollars (\$1,700) to be by him held and subsequently applied as follows, to wit: The said first party shall within five days

dividually upon said note and proceed with due diligence to the obtaining of a final judgment upon the same.

"In the said cause and prosecution of same, aside from principal, interest and costs, attorney's fees shall be asked and allowed not to exceed as follows, to wit, and to be included in said judgment: (1) If judgment is obtained by default of said J. W. Robinson, attorney's fees not to exceed twenty-five dollars (\$25.00). (2) If judgment is obtained after appearance and issue joined by said J. W. Robinson in the superior court, then attorney's fees not to exceed seventy-five dollars (\$75.00). (3) If the said J. W. Robinson shall prosecute an appeal to the supreme court from any judgment obtained in the said superior court, then attorney's fees not to exceed one hundred and fifty dollars (\$150.00). In case of appeal the said Capital National Bank agrees to require the sureties on appeal or supersedeas bond in case of a personal bond to justify and be accepted by the trial court and to assign any judgment rendered on appeal, in favor of said Capital National Bank to party of second part or such party as he shall direct. The said C. J. Lord as trustee shall deposit such escrow moneys with the said first party in its general funds and have issued unto himself as such trustee a certificate of deposit for the same.

"Upon the obtaining of a final judgment against the said J. W. Robinson upon the said note, the said C. J. Lord shall pay said first party the amount of said judgment including all costs, and attorney's fees out of the said escrow money, and if there be any surplus remaining, pay the same to the said second party. In case there be any deficiency between the amount of said judgment and the amount of said escrow deposit, the said second party shall immediately pay the said first party the difference existing between said sums. The first party shall thereupon assign to any person whom said second party may direct, the said judgment.

"It is mutually agreed and understood by the parties hereto, that the said deposit in escrow is not made in any way as a discharge or in payment of said note, but only as security for the payment of such judgment as may be obtained upon said note. It is further agreed that if the said J. W. Robinson shall at any time satisfy and discharge the said note, pending the said action or any judgment obtained thereon, that the said escrow deposit shall be forthwith returned to said second party. It is further agreed that upon deposit of said escrow money as aforesaid in the settling of the judgment obtained, for the payment of which the sum is deposited as security, that at the time of settlement, irrespective of the amount of interest accrued on said note after action and included in said judgment there shall be deducted from the amount necessary to settle said judg-

ment, an amount equal to eight per cent. (8%) of said principal sum of \$1,390, from the date of said escrow deposit to the date of such settlement.

"The first and second parties hereby mutually covenant and agree to and with each other that each will make faithful performance of all promises and agreements herein required on his or its part to be performed.

"In witness whereof, all of the said parties have hereunto set their hands and executed the foregoing agreement by their proper officers in duplicate, this 5th day of March, A. D. 1904.

"Capital National Bank,

"By C. J. Lord, President.

"Geo. A. Mottman,

"Second Party.

"C. J. Lord, Trustee."

The statement of facts is simply a résumé of the testimony, which is very brief. It appears that, in accordance with the contract, the money was paid to Lord, as trustee for the bank, Lord paying the money into the general fund of the bank and taking a certificate of deposit for the same. There is testimony in relation to the payment of a docket fee and taking out of a second certificate with that amount deducted, which does not seem to us to be material. The essential question is whether the conditions of this contract and the payment into the bank by the trustee, Lord, constituted a payment of the note by Mottman. We do not think they did. The fact that the trustee, Lord, was the president of the bank does not affect the legal status of the transaction. It appears from the agreement and from the testimony of Lord that he acted as trustee only, and while the money went into the general fund of the bank it went there subject to Lord's call, the same as it would have done if it had been deposited by any one else. Mr. Lord testified that the certificate was assignable; that the bank never had any custody or control of the money, save such as it obtained by virtue of its being deposited with the bank; that the money so deposited was received by the bank under and pursuant to the terms of a written agreement between himself and Mottman; and that his connection with the transaction was that of an individual acting as trustee, and not as an officer of the bank. There was no testimony tending to dispute this, unless it could be gathered from the provisions of the contract, and that the contract was not intended to operate as a payment of the debt is evident from the terms of the contract itself, which provides that it is mutually agreed and understood by the parties hereto that the said deposit in escrow is not made in any way as a discharge or in payment of said note, but only as security for the payment of such judgment as may be obtained on said note. While it may be true that a statement of this kind might not weigh against the terms of a contract which

as a legal proposition would constitute payment, yet it may be considered for the purpose of arriving at the intention of the contracting parties, by showing what construction they placed upon it. A prerequisite, under this contract, to the bank receiving this deposit as its money, was that it should reduce the claim to judgment, and under the terms of the contract it could not have claimed this money at the hands of the trustee without such an action on its part. There would have been nothing to prevent the holder of this certificate (the deposit and the certificate having constituted the bank and the depositor a debtor and creditor) from presenting it and obtaining the money which he had deposited. The contract was one which the parties had a right to enter into for the purposes therein expressed, and did not, we think, constitute a payment of the debt. The judgment is affirmed.

ROOT, J. I feel constrained to dissent. Brushing aside forms and having regard to substance, it seems to me that Mottman paid the note and was thereafter the only party authorized to maintain an action thereon.

HARRIS v. TOWN OF MT. VERNON.

(Supreme Court of Washington. Jan. 15, 1906.)

1. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALK — INJURIES — EVIDENCE — SUFFICIENCY.

In an action for injuries to a pedestrian from a defective sidewalk, evidence as to the character of the defect *held* to warrant a verdict for plaintiff.

2. SAME — EVIDENCE — ADMISSIBILITY.

In an action for injuries to a pedestrian from a defective sidewalk, it was proper to show the condition of the walk for a reasonable distance on each side of the place of injury.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporation, § 1734.]

3. SAME — QUESTION FOR JURY.

In an action for injuries to a pedestrian from a defective sidewalk, *held*, that the question whether the injury was the cause of plaintiff's physical condition was one for the jury.

Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Action by Rose Harris against the town of Mt. Vernon. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Dave Hammack, Millon & Houser, and Shranger & Barker, for appellant. McLean & Wakefield, for respondent.

FULLERTON, J. The respondent recovered a judgment against the appellant town in the sum of \$2,500 for injuries received from a fall caused by a defective sidewalk, constructed and maintained by the town on one of its streets. The town has appealed from the judgment, and as grounds for reversal assigns that the court erred, first, in refusing to grant the appellant's motion to take the case from the jury and enter judgment for

the appellant made at the close of the respondent's case in chief; second, in refusing to hold that the evidence was insufficient to justify the verdict; third, in the admission of certain evidence; fourth, in its instructions to the jury; and, fifth, in refusing to hold that the verdict was excessive and given under the influence of passion and prejudice.

The first two assignments suggest the same question, namely, the sufficiency of the evidence to justify the verdict. On this branch of the case it is argued that the evidence showed that the sidewalk at the place of the accident and generally in its vicinity was in reasonably good repair, and that the city had no notice, either actual or constructive, of the particular defect that caused the accident. The evidence on the part of the city, it is true, tended to this effect, and the jury, doubtless, would have been warranted in so finding. But there was substantial evidence the other way. It was testified by competent and disinterested witnesses, living within the vicinity of the walk, that the walk had long been out of repair, so much so, in fact, that one walking over it had to use more than ordinary care to avoid injury, and that the particular board that caused this injury was warped and loose, so that it would rock when stepped upon, and that it had been in that condition for more than a month prior to the accident. It was testified, also, that the attention of certain officers of the city had been called to the defective condition of the walk, and that it had been the subject of consideration by the city council prior to the accident. This, if believed by the jury, abundantly justifies their verdict. True, much or all of it was denied by the city; but the right to determine on which side the truth lay was with the jury, and this court is bound by their finding thereon. We conclude, therefore, that the verdict is sustained by the evidence, and the trial court did not err in so holding.

The third objection is based on the contention that the court admitted evidence as to the condition of the walk at points too remote from the scene of the accident. At the place in the record pointed out by the appellant in support of this contention the following appears in the examination of a Mr. Sterns, a witness for the respondent: "Q. How long have you lived here [meaning in the town of Mt. Vernon]? A. Three years the 16th of last July. Q. You know of the circumstances of Miss Harris getting hurt on that sidewalk last summer? A. Yes, sir. Q. You travel that sidewalk frequently, do you? A. Yes, sir. Q. I would ask you to state what was the general condition of that sidewalk at the time and prior to the time of this injury. (Mr. Million: Defendant objects as incompetent, irrelevant, and immaterial. The Court: Objection overruled. Exception allowed.) A. It was very bad. Q.

Where was it bad? From what points? A. From the bottom to the top of the hill. Q. In what particulars was it bad? A. The stringers were loose. They were rotten, and the blocking under them had rotted away, and the boards were loose. Q. What about holes in the walk? A. There were several of them." There was no error in this. It was permissible to show the condition of the walk for a reasonable distance on each side of the place of the injury, and, as the quotation from the record shows all that appears as to the length of the walk, it is impossible to say that this rule was violated. Moreover, the next question and answer, to which there was no objection, shows the points between which the witness found the sidewalk bad. If, therefore, the first question could be said to be too broad, it was sufficiently narrowed by this explanation.

The instruction complained of was to the effect that evidence of the general condition of the sidewalk in the immediate vicinity of the place of the injury was proper to be considered by the jury, along with the other evidence in the case, in determining the question whether or not the sidewalk was out of repair at the place of the injury. This we do not think was prejudicial. While it may be that evidence showing a walk to be out of repair at one place is not direct proof that it was out of repair at another, yet evidence of its general condition in the vicinity of the accident is some evidence of its condition at the place where the accident happened.

The objection to the amount of the verdict is based on the contention that the physical condition of the respondent had its origin in other causes than the injury, rather than the contention that her physical condition did not justify the verdict. At the time of the trial the respondent had developed a marked case of curvature of the spine, and it was the opinion of the only medical expert who testified that, while this condition could have been caused by the accident, it was not probable that it was so caused. On the other hand, it was shown by the testimony of the respondent and her immediate family that prior to the injury the respondent was a strong, healthy woman, showing no symptoms of any of the ailments that developed immediately afterwards, while since that time she has been an invalid, incapable of pursuing her ordinary occupation, and that her condition was not improving. Under these circumstances, we think it was for the jury to say whether the injury was the cause of the respondent's condition; and, inasmuch as they found that it was, we do not think their verdict excessive.

The judgment is affirmed.

MOUNT, C. J., and ROOT, CROW, DUNBAR, HADLEY, and RUDKIN, JJ., concur.

GIES v. BROAD.

(Supreme Court of Washington. Jan. 17, 1906.)

1. APPEAL—JURISDICTION—QUESTIONS REVIEWABLE.

Where the Supreme Court has jurisdiction of an appeal solely because the validity of an ordinance is involved, the proper construction of the ordinance is not before the court.

2. MUNICIPAL ORDINANCES—CONSTITUTIONALITY—WAGES OF LABORERS—REGULATION.

A municipal ordinance providing that the rate of wages for laborers on work done by contract for the city in the improvement of the streets shall not be less than a certain sum for a calendar day's work of eight hours is constitutional and valid.

Appeal from Superior Court, Spokane County; George W. Belt, Judge.

Action by George Gies against James C. Broad. Judgment for plaintiff, and defendant appeals. Affirmed.

Cullen & Dudley, for appellant. Robertson, Miller & Rosenhaupt, for respondent.

FULLERTON, J. The respondent commenced an action in the justice court for Spokane precinct, in Spokane county, to recover a balance of \$15.91 claimed to be due him as wages for services rendered the appellant. He recovered in the justice's court, and the judgment was affirmed on appeal to the superior court of Spokane county. This appeal is from the judgment of the superior court. From the record it appears that the appellant had a contract with the city of Spokane for the improvement of one of its streets. By ordinance of that city it is provided that on all work done by contract for the city in the improvement of its streets eight hours in any calendar day shall constitute a day's work, and that the rate of wages for laborers on such work who labor by the day shall not be less than \$2.25 for a calendar day's work of eight hours. The respondent had worked nine hours in each calendar day and had been paid wages at the minimum rate fixed by the ordinance. The action was instituted to recover for the extra time the respondent labored in excess of the time fixed as a day's work by the ordinance.

The appeal is brought within the jurisdiction of this court by reason of the fact that the action involves the validity of the ordinance above mentioned; the appellant contending that that part of the ordinance which fixes the minimum sum to be paid as wages for a day's labor on any public improvement undertaken by the city of Spokane, is unconstitutional and void. He has, however, suggested reasons for reversing the judgment even should we determine the ordinance to be valid, but it is evident that under the rule announced by us in *Henry v. Thurston County*, 31 Wash. 638, 72 Pac. 488, these questions are not before us. In that case we held that on an appeal where we had jurisdiction solely because the validity of a statute was involved we would review

the judgment appealed from only in case we found the statute invalid, and then only to the extent that it was affected by the invalid statute. This rule precludes any inquiry as to the proper construction of the ordinance. If we find the ordinance valid, the inquiry is ended; if invalid, the judgment falls because founded on the ordinance.

The question properly before us, namely, the validity of that part of the ordinance which undertakes to fix a minimum sum to be paid as wages for a calendar day's work, was in effect decided by us in the case of *In re Broad*, 36 Wash. 449, 78 Pac. 1004. There the question was whether that part of the ordinance was valid which limited the number of hours a laborer should be permitted to labor in any one calendar day on a public work undertaken by the city, and we held it valid on the principle that it was within the power of the state (and a city as its instrumentality) to prescribe the conditions on which it would permit public work to be done on its behalf; founding the decision on the case of *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148. The principle involved in that case is not distinguishable from the principle involved in the case now before us. For, surely, if it be within the power of the state to limit the number of hours a laborer may be permitted to labor in one calendar day on any public work undertaken by it, it can fix the minimum sum that shall be paid him as wages for such labor. The power to do either must rest on the principle that "it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." *Atkin v. Kansas*, supra. These considerations dispose of the errors assigned.

The judgment is affirmed.

MOUNT, C. J., and HADLEY, DUNBAR, CROW, and ROOT, JJ., concur.

POSTEL v. CITY OF SEATTLE.

(Supreme Court of Washington. Jan. 15, 1906.)

1. MUNICIPAL CORPORATIONS—STREET GRADING—CLAIMS FOR DAMAGES—WHEN FILED.

Under Seattle City Charter, art. 4, § 29, providing that all claims for damages against the city must be presented to the city council and filed with the clerk within 30 days after they accrue, a claim for damages, sustained by a property owner by the grading of a street, must be presented within the time required, as a condition precedent to an action thereon.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 991.]

2. SAME—ORDINANCE—VALIDITY—REASONABLE TIME.

Seattle City Charter, art. 4, § 29, requiring claims for damages against the city to be filed with the clerk within 30 days after the time when such claims accrue, is not invalid, as not allowing a reasonable time within which to present such claims.

Rudkin, J., dissenting.

Appeal from Superior Court, King County; George A. Joiner, Judge.

Action by P. H. Postel, Jr., against the city of Seattle. Judgment for defendant, and plaintiff appeals. Affirmed.

McBride, Stratton & Dalton, for appellant. Scott Calhoun and O. B. Thorgrimson, for respondent.

FULLERTON, J. The appellant is the owner of certain lots in the city of Seattle fronting on Republican street and First Avenue North. On February 4, 1903, the city of Seattle passed an ordinance providing for the grading of the streets above named, and pursuant thereto the city caused the same to be graded, completing the work on October 3, 1904. The grade as planned called for deep cuts in front of the appellant's property, and, when completed, his lots were left from 15 to 30 feet above the surface of the streets, cutting off access to them, except from the rear through a narrow alley over a steep grade. On March 16, 1905, the appellant presented to the city council of the city of Seattle, and filed with the city clerk, a claim for damages caused by the grade, which claim the city rejected. This action was thereupon brought to recover for the injury caused the lots by the grade. To a complaint embodying the foregoing facts the city demurred on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, whereupon the appellant elected to stand on his complaint. Judgment of dismissal was thereupon entered, and this appeal was taken therefrom.

Section 29, art. 4, of the charter of the city of Seattle, reads as follows:

"Sec. 29. All claims for damages against the city must be presented to the city council and filed with the clerk within thirty days after the time when such claims for damages accrued, and no ordinance shall be passed allowing any such claim or any part thereof, or appropriating money or other property to pay or satisfy the same or any part thereof, until such claim has first been referred to the proper department, nor until such department has made its report to the city council thereon, pursuant to such reference. All such claims for damages must accurately locate and describe the defect that caused the injury, accurately describe the injury, give the residence for one year last past of the claimant, contain the items of damages claimed, and be sworn to by the claimant. No action shall be maintained against the city for any claim for damages until same has been presented to the city council and sixty days have elapsed after such presentation."

The trial court held that this section of the city's charter requires claims for damages of all kinds against the city to be presented to the city council and filed with the city clerk within 30 days after the time when such claim accrues before an action can be commenced thereon; and, since the appellant

did not file his claim until some five months after its accrual, it was barred by this provision of the charter. Against this ruling the appellant makes two contentions: First, that this provision does not apply to this character of claim; and, second, if it does so apply, it is void, because a reasonable time within which to present such claims is not allowed by it.

With regard to the first question, we think there can be but little doubt that the charter provision requires claims of this character to be presented to the city council and filed with the clerk. The language used is "all claims for damages," and this admits of no exception. True, other portions of the section would seem to be more appropriate to claims of another character than this, but this cannot be held to do away with the general requirement. In presenting claims the details provided by the charter provision need only be followed in so far as they are applicable to the particular claim, but the general provision, requiring claims for damages to be presented, is applicable to all claims, and can be followed in every instance. A similar question was before this court in *Scurry v. Seattle*, 8 Wash. 278, 36 Pac. 145. The charter of the city of Seattle at that time required all claims for damages to be presented to the city council within six months after the time when such claim accrued, and we held that a claim for damages sustained by the grading of a street must be presented within the time required, as a condition precedent to the maintenance of an action thereon.

Nor do we think the second objection is well taken. In *Born v. Spokane*, 27 Wash. 722, 68 Pac. 386, and *Ehrhardt v. Seattle* (Wash.) 82 Pac. 296, we held that 30 days was a reasonable time within which to present a claim for personal injuries, and it would be difficult to make a distinction in this regard between claims of that character and claims of the character of the one at bar. We are therefore constrained to hold the requirement reasonable in this respect.

The judgment is affirmed.

MOUNT, C. J., and ROOT, CROW, DUNBAR, and HADLEY, JJ., concur.

RUDKIN, J. I dissent. A literal construction of the first part of the charter provision quoted in the majority opinion would require that all claims against the city should be presented within 30 days after a cause of action accrued. A claim arising out of contract as well as out of tort is "for damages." I think the latter part of the provision shows that the entire provision was only intended to apply to claims for damages arising from defects in the streets or other places which the city is obligated to keep in repair. Any other construction, in my opinion, renders the charter provision unreasonable and unconstitutional.

RICHARDSON v. STEINER, Judge.

(Supreme Court of Washington. Jan. 15, 1906.)

1. MANDAMUS — PARTIES — STATE AS PLAINTIFF.

An application for a writ of mandate in the interest of a private party is properly instituted in the name of the state.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 237.]

2. APPEAL — RECORD — TESTIMONY BEFORE COMMISSIONERS—NECESSITY OF BILL OF EXCEPTIONS.

Under Ballinger's Ann. Codes & St. § 5064, providing: that reports of commissioners, with the testimony and other evidence returned into court therewith, shall be deemed a part of the record upon being filed in the cause, testimony taken before commissioners, but not reported by them, extended from the stenographer's notes and filed with the clerk of the court by the attorneys of a party to be used on the hearing on the report, constitutes no part of the record, unless made so by bill of exceptions or statement of facts.

3. EXCEPTIONS, BILL OF — COMPELLING SETTLEMENT—DEFENSES.

Under Ballinger's Ann. Codes & St. § 5060, providing that a judge may be compelled by mandate to settle or certify a bill of exceptions or statement of facts, the fact that the trial judge has certified a statement of facts, which does not embody certain testimony in the case, is no defense to an application for a writ of mandate to compel him to settle and certify a statement of facts containing such testimony.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, § 82.]

Application for a writ of mandate by Tony F. Richardson against R. S. Steiner, judge of the superior court of Douglas county. Writ awarded.

Merritt & Merritt, for relator.

RUDKIN, J. The case of Richardson v. Richardson was before this court on a former appeal, and will be found reported in 36 Wash. 272, 78 Pac. 920. The judgment was there affirmed in part, but reversed as to the disposition made of the property rights of the parties. The case was remanded, with directions to take further testimony in such manner as the court might determine, and make an equal division of the property between the plaintiff and the defendant, in kind or otherwise. After the cause was remanded, the court appointed three commissioners "with the full and same power in relation to the matters, and subject to the limitations and directions prescribed and set out in this order of reference, as is possessed by this court, to conduct trial, to examine witnesses, to grant adjournments, to administer oaths, preserve order, to compel the attendance of witnesses, and to punish them for nonattendance or refusal to be sworn or to testify, for the purpose of taking testimony, and examining and ascertaining, setting out, recommending, and reporting to this court the facts and findings." Here follows a statement of the matters to be embodied in the report of the commissioners. It was further ordered "that, upon the completion of its duties here-

in, or upon the order of this court, said commission shall make a full and written report of all its doings in this behalf, and of all schedules and inventories, findings, facts, and recommendations to this court." The commissioners examined witnesses, heard testimony, inspected the property, and made a report and a supplemental report to the court. No testimony or other evidence was returned into court with either report, and no reference to the testimony or other evidence was made in either report, further than that the commissioners had examined witnesses and taken testimony. In fact, at the time these reports were filed, there was no record of the testimony taken before the commissioners, aside from the shorthand notes of the reporter. After the filing of these reports, the attorneys representing the plaintiff in the court below, the relator here, caused the notes of the testimony taken before the commissioners to be extended and filed a copy thereof with the clerk of the court at the hearing on the report of the commissioners. The testimony so filed was considered by the court and all parties concerned as the testimony taken before the commissioners, but the same was not reported by the commissioners nor authenticated in any way. The court confirmed the report of the commissioners and rendered judgment in accordance with their recommendations. The plaintiff has prosecuted an appeal from the judgment so rendered. Afterwards, and within the time required by law, the plaintiff filed a proposed statement of facts, which embodied the testimony taken before the commissioners, and filed as aforesaid. The defendant filed proposed amendments, consisting of the order of reference, the report of the commissioners, and other matters not necessary to be considered here. The matter of settling and certifying the statement of facts came on regularly to be heard, and, so far as the record before us discloses, the defendant made no objection to the statement as proposed by the plaintiff, and the plaintiff made no objection to the amendments as proposed by the defendant, but the court of its own motion refused to embody the testimony above referred to in the statement of facts, for the reason that the same was already a part of the record. On the foregoing facts, which are admitted by the demurrer of the respondent, the plaintiff has applied to this court for a writ of mandate requiring the trial judge to embody said testimony in the statement of facts, and certify the same as required by law.

The defendant in the court below has made no appearance in this court, but the trial judge has filed a demurrer to the application on the following grounds: (1) Because the plaintiff has no legal capacity to sue; and (2) because the application for the writ does not state facts sufficient to constitute a cause of action. The first ground of demurrer was decided adversely to the respondent in State

ex rel. Weinberg v. Pacific Brewing, etc., Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208. It was there held that an application for a writ of mandate in the interest of a private party was properly instituted in the name of the state. Section 5064, Ballinger's Ann. Codes & St., provides that "all reports of referees or commissioners, with the testimony and other evidence returned into court there-with, * * * shall be deemed and are hereby declared to become, upon being filed in the cause, * * * a part of the record in the cause, for all the purposes thereof and of an appeal therein; and it shall not be necessary or proper, for any purpose, to embody the same in any bill of exceptions or statement of facts." If the testimony referred to falls within the purview of the above statute, the writ should be denied; but in our opinion it does not. It was not reported by the commissioners, nor was it in any manner identified or referred to in their report or in the final judgment of the court. It manifestly did not become a part of the record for the purpose of an appeal or for any purpose, by being filed in the cause by one of the parties to the action. Until this testimony was adopted by the court and the parties at the hearing on the report of the commissioners, it formed no part of the record and had no connection with the case. If, instead of consenting to the consideration of this testimony, the defendant had moved to strike it from the files, the court would have no alternative but to grant the motion. Perhaps the better practice would have been to require the commissioners to return the testimony taken before them with their report, so that the same might become part of the record. But that question of practice does not concern this court, nor did it concern the court below.

It is admitted that the testimony in question was considered by the trial court on the hearing of the application for a judgment on the report of the commissioners, and it is therefore proper for the consideration of this court on appeal. We are of opinion that such testimony was not returned by the commissioners within the purview of the statute in question, and formed no part of their report; that it first became evidence in the case when adopted by the court and the parties at the hearing of the application for judgment; and that it formed no part of the record unless made so by bill of exceptions or statement of facts. The fact that the trial judge has already certified a statement of facts, which does not embody the above testimony, is no defense to this application. Section 5060, Ballinger's Ann. Codes & St., provides as follows: "And if the judge refuse to settle or certify a bill of exceptions or statement of facts or to correct or supplement his certificate thereto, in a proper case, he may be compelled so to do by a mandate issued out of the Supreme Court, either pending an appeal or prior thereto."

Let the writ issue as prayed, commanding the respondent to settle and certify a statement of facts embodying all testimony considered in the trial court on the application for judgment on the report of the commissioners, and such other matters as are required by law.

MOUNT, C. J., and FULLERTON, HADLEY, DUNBAR, CROW, and ROOT, JJ., concur.

SIDEBOTHAM v. MERCHANTS' FIRE ASS'N.

(Supreme Court of Washington. Jan. 15, 1906.)

INSURANCE—PROOFS OF LOSS—WAIVER.

Where insured in a fire policy called at the insurer's office after the loss and gave oral notice thereof, and was told, in response to a question as to what he should do, that he should furnish his books and invoices, which he did, and was subsequently told that he had not complied with his contract, and that it was not the business of the insurer to inform him in what particular, and thereafter he received a letter stating that, if he intended to make any claim, the manner of proceeding was plainly printed in the contract, the conduct of the insurer amounted to a waiver of proofs of loss.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by William Sidebotham against the Merchants' Fire Association. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Leopold M. Stern and H. T. Granger, for appellant. Andrew J. Balliet, for respondent.

FULLERTON, J. The appellant is a mutual fire insurance company organized under the laws of this state. On March 11, 1903, it issued its policy of insurance to the appellant covering a certain stock of merchandise, and certain furniture and fixtures owned by him, insuring him in a sum not exceeding \$800 against loss by fire for a term of one year from and after that date. The property was destroyed by fire within the term covered by the policy, and, on the refusal of the company to pay the amount of the loss, this action was brought to recover the same. In his complaint the respondent alleged that he had complied with all the conditions of the policy, save that requiring him to furnish sworn proofs of loss, and that the company had waived this requirement by denying any liability under the policy and refusing to pay in any event. Issue was taken on the allegations of the complaint, and a trial had which resulted in a verdict and judgment for the respondent. The insurance company appeals.

The single question raised and discussed by counsel for appellant is the sufficiency of the evidence to justify the finding of the jury that the appellant had waived the provision of the policy requiring the respondent to make sworn proofs of loss. On this ques-

tion, while it was somewhat meager, we think there was not a total want of substantial evidence. It was shown that on the day after the fire occurred the respondent called in person at the insurance company's office, and notified its officers of the fire, and his losses thereunder, giving them at the same time all the information he possessed as to the origin of the fire; in fact, he was subjected to a long cross-examination by the officer of the company in charge concerning all of these matters. At the conclusion of the interview the appellant inquired of the officer what was necessary to be done in order to have his loss adjusted, and was informed that he would be required to furnish invoices from all of the wholesale dealers with whom he had dealt, showing the amount of goods purchased by him while in business, and submit for examination such of his books as would show the amount of goods disposed of during the same period. The interview then ended, and the respondent after some time procured the invoices required and submitted them with his books to the insurance company for examination. Later on a representative of the company was sent out to investigate the cause of the fire. Following this there were a number of interviews between the respondent and the company's officer during which the matters were again gone over. Finally the respondent inquired directly what the company proposed to do about adjusting and settling the loss, and was told, nothing at all. Inquiring why, he was answered, that he had not complied with his contract. Inquiring in what particular he had failed, he was told that it was not the business of the company to inform him. Finally, just before the time expired in which he was required to furnish proofs of loss, he called again at the insurance office, and, finding no representative of the company in, left a note saying that if the matter was not forthwith settled he would institute suit on the policy. On the next day he received in reply to this a letter from the company in the following words: "If you intend or desire to make any claim for loss against the company, the manner of proceeding and presenting said claim are plainly printed in your contract, and we respectfully refer you to them." This ended the negotiations between the parties, and soon thereafter this action was brought. The company then for the first time, made known to the respondent the precise ground on which it rested its claim of nonliability.

The foregoing, while but a brief outline of the testimony, shows conclusively that the respondent was misled by the acts of the company's officer into the belief that he had done all that the company required of him in the way of furnishing proofs of loss. And what is more to the point, it shows that the company's officer knew he was being deceived in that respect. The company, therefore, owed him the duty of informing him

directly in what manner he had failed to comply with his contract, and failing in that, it must be held to have waived the requirement. It is argued, however, that the appellant did not owe the respondent the duty of informing him how to proceed under his policy in order to make a valid claim of loss. This would be true undoubtedly had the appellant dealt with the respondent at arms length from the start, but it did not do this. It undertook to inform him what it was necessary to do in order to have his loss adjusted, and having undertaken to so inform him it owed him the duty of informing him correctly. But it is said that the letter above quoted did inform him in what particular the company claimed that he had not complied with his contract. But plainly this is not so. Its want of frankness would be apparent did we not know what had preceded it, but in the light of that, it looks like an intentional effort to deceive.

The judgment is right, and should be affirmed. It is so ordered.

MOUNT, C. J., and ROOT, CROW, DUNBAR, HADLEY, and RUDKIN, JJ., concur.

KOGER v. ARMSTRONG.

(Supreme Court of Kansas. Jan. 6, 1906.)

WITNESSES—TRANSACTIONS WITH DECEASED PERSONS.

Testimony of a maker of a note, not made a party in a suit thereon, that he was the principal and defendant a surety, and that the deceased payee had, for a valuable consideration and without the knowledge of the surety, extended the time of the payment thereof, is not within Gen. St. 1901, § 4770, forbidding a party to testify in his own behalf in respect to transactions personally had with a deceased person.

Error from District Court, Brown County; William I. Stuart, Judge.

Action by Thomas M. Armstrong, as administrator of Joseph Armstrong, deceased, against S. H. Koger. There was a judgment for plaintiff, and defendant brings error. Reversed.

A. B. Crockett, for plaintiff in error.
James A. Clark, for defendant in error.

PER CURIAM. Thomas M. Armstrong brought an action as administrator of Joseph Armstrong to recover upon a note given to the latter and executed by S. Huston and S. H. Koger. In the plaintiff's pleading both the makers of the note were named as defendants, but service of summons was had only upon Koger. At the trial Koger offered in evidence the deposition of Huston, taken in Oklahoma, in which the witness stated that he was the principal upon the note and that Koger was merely a surety; that in the lifetime of the payee, by an arrangement made with the witness, the time of payment of the note had been extended for a valuable consideration, without the knowledge or con-

sent of the surety, thereby effecting his discharge. An objection was sustained to the admission of this deposition upon the ground that it was within the rule (section 4770, Gen. St. 1901) forbidding a party to testify in his own behalf in certain cases in respect to any transaction had personally by such party with a deceased person. The rule, however, does not apply, for the reason that the witness, Huston, was not a party to the litigation, and his testimony was not offered in his own behalf. Not only was Huston not formally made a defendant in the case, his interests were not identical or involved with those of Koger. The evidence he gave had no tendency to establish a defense on his own part. Indeed, he explicitly admitted his liability on the note. Neither the spirit nor the letter of the statute rendered him an incompetent witness. See *Shorten v. Judd*, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587; *Murphy v. Colton* (Okla.) 44 Pac. 208; 30 A. & F. Encyc. of L. (2d Ed.) 982, par. 2. It is also suggested that the rejected evidence was incompetent because it stated conclusions rather than facts. It was couched in very general terms, but was for the most part admissible.

The judgment is reversed, and the cause remanded, with directions to grant a new trial.

ALBRIGHT et al. v. BANGS et al.

(Supreme Court of Kansas. Dec. 9, 1905.)

EXECUTORS AND ADMINISTRATORS—FOREIGN ADMINISTRATOR DE BONIS NON—SALE TO PAY DEBTS—VALIDITY.

Where a nonresident dies testate in another state owning property in Kansas, and the executors named in the will are appointed and qualify as such in the other state, and letters testamentary are afterwards issued to the same persons in Kansas, an administrator de bonis non, who is appointed in the foreign state on account of the death of one executor and the removal of the other, is not thereby made the successor in trust of the executors under their Kansas appointment, so far as to enable a Kansas court to permit him to sell real property to pay debts of the estate under an order previously granted to the executors, without the giving of a new notice by the administrator of his application for such authority. A sale made by the administrator without such notice is void, and a deed made under it constitutes no defense to an action of ejectment, brought by the legatees or their successors in interest.

(Syllabus by the Court.)

Error from District Court, Cowley County; C. L. Swarts, Judge.

Action by Milton A. Bangs and others against P. H. Albright and others. Judgment for plaintiffs. Defendants bring error. Affirmed.

G. H. Buckman (O. P. Fuller, of counsel), for plaintiffs in error. Hackney & Lafferty, for defendants in error.

MASON, J. Soranus L. Bretton died testate in Illinois in 1881. The will was duly

probated in the county court of Rock Island county, Ill., and the two persons whom it named as executors were appointed and qualified as such. These executors then represented to the probate court of Cowley county, Kan., that at the time of his death said testator owned certain real and personal property in that county, and asked that the will be there admitted to probate, and that they be granted letters testamentary that they might proceed in the management of the part of the estate found in Kansas. An order was made admitting the will to record upon the strength of its having been approved by the Illinois court, and letters testamentary were granted to the executors, who gave the bond and took the oath required by the Kansas statute and entered upon the performance of their duties in this state. In 1883 they filed in the Cowley county probate court a petition for leave to sell real estate situated in that county for the payment of debts. Notice of a hearing thereon was properly given, and an order was made authorizing the executors to sell certain tracts of land for that purpose at private sale. A number of tracts were accordingly sold, the sales were confirmed, and deeds were executed. On June 3, 1886, the court ordered that no more of the real estate should be sold until a reappraisement should be made and until the court should direct further proceedings under the order of sale already made. For more than 12 years nothing further was done to subject the real estate remaining unsold to the payment of debts. On August 30, 1898, Burton F. Peck made a showing in the probate court of Cowley county that the Illinois court having jurisdiction of the Bretton estate had appointed him administrator de bonis non with the will annexed, on account of one executor having died and the other having refused to act and being disqualified by nonresidence in Illinois. He asked the Kansas court to make an order recognizing him as such administrator, with authority to sell real estate in the manner prescribed by law. An order was accordingly made recognizing him as such administrator, confirming his appointment by the Illinois court, and approving the bond which had been there given. This administrator then presented an application to the Cowley county probate court, representing that an indebtedness against the estate remained unpaid, reciting that the order of sale made 15 years before was still in force, and asking that appraisers be appointed to appraise enough real estate to satisfy such debt. Appraisers were named, appraisements were had, a tract of land was sold, the sale was confirmed, a deed was ordered and executed, and the purchaser went into possession. Thereafter several conveyances of the property were made, the last grantees being Grant Stafford and P. H. Albright. In 1902, an action was brought by the Bretton legatees against Stafford and Albright for the re-

covery of the possession of this land, under the claim that the administrator's sale was absolutely void and passed no title. They recovered a judgment, from which the defendant prosecutes error.

The administrator, Peek, gave no notice of the hearing of a petition presented by him for an order authorizing the sale of real estate, and the sale was obviously void on this account, unless the proceedings taken by him can be regarded as a continuation of those begun by the executors. They were manifestly so considered by him and so treated by the probate court. The only question that need be determined here is whether the two proceedings were so connected that the jurisdiction to authorize sales of real estate acquired by the probate court in virtue of the notice given by the executors remained with the court so as to warrant the making of an order without further notice for the administrator to sell lands covered by the original notice and order. It is not doubted that an order made upon due notice for the sale of real estate by an executor or administrator is sufficient to authorize a sale by his successor in trust (18 Cyc. 726, 758), but the vital inquiry here is whether for this purpose Peek, the administrator *de bonis non*, was the successor of the executors who gave the notice and to whom the original order of sale was granted. In the investigation of this question, it is necessary to observe carefully the different steps that were taken and the statutory provisions by which they were respectively authorized. In this connection it is first to be noted that there are two separate and distinct methods under our statute by which real property in this state may be sold to satisfy the debts of a nonresident testator. One of them is that provided in sections 7962 to 7965 of the General Statutes of 1901. Under this method, when a will has been duly proved in another state, upon the production by the executor or other interested person of an authenticated copy of the will and probate thereof, the probate court of any county in this state in which there is property upon which the will may operate may admit it to record (section 7963). Section 7965 reads: "After allowing and admitting to record a will pursuant to the four preceding sections of this act, the court may grant letters testamentary thereon, or letters of administration with the will annexed, and may proceed in the settlement of the estate that may be found in this state; and the executor taking out letters, or the administrator with the will annexed, shall have the same power to sell and convey the real and personal estate, by virtue of the will or the law, as other executors or administrators with the will annexed shall or may have by law." It will be noticed that the section quoted contemplates the actual appointment by a Kansas court of an executor or administrator who

shall be subject to the control of that court in all things.

The other method referred to is described in sections 2950 and 2951 of the General Statutes of 1901. Section 2950 reads as follows: "When an executor or administrator shall be appointed in any other state, territory or foreign country on the estate of any person dying out of the state, and no executor or administrator thereon shall be appointed in this state, the foreign executor or administrator may file an authenticated copy of his appointment in the probate court of any county in which there may be any real estate of the deceased; after which he may be authorized under an order of the court to sell real estate for the payment of debts or legacies and the charges of administration, in the same manner and upon the same terms and conditions as are prescribed in the case of an executor or administrator appointed in this state, except as hereinafter provided." Section 2951 provides that if the bond already given by the foreign executor or administrator be found sufficient he shall not be required to give any further security; that otherwise he must give an undertaking properly to account for the proceeds of all sales he may make, according to the laws of the state in which he was appointed. It is to be noticed that these sections do not contemplate the appointment of a Kansas executor or administrator, or any appointment in Kansas whatever. They merely relate to the recognition, for the purpose of effecting the sale of real estate situated in Kansas, of an appointment made elsewhere. In the present case the executors proceeded under the first stated of these two methods. They did not ask that the Kansas court should authorize them to sell real estate in virtue of their having qualified as executors in Illinois. They were appointed as executors for Kansas, amenable to the Kansas courts and the Kansas laws in all things, and they gave bond and took their oaths as Kansas executors. The circumstance that they had already been appointed as executors in Illinois is a mere incident. It was not essential to their appointment in Kansas. Indeed, it would appear that, since the statutes of Illinois and of Kansas alike forbid the appointment of a nonresident executor, no one could properly qualify as an executor in both states.

On the other hand, the administrator proceeded under the second method. He did not seek to be, nor was he, appointed as a Kansas administrator. He merely asked to have the appointment which had already been made in Illinois recognized by the Kansas court, so that he might, as an Illinois administrator, sell Kansas real estate under the supervision of a Kansas court. As appears by section 2950 above quoted, this could be done only upon the theory that no executor or administrator had been appointed in Kansas. Ex-

ecutors had been appointed in Kansas. One of them had died. The other, although removed by the Illinois court because he was not a resident of Illinois, may have been still qualified to act in Kansas, so far as the record discloses. In order for the Cowley county probate court to have had jurisdiction to permit the foreign administrator to sell Kansas real estate, the executors already appointed must have been disposed of in some way. Perhaps, to sustain the acts of the court, it may be assumed that the surviving executor had been removed by the Kansas court as well as by that of Illinois, and that the situation therefore became the same, so far as related to sales of real estate by a foreign administrator, as though no executor or administrator had been appointed in Kansas. In that view of the matter the administrator *de bonis non*, in virtue of his appointment in Illinois, might have been authorized to sell real estate in Kansas "in the same manner and upon the same terms and conditions as are prescribed in the case of an executor or administrator appointed in this state." But to procure an order for that purpose it was essential that he should give notice. He could not avail himself of the notice given by the executors 15 years before, for he was not their successor in this matter. He did not succeed them in the capacity in which they had acted in giving the notice and obtaining the order of sale. He may have been, and doubtless was, the successor of the executors so far as related to their appointment and qualification in Illinois; but he was not their successor in respect to their appointment and qualification in Kansas. The notice they gave and the order they procured from the Kansas court were solely in virtue of their appointment in Kansas, and, although they chanced to be the same persons to whom letters testamentary had already been issued in Illinois, it does not follow that the person appointed to succeed them there acquired the authority to complete their acts begun in their capacity as Kansas appointees. The administrator's deed was therefore void, and constituted no defense to the action of ejectment brought by the owners of the land.

The judgment is affirmed. All the Justices concurring.

BEISWANGER et al. v. BANGS et al.
(Supreme Court of Kansas. Dec. 9, 1905.)

Error from District Court, Cowley County;
Chas. L. Swarts, Judge.

Action between Christian Henry Beiswanger and others and Milton A. Bangs and others. From the judgment, Beiswanger and others bring error. Affirmed.

G. H. Buckman, Grant Stafford, and O. P. Fuller, for plaintiffs in error. Hackney & Lafferty, for defendants in error.

PER CURIAM. The facts in this case are substantially the same as those in *Albright v. Bangs* (just decided) 83 Pac. 1030, and the judgment is affirmed for the reasons there given.

Ex parte HOWARD.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. CRIMINAL LAW—JUDGMENT—COMMITMENT—VALIDITY.

A judgment and commitment to the penitentiary, which recite only that the defendant in a criminal action pleaded guilty to a charge of grand larceny, and that the court sentenced him "to confinement and hard labor in the state penitentiary of the state of Kansas until discharged therefrom by due course of law," are each void for uncertainty.

2. SAME—DEFINITENESS OF JUDGMENT.

A judgment of imprisonment, to be valid, especially under the indeterminate sentence law, must be so definite and certain in its terms that both the convict and the officer upon whom its execution devolves may know therefrom the term of imprisonment.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2521.]

3. SAME—INDETERMINATE SENTENCE.

Under an indeterminate sentence, the law, and not the court, determines the duration of punishment, and the record of a conviction and sentence should set forth fully the name and degree of the crime of which the conviction was had; and, if different penalties attach to different classes of the same degree of the crime, the record should also disclose the particular act or class of which conviction was had.

4. SAME—PENALTIES.

This law imposes the extreme penalty prescribed by the crimes act for each degree, act, or class of crime, and makes provision for the mitigation of such penalty.

Graves, Greene, and Mason, JJ., dissenting from first paragraph of syllabus and conclusion of opinion.

(Syllabus by the Court.)

Application of William Howard for writ of habeas corpus. Petitioner remanded on condition.

Robert D. Garver, for petitioner. C. C. Coleman, Atty. Gen. (Clad Hamilton, of counsel), for respondent.

SMITH, J. The petitioner was prosecuted in the district court of Johnson county on information charging him with stealing chickens in the nighttime. The following is the record of the proceedings had on such information:

"State of Kansas, Plaintiff, v. Alias William Howard, Defendant. Grand Larceny No. 1,177.

"Now, on this day, came plaintiff, by Chas. C. Hoge, county attorney and attorney for the prosecution, and as well also came defendant's attorney, Chancy B. Little, who announces to the court that the defendant herein is in the custody of P. K. Hendrix, sheriff of Johnson county, Kansas, and is in the jail of said county and is desirous of pleading guilty at this time to the information herein. Thereupon the court

orders said sheriff to produce the body of said defendant in open court. And, said order having been obeyed, said defendant duly appears in open court, in his own proper person and by Chancy B. Little, his attorney. Thereupon the defendant is duly arraigned and listened to the reading of the information, as it was read by the clerk, and charging him with grand larceny, and is required to plead thereto. And thereupon defendant pleads guilty. And now this cause came on for judgment and the sentence of the court against the defendant, William Howard, upon the plea of guilty, heretofore entered against him herein, upon arraignment upon the information filed against him herein for the crime of grand larceny, and thereupon came Chas. C. Hoge, county attorney for Johnson county, Kansas, on behalf of the prosecution as before, and by order of the court the defendant is brought into court by the sheriff of said county and appears in court in his own proper person and by Chancy B. Little, his attorney, and the defendant, being now caused to stand before the court, is informed by the court, of the plea of guilty, heretofore pleaded herein upon arraignment, to said information filed against him herein by the said county attorney aforesaid for grand larceny, and is asked by the court whether he has any legal cause to show why judgment and sentence of the court should not be pronounced against him upon the said plea of guilty herein; and, no sufficient cause being alleged by the defendant or appearing to the court why such judgment should not be pronounced, it is, therefore, now by the court here considered, ordered, and adjudged that the said defendant, William Howard, be and he is hereby sentenced to confinement and hard labor in the State Penitentiary of the state of Kansas until discharged therefrom by due course of law, and that he pay the costs of the prosecution herein against him, taxed at \$——, and that execution issue." The petitioner alleges that this judgment is void, and that he is unlawfully deprived of his liberty, and is imprisoned in the state penitentiary by the warden thereof, whom he makes respondent, claiming to act under authority of such sentence. The respondent moves to quash the writ on the ground that the petition does not state facts sufficient to entitle him to the relief prayed for, and the case is submitted on the petition and motion.

There are two degrees only of larceny under the crimes and punishments act of this state, viz., grand larceny and petit larceny, but there are two penalties for acts defined as grand larceny; that is to say, upon conviction of certain acts defined as grand larceny a penalty of imprisonment not exceeding seven years is prescribed, and of certain other acts defined as grand larceny imprisonment not exceeding five years is prescribed. To the latter class the stealing

of domestic fowls in the nighttime was added by chapter 218, p. 372, Laws of 1903. Prior to the enactment of the indeterminate sentence act (chapter 375, p. 571, Laws of 1903) the trial court, upon the conviction of an accused of grand larceny, having knowledge of the particular acts charged, pronounced a certain determinate sentence of imprisonment. If the criminal act fell in the seven-year class, imprisonment was imposed of seven years or some definite shorter term; if in the five-year class, the sentence was for five years, or some definite term shorter than five years. Hence there could be no confusion or uncertainty if the record should not be made in compliance with section 5699, Gen. St. 1901, which reads: "Whenever judgment upon a conviction shall be rendered in any court, the clerk of such court shall enter such judgment fully on the minutes, stating briefly the offense for which such conviction, shall have been had and the court shall inspect such entries and conform them to the facts; but the omission of this duty either by the clerk or judge shall in no wise affect or impair the validity of the judgment." Under the statutes in force prior to the enactment of the indeterminate sentence act, an accused found guilty of the crime of grand larceny might be sentenced to confinement and hard labor in the penitentiary for four years. If the record disclosed only these two facts, the conviction and the sentence, it would be impossible to tell whether the crime committed was one for which the extreme penalty is five years or is seven years. The convict and the prison officials would, however, know definitely that the convict was placed in their keeping for a definite term of four years, not to be exceeded in any event, but which might be reduced by good conduct under the rules of the prison. Under the sentence in question the warden knows only that the court attempted to sentence the petitioner to the extreme penalty for grand larceny (State v. Page, 60 Kan. 664, 57 Pac. 514), but he has no official knowledge whether that penalty is five years' imprisonment or seven years.

It is urged that the extreme penalty for the crime of grand larceny is five years, except in certain specified cases in which it is seven years, and that the judgment should be presumed to be in the general class, and not in the exceptional class, or, if the term of sentence is in doubt, the culprit should be given the benefit of the doubt, and should be held to have been sentenced to the shorter term. We cannot accept either of these contentions. A judgment of imprisonment to be valid must be so definite and certain in its terms that both the convict and the officer upon whom its execution devolves may know the term of imprisonment. *Pickett v. State*, 22 Ohio St. 405; *People ex rel. Hinckley v. Pirfenbrink*, 96 Ill. 69. If the punishment attempted to be imposed by the

judgment be greater than is authorized by law, the judgment is void. In *re McNeil*, 68 Kan. 366, 74 Pac. 1110; In *re Dill*, 32 Kan. 668, 5 Pac. 39, 49 Am. Rep. 505. The statute prescribes one penalty for certain acts denounced as grand larcenies, and another penalty for certain other acts denounced, also, as grand larcenies. Hence the judgment must show in which one of the two classes of grand larceny the criminal act falls before a sentence under the indeterminate act can be imposed. Not necessarily so under the pre-existing statute, where the court determined the duration of punishment. Under the indeterminate sentence act the law, not the court, says what the duration of punishment shall be. *State v. Page*, 60 Kan. 668, 57 Pac. 514. It imposes the extreme penalty and then provides for its mitigation. Before it can be determined from the law what the extreme penalty is, there must be a definite sentence to which the law can be applied, and any attempted sentence short of this is a nullity. Such is the attempted sentence in this case. The judgment is so indefinite and uncertain as to the particular grand larceny for which the defendant was to be punished that the law attaches neither extreme penalty thereto, and a commitment to imprisonment in the penitentiary for an unlimited time is a nullity. It is not a case of the imposition of a greater or of a less penalty than is authorized by law. It is a sentence to confinement and hard labor in the state penitentiary to which neither the court nor the law places any duration as to time. The attempted sentence being a nullity, the petitioner stands in the position of not being sentenced at all. He has pleaded guilty to a definite charge of a crime, but has not been sentenced therefor.

We have not overlooked *In re Nolan*, 68 Kan. 796, 75 Pac. 1025, in which practically the same question as herein was involved, and in which case the decision is apparently adverse to the conclusion herein reached. It will be observed, however, that the *Nolan* Case was decided upon the authority of *In re Black*, 52 Kan. 64, 34 Pac. 144, 39 Am. St. Rep. 331, and on the question whether the defect in the verdict rendered the judgment thereon void. In the *Nolan* Case the only question involved herein is ignored, and the court says the *Black* Case "is exactly in point," and quotes therefrom as follows: "We think the record in this case shows that the district court regarded the verdict as a verdict of guilty of burglary in the first degree, and proceeded to sentence the defendant accordingly. In doing so, the court acted judicially and judicially determined the effect of the verdict. If the court erred, the defendant had his remedy by appeal. He neglected to avail himself of that right. We do not think he can now obtain his discharge from custody because of an erroneous de-

cision of the court as to the force and effect of the verdict." Now the indeterminate sentence was not in existence in 1893, when the *Black* Case was decided, and that case is not authority on the question here involved. Neither does the *Nolan* Case purport to decide the question here involved, whether the judgment was void for indefiniteness, although it might well have been determined therein. From what has been said, it is apparent that the numerous decisions cited relating to judgments not under an indeterminate sentence law can have little application to the case at bar.

The petitioner claims that the indeterminate sentence act of 1903 is unconstitutional. The case of *State v. Page*, *supra*, fully disposes of this contention adversely to the petitioner.

It is the judgment of this court that the sentence is void; but, the conviction being regular and valid, the petitioner ought not to be discharged. A valid judgment should be rendered, and the petitioner should be returned to the custody of the proper authorities for that purpose. If, however, this be not done within 20 days, the petitioner will be discharged from the warden's custody.

JOHNSTON, C. J., and BURCH and PORTER, JJ., concurring.

GRAVES, J. (dissenting). I dissent from the first paragraph of the syllabus, and the conclusion reached in the foregoing opinion.

The petitioner, by his voluntary confession made in open court, is guilty of grand larceny. No question of irregular or erroneous conviction, or miscarriage of justice, in any way is suggested. The sole cause given for his release is that the writ by which he is held is void because so indefinite and uncertain that it is impossible to ascertain therefrom the maximum punishment fixed by law for the crime of which he was sentenced. The statute defining grand larceny is as follows: Section 1, c. 218, p. 372, Laws 1903: "Every person who shall be convicted of feloniously stealing, taking or carrying away any money, goods, rights in action or other personal property or valuable thing whatsoever of the value of twenty dollars or more or any horse, mare, gelding colt, filly, ass, mule, neat cattle, sheep, goat, hog, or in the nighttime any domestic fowls, harness or saddles belonging to another, shall be deemed guilty of grand larceny." The statute fixing the punishment therefor is section 2070, Gen. St. 1901, which reads: "Persons convicted of grand larceny shall be punished in the following cases as follows: First, for stealing a horse, mare, gelding, colt, filly, neat cattle, mule or ass, by confinement and hard labor not exceeding seven years. Second, in all cases of grand larceny, except as provided in the two succeeding sections by confinement and hard labor not exceeding five years." The words "except as provided in

the two succeeding sections," used in the above statute, have no significance, as the two succeeding sections do not refer to the same crime, and there never were two sections immediately following this section, as enacted in the laws of this state, that applied to grand larceny. This section was taken bodily from the Revised Statutes of Missouri of 1845; it being section 31, c. 47, art. 3, of said statute, and was placed in the compiled laws of Kansas of 1855, commonly known as the "bogus statutes," and appears as section 31, c. 49, thereof. In the Missouri statute, from which this section was taken, the two sections immediately succeeding this were sections 32 and 33, art. 3, of said chapter 47, which read:

"Sec. 32. If any person shall entice, decoy, or carry away out of this state, any slave belonging to another, with intent to deprive the owner thereof of the services of such slave, with intent to procure or effect the freedom of such slave, he shall be adjudged guilty of grand larceny, and punished by imprisonment in the penitentiary not less than five years.

"Sec. 33. If any persons shall aid or assist in enticing, decoying, or persuading, or carrying away, or sending out of this state, any slave belonging to another, with intent to effect the freedom of such slave, or to deprive the owner thereof of the service of such slave, he shall be adjudged guilty of grand larceny, and, upon conviction, shall be punished by imprisonment in the penitentiary not less than five years."

These are the two "succeeding sections" to which these words were evidently intended to refer. For some reason, probably an oversight, the compilers of the "bogus statutes" did not include these last two sections in the Kansas crimes act, and therefore the words "except as provided in the two succeeding sections" have never had any force or meaning in this state. Therefore this section must now be read with these words eliminated and the word "other" must be inserted after the word "all"; otherwise, this clause is inconsistent with what precedes it in the same section.

The present law under which the petitioner was sentenced (chapter 375, p. 571, Laws 1903) provides that: "The court imposing sentence shall not fix the limit or duration of the sentence, but the term of imprisonment of any person so convicted shall not exceed the maximum, nor be less than the minimum term provided by law for the crime for which the person was convicted and sentenced, the release of such to be determined as herein-after provided." It also provides that the board of directors and warden shall constitute a prison board for the purposes therein stated. It is made the duty of the district judge pronouncing sentence and the county attorney to furnish the prison board with information concerning the prisoner, showing his industry, character, associations, disposi-

tion, and otherwise, as may be required, and the prison board may also gather information deemed by it material from other officials and persons who have known the prisoner. The prison board may release prisoners on parole, under such rule as it may adopt, and after any prisoner has been on parole six months or longer the warden may in his discretion certify to the prison board that such prisoner can be finally released with safety to the public. If the board concurs with the warden, a recommendation to that effect is sent to the judge who pronounced sentence, who is thereupon required to enter a final discharge of the prisoner from further liability under his sentence, and, upon approval of this proceeding by the Governor, the prisoner goes free, with \$10 cash, a new suit of clothes, and transportation home. From this it will be seen that the term of imprisonment in any case is indefinite and uncertain, except as to the extreme limit thereof. The court pronouncing the sentence names the crime, the law fixes the extreme limit of punishment, and the prison board really determines the term of imprisonment, not exceeding the legal maximum.

This court in its opinion in this case says, in effect, that in the case of grand larceny the mere statement of the crime in the judgment and writ of commitment make both void, for the reason that it is impossible for the prison board to tell therefrom whether the punishment fixed by law for such crime is for a period "not exceeding seven years," or "not exceeding five years." A judgment may be uncertain and indefinite, and still be valid. Before it can be held to be void for this reason it must be so uncertain and indefinite that it is impossible to ascertain its meaning with reasonable certainty. In this case there is very little difficulty, it seems to me, in ascertaining from this judgment the punishment prescribed by law for this petitioner. He is guilty of grand larceny. This offense is clearly defined in the statute first hereinbefore quoted. The punishment is prescribed in section 2070 above quoted. For stealing any of the property mentioned in the first clause of that section the punishment is "not exceeding seven years." The petitioner was not charged with, did not plead to, and was not convicted of, stealing any of the property therein specified, and therefore he cannot be imprisoned seven years. But this fact does not acquit him of the offense. The punishment prescribed for stealing any other of the property embraced in the definition of grand larceny is "not exceeding five years." No other punishment being prescribed for grand larceny, it follows that it must be one or the other of these two periods. Where there are two things, and one is eliminated, the remainder is not difficult to determine.

It is claimed that, because the kind of property stolen is not specified in the judgment, it is impossible to determine the ex-

tent of punishment applicable. It may be conceded that, if the kind of property stolen was stated in the writ, as it is in the opinion of the court, it would be more definite, but it does not follow that the absence of this specification makes the judgment or writ void. When it is conceded, as it must be in this case, that a prisoner is guilty of a crime, it then follows that the lowest punishment prescribed by law for that crime is the proper punishment to inflict, unless there is something shown to indicate that a greater punishment is applicable. If this petitioner was the only person who could be affected by this decision, it would not be very important, but a precedent is here established which applies to all prisoners, and to crimes of every kind and degree. Courts should always be vigilant to extend every protection given by the law to persons accused of crime, but after a person has been fairly and legally convicted of a felony, and asks to be absolutely relieved of the legal punishment therefor solely because of some defect in the papers by which he is held, the request should not be granted, unless its allowance is necessary for the protection of his legal rights, and he is without other adequate remedy. This petitioner might have compelled the district court by appeal, if necessary, to make this judgment and writ as specific and definite as desired, but that is just what he does not want. He prefers to obtain absolute freedom by an appeal to that much-abused writ, which succeeded so well in this case. The decisions of this court in the past have been strongly against all "general gaol delivery" proceedings. It refused to assist convicted criminals in their efforts to avoid just and legal punishment on account of irregular or defective proceedings. It refused to set aside judgments as void for uncertainty, when, in my judgment, much greater reason was shown therefor than appears in this case. Under the law as it was before 1903 the time of imprisonment was specifically stated in the writ of commitment, which was the sole measure by which the years, months, and days of the prisoner's incarceration was determined. Then certainty was essential and of great importance; much more so than now. To meet this necessity for certainty, juries were required to state in their verdict, if the offense charged consisted of different degrees, the degree of which the defendant was found guilty. And yet, in a case where the defendant was charged with murder in the first degree, and of all the inferior degrees thereof, and the jury returned a verdict of "guilty as charged in the information," without specifying any degree, and the court pronounced sentence for murder in the first degree, this court refused to set aside the judgment as void. *State v. Jennings*, 24 Kan. 642; *In re Black*, 52 Kan. 64, 34 Pac. 414, 39 Am. St. Rep. 331; *In re Nolan*, 68 Kan. 796, 75 Pac. 1025.

My Associates waive these decisions aside

as inapplicable because rendered under a law different from the present statute. The difference, however, so far as applicable here, is that the prior law made certainty as to punishment in judgments and writs of commitment far more important than now. If these decisions were correct then, the writ of habeas corpus should have been refused now. To restrain courts from using this "great writ of right" too freely section 671 of the Code of Civil Procedure was enacted, which reads: "No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody or discharge him when the term of commitment has not expired in either of the cases following: * * * Second, upon any process issued on any final judgment of a court of competent jurisdiction." This statute does not apply where the process is absolutely void, as my Associates have found the judgment and writ in this case to be. It is upon this finding that I disagree with them, and I only quote this statute to show that nothing short of absolute nullity will justify courts in setting aside writs issued to carry out sentences lawfully pronounced against convicted criminals. In the case of *In re Black*, supra, the court said: "We think the record in this case shows that the district court regarded the verdict as a verdict of guilty of burglary in the first degree, and proceeded to sentence the defendant accordingly. In doing so, the court acted judicially and judicially determined the effect of the verdict. If the court erred, the defendant had his remedy by appeal. He neglected to avail himself of that right. We do not think he can now obtain his discharge from custody because of an erroneous decision of the court as to the force and effect of the verdict." So, in this case, the defendant had the right to insist upon and compel a clear and specific judgment in accordance with his plea of guilty. He did not do so. He should not now be allowed to escape punishment on the ground that the judgment is void, when it can be ascertained with reasonable certainty therefrom the exact punishment prescribed by law for the offense to which he pleaded guilty and for which he was sentenced.

I am authorized to say that Justices GREENE and MASON concur in this dissent.

STATE v. IRELAND.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. CRIMINAL LAW—VERDICT—SUFFICIENCY.

Under section 239 of the Code of Criminal Procedure (Gen. St. 1901, § 5634) a verdict is sufficient which finds defendant guilty of the principal acts which constitute the offense and then states the section of the crimes act in which the offense is defined, so that the court can determine from the verdict the grade or character of the offense.

2. HOMICIDE—MURDER—MANSLAUGHTER.

Neither murder nor manslaughter is defined by the statute of Kansas. These terms as

used in the crimes act have the same meaning as at common law. Murder is the unlawful killing of a human being with malice aforethought. Manslaughter is the unlawful killing of a human being without malice.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, §§ 12, 52.]

3. CRIMINAL LAW—INSTRUCTIONS—DEFINITION OF OFFENSE.

It is no objection to an instruction defining an offense that the exact words of the statute are not used, where the instruction in plain language defines the offense and states the essential elements thereof.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1812.]

4. HOMICIDE—INSTRUCTIONS—ASSAULT WITH INTENT TO KILL.

In a prosecution under section 38 and 42 of the crimes act (Gen. St. 1901, §§ 2023, 2027), where the jury are instructed in regard to murder and manslaughter, it is unnecessary to instruct upon the different degrees of murder or manslaughter.

(Syllabus by the Court.)

Appeal from District Court, Cowley County; C. L. Swarts, Judge.

A. E. Ireland was convicted of assault, and appeals. Affirmed.

C. T. Atkinson and Frank L. Mulholland, for appellant. C. C. Coleman, Atty. Gen., W. D. Kreamer, Torrance & Bloss, and Wm. R. Smith, for the State.

PORTER, J. A. E. Ireland was convicted in the district court of Cowley county of assaulting, beating, and wounding one Harrity. He was sentenced to six months in the county jail, and appeals.

The information charged in substance that defendant did unlawfully and feloniously, on purpose, and of malice aforethought, with a deadly weapon, to wit, a large and heavy rock, assault, beat, and wound J. D. Harrity with intent to kill. This was a charge under section 38, c. 31, Gen. St. 1901. The verdict of the jury was as follows: "We, the jury impaneled and sworn in the above-entitled case, do upon our oath find the defendant, A. E. Ireland, guilty of assaulting, beating, and wounding J. D. Harrity, thereby endangering his life, with a rock, as charged in the information, without design to effect death and without malice aforethought, as charged in the information under section 42 of chapter 31 of the Statutes of the state of Kansas." It is only necessary to consider four of the specifications of error.

1. The first, which is the main contention of appellant, is that the verdict is insufficient to support a judgment. It is urged that the jury failed to specify in the verdict the degree of offense of which they found appellant guilty, as required by section 239 of the Code of Criminal Procedure, which reads as follows: "Upon the trial of any indictment or information for any offense, where by law there may be conviction of different degrees of such offense, the jury, if they convict the defendant, shall specify in their verdict of what degree of the offense they find the defendant guilty."

State v. Scarlett, 57 Kan. 252, 45 Pac. 602, is relied upon. In that case the verdict made no reference to any section of the crimes act and did not attempt to state any of the elements of the offense of which the jury found defendant guilty. The portion of the verdict in that case material to consider is in these words: "Do upon our oaths find the defendant guilty as charged in the second count of the information." That count of the information was under section 42, which includes assault and battery and simple assault, and this court held that the verdict was insufficient.

State v. O'Shea, 59 Kan. 593, 53 Pac. 876, is cited by appellant. The verdict there was, "guilty of an assault with a deadly weapon, with intent to kill, as charged and set forth in the information," and this court said (page 596 of 59 Kan., page 577 of 53 Pac.): "The requirement of section 239 of the Criminal Code that the jury shall specify in their verdict of what degree of the offense they find the defendant guilty has caused very nice and embarrassing questions to arise in a number of cases; but it may now be deemed the law of this state, well settled by a line of decisions, that the degree of offense of which the conviction is had must be determined from the verdict itself, and that the addition of the words 'as charged and set forth in the information' is insufficient to show that the jury intended to find the defendant guilty of every element of the principal crime charged in the information." In the opinion (page 597 of 59 Kan., page 878 of 53 Pac.) the court refers especially to the failure of the verdict to, "state either that the acts were done on purpose or of malice aforethought. To constitute the crime defined by section 39 these elements are essential." It is a fair inference from the foregoing that the court would have held the verdict in that case sufficient if it had stated all the essential elements which constitute the offense of which defendant was found guilty so that the degree of the offense could be determined from the verdict itself.

In the present case, the jury have stated the acts done which constitute the offense, and in further aid of their verdict have specified the section of the crimes act in which the offense is defined, so that the court is enabled to determine from the verdict itself the grade or character of the offense of which defendant was found guilty. Thus, the object of the requirement of section 239 is fully satisfied, and the verdict is sufficient.

2. Next we shall consider the errors complained of in reference to instructions. The record in this case comprises almost 500 pages, and includes for some inscrutable reason much of the proceedings upon a previous trial in December, 1904, where the jury disagreed, including many pages of affidavits for a continuance and all the instructions of the court upon that trial. The case was re-

tried in March, 1906. The instructions upon the last trial take 12 pages of the record. The offense charged is an assault with a deadly weapon with intent to kill, under section 38 of the Crimes Act. The court instructed fully under that section, and also, under sections 42 and 43, defined murder and manslaughter and manslaughter in the first and fourth degrees, informing the jury that manslaughter in either the second or third degrees did not apply, gave careful definitions of all the terms used in the three sections referred to and the usual instructions in criminal cases, and appellant insists that there were not instructions enough. He urges that the court committed prejudicial error in refusing to instruct in reference to the second and third degrees of manslaughter; that these are included in and inferior to the offense charged in the information; and that he was entitled to instructions upon those degrees. It is the duty of the court to instruct the jury in regard to the law applicable to the facts in the case. *The State v. Ryno*, 68 Kan. 348, 74 Pac. 1114, 64 L. R. A. 303.

The defendant was convicted under section 42, which reads as follows: "If any person shall be maimed, wounded or disfigured, or receive great bodily harm, or his life be endangered by the act, procurement or culpable negligence of another, in cases and under circumstances which would constitute murder or manslaughter if death had ensued, the person by whose act, procurement, or negligence such injury or danger of life shall be occasioned shall, in cases not otherwise provided for, be punished by confinement and hard labor, not exceeding five years, or in a county jail not less than six months." This section makes no reference to any degrees of murder nor to any degrees of manslaughter. It might have defined an offense which, had death ensued, would amount to murder in the first or second degrees, and an offense which, under other circumstances, if death had ensued, would have amounted to manslaughter in any of the four degrees as defined in previous sections. But it does not do this. It provides that, if certain things occur under certain circumstances, "which would constitute murder or manslaughter if death had ensued," the person guilty shall "be punished by confinement and hard labor not exceeding five years, or in a county jail not less than six months." Neither "murder" nor "manslaughter" is defined under our crimes act nor by any statute. Section 6 provides that "every murder which shall be committed," by certain means, "shall be deemed murder in the first degree"; and in section 7 it is provided that "Every murder which shall be committed," by certain other means, "shall be deemed murder in the second degree." And so manslaughter in the first, second, third, and fourth degrees is defined, but nowhere in the statutes is "murder" or "manslaughter" defined.

While this court has said there are no common-law crimes in Kansas (*State v. Young*, 55 Kan. 349, 356, 40 Pac. 659), we must look to the common law for the definition of the words "murder" and "manslaughter," as used in the crimes act when standing alone. Neither defines a crime of itself under our statutes, but nevertheless each word has a well-known meaning. "In this state, the provisions of the common law remain in force in aid of the general statutes of the state." *Ætna Life Ins. Co. v. Swayze*, Adm'x, 30 Kan. 118, 122, 1 Pac. 36. When the celebrated case of *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711, was tried, these terms had not been defined by the statute of Massachusetts, and Chief Justice Shaw said: "For this, we resort to that great repository of rules, principles, and forms, the common law." "Murder is the voluntary killing of any person of malice prepense or aforethought either express or implied by law." *East's Pleas of Crown*, c. 5, § 2. The American authorities usually define it as the unlawful killing of a human being with malice aforethought express or implied. Manslaughter is the unlawful killing of a human being without malice express or implied. *Commonwealth v. Webster*, supra; A. & E. Enc. of Law (2d Ed.) §§ 131 & 171. In the common parlance of criminal law the words "express or implied" are omitted usually in both definitions.

There was no necessity in this case for any instruction in reference to any of the degrees of murder or manslaughter. The court defined murder and manslaughter, and all that was given in addition could not have prejudiced appellant. He was convicted under section 42 of an offense which, if death had ensued, would have amounted to a lesser grade of offense than those upon which he complains the jury were not instructed. It is urged, however, that the instruction given by the court upon manslaughter in the fourth degree does not accord with the definition of that crime in sections 26 and 27. The court defined it as follows: "Manslaughter in the fourth degree consists in the unlawful killing of a human being without design to effect death and without malice aforethought by an unlawful act of a dangerous character." Another instruction said: "Or, if the defendant assaulted, beat, and wounded J. D. Harrity with a rock, as charged in the information, and thereby endangered his life, and without a design to effect the death of Harrity, then such facts would have constituted the offense manslaughter in the fourth degree, had the death of the said Harrity resulted therefrom."

Appellant claims that instead of these the court should have given sections 26 and 27 of the crimes act, which read as follows:

"The involuntary killing of another by a weapon, or by means neither cruel nor unusual, in the heat of passion, in any cases

others than justifiable homicide, shall be deemed manslaughter in the fourth degree.

"Every other killing of a human being, by the act, procurement or culpable negligence of another, which would be manslaughter at the common law, and which is not excusable or justifiable, or is not declared in this article to be manslaughter in some other degree, shall be deemed manslaughter in the fourth degree."

The jury might have difficulty in understanding some of the language of section 27, while the charge of the court is not susceptible of misconstruction and states the necessary elements of the offense. It is not necessary, nor is it always the better plan, in defining an offense to use the exact words of the statute, if the court, in plain language, defines it, omitting none of the essential elements thereof.

3. It is contended further that, inasmuch as the jury by their verdict found that the assault was "without design to effect death and without malice aforethought," they necessarily must have acquitted appellant of any intent. That intent is of the essence of crime, is elemental, and counsel hardly needed to cite so many authorities upon that proposition. But the jury found defendant guilty of the offense of an assault, and thereby necessarily found him guilty of the intent to commit that offense. The finding that it was without malice aforethought and without design to effect death did not acquit him of all intent.

4. The appellant also claims that the verdict is contrary to the evidence. We have examined the record and find that it contains abundant evidence that appellant assaulted Harrity and struck him upon the back of the head with a rock as large as a man's fist, wounding and staggering him. The blow was a severe one and was struck while Harrity was standing with his back to appellant, not expecting an attack, and without provocation or warning. The jury inspected and examined the rock and found that the assault did endanger the life of Harrity, and we cannot weigh the testimony or disturb their finding.

The judgment will be affirmed. All the Justices concur.

OGG v. GLOVER.

(Supreme Court of Kansas. Nov. 11, 1905.)

1. ELECTIONS—NOMINATIONS—BALLOT—CITY OFFICERS.

A political party having only a local organization may nominate a ticket for city offices by a convention, primary election, or caucus, and have it placed upon the official ballot, so that it may be voted for by a single cross-mark placed in a circle.

2. SAME—POLITICAL PARTY—NAME—BALLOT.

Where a certificate of nomination regular in form is filed with the city clerk purporting to show the nomination of a full set of city officers by a mass convention of a party designated as the "City Party," and no objection

thereto is filed within three days, and the names so certified appear on the official ballot under the title "City Ticket," over which a circle is printed, with directions to place a cross-mark therein to vote a straight ticket, ballots cast at the ensuing election which are marked only in such circle cannot be rejected upon the grounds that the ticket was not nominated by a political party and that there was in fact no political party in the city known as the "City Party."

3. SAME—PARTY EMBLEM.

Where a certificate of nomination of candidates for city offices filed in behalf of a political party having only a local organization fails to show a party emblem, and no objection is made to the certificate prior to the election, ballots cast for the ticket of such party, by making a cross in a circle printed above it, cannot be rejected on account of the absence of an emblem.

4. APPEAL—EVIDENCE—PRESUMPTIONS.

Ballots transmitted to this court unsealed as a part of the evidence in an election contest do not lose their probative effect from being temporarily intrusted by the clerk to the possession of the attorneys of one of the parties. No presumption that an attorney made any change in them arises from the fact that he had an opportunity to do so.

5. ELECTIONS—BALLOTS—VALIDITY.

Rules for determining the validity of disputed ballots announced and applied.

(Syllabus by the Court.)

Quo warranto by F. R. Ogg against John J. Glover. Judgment for plaintiff.

S. T. Seaton, L. G. Ferrel, E. C. Owen, and Ogg & Scott, for plaintiff. C. H. Potts, J. W. Parker, C. B. Little, C. W. Gorsuch, I. O. Pickering, J. P. Hindman, J. T. Little, C. L. Randall, and A. Smith Devenney, for defendant.

MASON, J. This is an original proceeding brought to try the title to the office of mayor of the city of Olathe. The plaintiff and defendant were opposing candidates for that office at the last city election. The official canvass gave the defendant a majority of 126. He received the certificate of election, qualified, and is now acting as mayor. The plaintiff claims that a majority of the legal ballots were cast for him and that he is entitled to the office. The defendant was an independent nominee. The plaintiff's name appeared upon a ticket printed upon the official ballot under the designation "City Ticket," which bore no party emblem, but at the head of which was placed a circle, under the words: "For a straight ticket, make a cross-mark in the circle below, and not elsewhere on the ballot." Some 252 ballots were cast having a cross-mark in this circle, and no other mark upon them. In the First and Third Wards such ballots were counted. In the Second Ward, where they numbered 126, they were rejected. If these ballots were void, the plaintiff's case must fail. Otherwise the result depends upon a recount of 204 ballots to each of which some specific objection is made by one party or the other.

The general objection made to the counting of ballots marked only in the circle over

what was designated as the "City Ticket" is that this ticket was selected, certified, and printed under such circumstances that it could not be treated as a party ticket; that the candidates composing it were not entitled to the privilege of being voted for collectively, but that the voter could only effectively give them his support by marking crosses in the squares opposite their several names. Three specific grounds are urged in support of this objection: (1) That under the statute only a political party having a national or state organization has a right to nominate candidates otherwise than by petition, or to use a circle in connection with a party ticket; that, as the framers of this ticket made no pretense to having more than a local organization, they had no such right. (2) That the ticket was not that of any political party whatever, and for that reason could not be voted for as a whole by means of a cross-mark placed in a circle. (3) That a circle can be employed only in connection with a party emblem, and, as no emblem was printed on this ticket, the circle could not rightfully be used. These contentions will be considered in the order stated.

The plaintiff concedes that he was not the nominee of a political party having a national or state organization, but claims that in a city election all the privileges of any political party, including the use of the circle in voting, may be exercised by one having merely a local organization, under the provisions of section 2696 of the General Statutes of 1901 (section 1, c. 177, p. 311, Laws 1901), which reads: "All nominations made by political parties shall be known and designated as 'party nominations,' and the certificates by which such nominations are certified shall be known and designated as 'party certificates of nomination.' Party nominations of candidates for public office can be made only by a delegate or mass convention, primary election or caucus of qualified voters belonging to one political party having a national or state organization: Provided, that party nominations for city officers may be made by a convention, primary election or caucus of qualified electors belonging to a political party having only a local organization. Party nominations so made shall, subject to the provisions of this act, be placed upon the official ballot." The defendant relies upon this language of the next section (section 2697, Gen. St. 1901, section 2, c. 177, p. 311, Laws 1901): "Any political party having a state or national organization, by means of a delegate or mass convention, primary election, or caucus of qualified voters belonging to such party, may, for the state or municipality, or any lawfully organized portion of either, for which such convention, primary election or caucus is held, nominate one person for each office that is to be filled therein at the next ensuing election, and, subject to the provisions of this act, file a certificate of such nomination so made." In his brief

the defendant says: "While it is provided by section 1 (section 2696, Gen. St. 1901) that a local political party may make party nominations, and under this law it might use the party name to designate its ticket, yet such ticket could only be placed on the official ballot by petition, and would not then be entitled to use either a party emblem or a circle. In other words, the law does not require official notice to be taken of such political parties, and they are not entitled to the privileges which the law specifically gives to political parties having a state or national organization. A political party having only a local organization cannot file a certificate of nomination." To this we cannot agree. It is true that section 2697 does not in terms refer to political parties having only local organization, and its language taken alone might seem to exclude them. But this section must be read in connection with the preceding one, which is a part of the same act. The proviso of that section relating to local political parties plainly contemplates their making nominations for city officers by convention, primary election or caucus, and using "party certificates of nomination." It must be taken to qualify the language of section 2697, and to make the terms "political parties," "party nominations," "party certificates," "party names," and kindred expressions, wherever found in the act, apply to local political parties, as well as to those having a national or state organization, so far as relates to city elections, except where the context forbids this construction.

Under the second specification noted the defendant contends that the findings made by the commissioners by whom the evidence has been taken show that the so-called "City Ticket" was not nominated by any political party whatever, even by one having only a local organization. It appears that in former years there had been in Olathe a local organization known as the "Citizens' Party," which usually presented a ticket at the city election. This year the city central committees of that party and of the Republican Party, in response to a suggestion made for the purpose of promoting harmony in municipal matters, united in calling a mass meeting to nominate candidates for city offices. A meeting was held pursuant to this call, which was participated in by voters who were members of various political parties. At this meeting a full set of candidates for city offices was named, the plaintiff being nominated for mayor. It was then voted that the ticket thus formed should be designated as the "City Ticket," and a committee was appointed to have general charge of the campaign. No resolutions were presented and no platform was adopted, but speeches were made, as disclosed by the evidence, to the effect that the purpose of the participants was to eliminate partisan politics from the city government. Previous to this time there

had been no party in Olathe known as the "City Party." The contention of the defendant is that these considerations affirmatively establish that the ticket in question was not that of a political party within the meaning of the statute. Of the cases cited in support of this position several have but little, if any, relevancy because they turn upon the conflicting claims of rival organizations to the use of the same party name. Two of them, however, namely, *Certificates of Nominations of McKinley-Citizens' Party*, 6 Pa. Dist. R. 109, and *Nomination of Jeffries*, 9 Pa. Dist. R. 863, contain expressions favoring the defendant's contention. In the syllabus of the former case it is said: "A political party is a body of electors having distinctive aims and purposes, and united in opposition to other bodies of electors in the community within which it exists. A body of electors coming together for a single object, and with no continuity of aim or policy, is not authorized to file certificates of nomination, though it in fact polled at the last preceding election over 2 per centum of the largest entire vote for any office cast in the state." In the latter case the syllabus reads: "There may be the prescribed number of votes cast at a preceding election to constitute the aggregation of voters a political party, but if the body does not also avow or proclaim a dogma or doctrine which invites support from the community at large, and not a section or fragment of it, and which is necessarily antagonistic to the tenets of recognized organizations or some of them, it cannot be a political party according to the legislative intent. And a party comes within this definition, and not entitled to a column on the official ballot, which is made up of several co-operating elements, which ordained no creed, adopted no platform, issued no declaration of principles, promulgated no fellowship of opinion or purpose in respect to public affairs, or in opposition to the well-defined principles of established parties, and to become a member of which no abnegation of faith nor absolution of allegiance from existing parties is required." The force of these decisions, as applied to the present question, is at least seriously impaired by the provision of the Kansas statute already discussed, giving merely local organizations a political status in city matters. But the essential doctrine upon which they are based has later been repudiated by the court of last resort in Pennsylvania. In *Independence Party Nomination*, 208 Pa. 108, 57 Atl. 344, it is said: "Every elector, as already said, has the right to express his individual will in his own way, and for his own reasons, which are not open to question, however unsound and unimportant others may deem them. And the rights of electors acting together as a party are equally beyond question. The electors themselves are the only tribunal to decide whether the principles, platform, aim, or method of reaching the

desired object are broad enough, permanent enough, or important enough to be the basis of united action as a party, and, if they so decide, courts must recognize and treat them accordingly. * * * What the bond shall be which holds the combination together is exclusively within its own determination. It may be different principles from those of other political parties, a different object, or the same object by different means. These, and all similar matters, are outside the jurisdiction of the courts, and rest exclusively on the will of the individual electors. The objection, therefore, made in the court below, that the Independence Party claim to be still Democrats on national issues, is not one with which the court has any concern." To the same general effect, see *Davidson v. Hanson*, 87 Minn. 211, 92 N. W. 93; *Baker v. Scott*, 4 Idaho, 596, 43 Pac. 76; *Roller v. Truesdale*, 28 Ohio St. 586.

Our statute formerly required that for a political party to be recognized as such it must have cast not less than 5 per cent. of the total vote at the preceding election. But the section containing this provision (section 4, c. 129, p. 251, Laws 1897) was repealed and replaced by section 2 of chapter 177, p. 311, Laws 1901 (section 2697, Gen. St. 1901), which omits this requirement. The fact that the collection of voters calling themselves the "City Party" had not previously co-operated in politics was, therefore, not fatal to their pretensions to a place upon the official ballot. It can hardly be thought that the common purpose by which they were actuated might not be indicated by the character of the speeches made at their meeting or by other means, even although no formal platform was adopted. The doctrine that partisan politics should be kept out of the city government, that is that voters in city matters should not align themselves in accordance with their beliefs upon questions affecting the administration of state and national affairs, appears to be a sufficient basis for the union of voters favoring that theory, and no reason is apparent under our statute why they might not acquire by organization the right to be classed as a political party in matters relating to city elections. But the questions thus suggested need not be decided. We prefer to rest the determination of this matter upon another ground. Section 2703 of the General Statutes of 1901 provides: "The certificate of nomination being so filed, and being in apparent conformity with this act, shall be deemed to be valid unless objection thereto is duly made in writing within three days from the date said papers are filed with the proper officers. * * * Objections or questions arising in the case of nominations for city or incorporated town officers shall be considered by the mayor and clerk, with whom one councilman, chosen by a majority of the councilmen, shall act; and the decision of a majority of such officers shall be final." In this case a certificate of nomi-

nation was filed with the city clerk purporting to be that of a political party called the "City Party." Whether such a party really existed, and whether it was entitled to have its ticket appear upon the official ballot under that head, and in connection with a circle by means of which an elector could indicate his choice for all the names thereon by making a single cross, were questions of fact that obviously might have been raised by objections duly filed and heard and decided by the tribunal provided by law for that purpose. No exception to the certificate having been taken before the election by the method for which the law makes express provision, it is too late after the votes have been cast to take advantage of any such defect as that here alleged by an objection to the counting of the ballots. Under similar statutes, the authorities are substantially unanimous in upholding this position. See 15 Cyc. 339, 340, and cases cited, especially in note 74; *Blackmer v. Hildreth*, 181 Mass. 29, 63 N. E. 14; *Earl v. Lewis* (Utah) 77 Pac. 237.

Upon this branch of the case it remains only to consider the effect of the omission of a party emblem from the ballot. In section 2699 of the General Statutes of 1901 it is provided that: "Party certificates of nomination shall contain and show, by a representation thereof, some simple device or emblem to designate and distinguish the candidates of the political party making the nominations." In this case the certificate of nomination failed to show a party emblem, and consequently none was printed upon the ticket. It may well be argued that this defect was waived by the failure to make timely objection to the certificate, inasmuch as it originated there, although it showed upon the face of the document, which therefore was not fully in "apparent conformity" with the statute. In *Allen v. Burrow*, 69 Kan. 812, 818, 77 Pac. 555, the tribunal created to consider objections to certificates of nomination is said to be competent to pass upon a question of the form of a certificate. In *Blackmer v. Hildreth*, supra, and *Earl v. Lewis*, supra, under statutes similar to ours it is said that even the failure to file the certificate within the time limit fixed by law is a matter for the consideration of such tribunal. But we do not care to place the decision of this matter upon such narrow ground. In *Boyd v. Mills*, 53 Kan. 594, 37 Pac. 16, 25 L. R. A. 486, 42 Am. St. Rep. 306, it was held that where the colored sample ballots were by mistake used for voting by all the voters at one polling place, the ballots should nevertheless be counted. The present case is within the spirit of that decision. It is true that there has been a change in the phraseology of the law since that opinion was written. The statute then read: "None but ballots provided in accordance with the provisions of this act shall be counted." Section 25, c. 78, p. 119, Laws 1893. This has been held to mean that the voters may not use

ballots of their own choosing, but only those furnished to them by the proper officials. *State v. Bernholtz* (Iowa) 76 N. W. 662. The corresponding part of our present statute reads: "No ballots other than those provided, printed, and indorsed in accordance with the provisions of this act, shall be delivered to a voter, deposited in the ballot box, or counted." Section 11, c. 177, p. 327, Laws 1901; section 4, c. 228, p. 397, Laws 1903; section 3, c. 222, p. 369, Laws 1905. Just what change in the policy of the law was intended to be accomplished by the additional words employed in the latter statute need not now be determined. It cannot reasonably be believed however that it was the intention of the Legislature that any slight departure from the strict letter of the law in the preparation or printing of the ballots should disfranchise the voters of an entire community. The courts of England and Australia have given a very technical construction to statutes of this character. The supreme court of Montana originally followed their lead in this respect upon the principle that in adopting a foreign statute the Legislature was to be deemed to have adopted also the interpretation already given it by the courts of the country from which it was borrowed. *Price v. Lush*, 10 Mont. 61, 24 Pac. 749, 9 L. R. A. 467. Later, however, yielding to the argument that restrictions upon the electoral franchise should be employed with more caution in this country than under other forms of government, the court disapproved this case, and after a very thorough review of the American decisions, reached the conclusion that an election, otherwise legally and fairly conducted, was not to be invalidated by reason of an irregularity in the preparation of the ballot. *Stackpole v. Hallahan*, 16 Mont. 40, 40 Pac. 80, 28 L. R. A. 502. This is unquestionably in accordance with the great weight of authority in the United States. See the cases already cited, especially *Blackmer v. Hildreth*, and *Earl v. Lewis*. The purpose of placing a party emblem upon the official ballot is obviously to enable the adherents of the party to quickly, easily, and surely identify the ticket. The omission of the emblem from the "City Ticket," under the circumstances here present could not possibly have worked any prejudice to its opponents. *Jones v. State*, 153 Ind. 440, 55 N. E. 229. Such omission, however important it might have been if pointed out upon an objection to the certificate of nomination, affords no ground for rejecting the ballots cast at the election.

A question preliminary to the examination of the 204 ballots which are protested for special reasons is raised by the defendant. After the election returns had been opened and examined before the commissioner, these particular ballots were separated from the others, classified, and, by the consent of both parties, transmitted to this court by the commissioner, for the purpose of enabling them

to be used upon the hearing of the case; it being found impracticable to write such a description of them as would exhibit the precise character of their markings. They came into the custody of the clerk of this court unsealed, and were by him placed in that condition among the papers in the case. Later the plaintiff's attorneys obtained these ballots from the clerk, took them to a table in the clerk's office, and there spent some time in their examination. The defendant claims that these ballots, from having been for a considerable interval in the hands of persons having an interest in the litigation, have lost their character as evidence, and should be ignored. The argument is made that the Legislature has been at great pains to prevent the possibility of any tampering with the returns of an election, especially by providing that the ballots shall be opened only in the event of a contest, and then in open court, or in an open session of the body trying the contest, and in the presence of the officer in whose custody they are (section 4, c. 228, p. 397, Laws 1903); that these precautions are rendered wholly unavailing if, after the ballots are opened, they may be placed on file in a public office unsealed, and there handled by interested persons without official supervision. The fallacy of this reasoning is apparent. It is obvious that until the ballots are opened, examined, and counted it is imperative that the greatest care possible be taken to guard against any opportunity for changing them. But when they have been once subjected to a critical inspection, and especially when they have become a part of the records of a court, there is ordinarily no longer the same reason for extreme precaution in that regard, for their contents having become known with certainty there is less room for the suspicion of any subsequent alteration, and their very character as part of the court files is a protection. In the present case, if it had seemed to the commissioner to be desirable, or if either party had requested it, the particular ballots in controversy might properly have been resealed until such time as this court should reopen them. But since that was not done, and the ballots were treated like any other documents on file with the clerk, there was no impropriety whatever in the conduct of the plaintiff's attorneys already related. It is urged that in handling these ballots pencil marks might have been made by accident or design, slight in themselves, but sufficient to vitiate a number of votes. This might be some reason for the ballots having been placed under seal, but it is no reason whatever for presuming in the absence of all proof that any such marks were in fact made. Papers of the highest importance, any change in which might involve the gravest consequences, are habitually taken from the court files by attorneys, by the consent of the clerk, and kept in their possession for days at a time, with every opportunity for


alteration. It has never been suggested that in such cases the authenticity of the documents is discredited, or that a presumption of fraud on the part of an attorney arises from the most ample opportunity for its exercise.


In this connection it is necessary to notice language in the defendant's brief to which objection is made. It is said in the brief that the plaintiff's attorneys "not only had the opportunity of tampering with the ballots, but actually did so." If by this it were intended to charge that the ballots were in any way changed by the plaintiff's attorneys the statement would warrant striking the brief from the files, for there is no shadow of evidence to support such an assertion, and such an attack upon opposing counsel should not be permitted to pass unnoticed. But it was explained in the oral argument by the defendant's attorneys that they used "to tamper" as an equivalent for the phrase "to handle without lawful authority," and the context seems to be consistent with such use of the objectionable phrase in the present instance. This explanation doubtless brings the words quoted within the scope of permissible argument. But on the next page of the defendant's brief an expression is used, the purport of which need not be here given, to which the court is unable to attach any meaning whatever that does not involve a gratuitous reflection upon the personal character of two of the plaintiff's attorneys. Attention was called to this language in the oral argument, and no offer has been made to qualify it, or to show that it is capable of any construction other than that suggested. If it was so intended, the defendant's attorneys by its use forfeited all right to have their brief considered. *Stager v. Harrington*, 27 Kan. 414; 3 Encycl. of P. & P. 723, 724. To have struck the brief from the files and given time for presenting another would have caused delay and inconvenience, and to have ignored it altogether would have deprived the court of the benefit of its contents in solving the disputed questions of law involved. It has therefore been made use of in its present form; but unless the expression referred to is voluntarily withdrawn or satisfactorily explained, it will, by order of the court, be erased from the copies of the brief, which will remain a part of the public records. It should be added that three of the defendant's attorneys, A. Smith Devenney, C. L. Randall, and I. O. Pickering, have filed written disclaimers of any purpose on their part to question the integrity of opposing counsel.

The 204 doubtful ballots have been examined and those to which no valid objection appears have been counted. Some of the ballots accepted by the election boards have been rejected here, and in a smaller number of cases ballots which the boards classed as void, on account of defective marking, have been held to be sufficient. In this canvass, wherever the voter has apparently

attempted in good faith to comply with the statute by making simple cross-marks in the proper squares, effect has been given to his intention as so expressed, even although some departure from symmetry and regularity is shown; for instance, where a pencil mark is made double for a part of its length, or for all of it, in an evident attempt to make it plainer, or where accidental hooks or curves appear at the ends of the lines, caused by carelessness in removing the pencil. Irregularities of this character, being incapable of accurate description and not being adapted to use as a means for the subsequent identification of the ballot, are not considered destructive of the voter's purpose. Ballots have been rejected for the following causes:

The use of a blue or purple pencil in marking.

The placing in any square of a cross one of the arms of which is distinctly and purposely paralleled by a third line, forming such a figure as this:  Wheeler v. Caldwell, 68 Kan. 776, 74 Pac. 1031.

The placing in any square or circle of a distinct third line in addition to the two forming the cross, although not parallel to either, forming such a figure as this: 

The placing in any square or circle of a single line, not crossed by another.

The placing in any square or circle of a nondescript character, which shows no attempt at forming a simple cross.

The placing of a cross outside of any square or circle.

The placing of a cross in a square in the blank column, opposite which no name is written.

The defacing of the ticket by apparent attempts at erasing marks already made.

The placing of a cross in the circle and also a cross in one of the squares in the same column, but not in all of them. The law in this respect is changed by section 3, c. 222, p. 369, Laws 1905.

The placing of a cross in the circle and also a cross in a square of some other column.

The placing of crosses in the squares opposite the names of two candidates for the same office. The law in this respect is also changed by the act of 1905.

The writing in the blank column of a name which is already printed on the ballot as that of a candidate for the office indicated.

The writing of a name in the blank column

without placing a cross in the corresponding square.

The writing of a name on the ballot elsewhere than in the blank column.

For a collection of recent cases upon the defective markings of ballots under the Australian ballot law, see 15 Cyc. 352-362.

A recount of these ballots, in connection with those to which no exception is taken, conducted under the rules indicated, gives the plaintiff 595 votes and the defendant 576.

Judgment is accordingly rendered for the plaintiff. All the Justices concurring.

(72 Kan. 701)

OWEN v. MILHOAN.

(Supreme Court of Kansas. Nov. 11, 1905.)

Quo warranto by E. C. Owen against J. H. Milhoan. Judgment for plaintiff.

S. T. Seaton, L. G. Ferrel, E. C. Owen, and Ogg & Scott, for plaintiff. C. H. Potts, J. P. Hindman, I. O. Pickering, C. B. Little, J. W. Parker, J. T. Little, C. W. Gorsuch, A. Smith Devenny, and C. L. Randall, for defendant.

PER CURIAM. This case is in all respects similar to Ogg v. Glover, 83 Pac. 1039, just decided, except that the office involved is that of police judge. Applying the principles announced in that case to a count of the ballots in this gives the plaintiff 598 votes and the defendant 570.

Judgment is therefore rendered for the plaintiff.

(72 Kan. 700)

PETTYJOHN v. SCOTT.

(Supreme Court of Kansas. Nov. 11, 1905.)

Quo warranto by C. F. Pettyjohn against O. J. Scott. Judgment for plaintiff.

S. T. Seaton, L. G. Ferrel, E. C. Owen, and Ogg & Scott, for plaintiff. J. W. Parker, I. O. Pickering, C. H. Potts, C. B. Little, J. P. Hindman, J. T. Little, C. W. Gorsuch, A. Smith Devenny, and C. L. Randall, for defendant.

PER CURIAM. This case is in all respects similar to Ogg v. Glover, 83 Pac. 1039, just decided, except that the office involved is that of city treasurer. Applying the principles announced in that case to the count of ballots in this gives the plaintiff 587 votes and the defendant 559.

Judgment is therefore rendered for the plaintiff.

STATE v. ELLIS et al.

(Supreme Court of Kansas. Dec. 9, 1905.)

DESCENT AND DISTRIBUTION—REALTY.

Resident citizen half-sisters of a resident citizen who died intestate, leaving neither widow nor children, and whose parents both died before him nonresident aliens, inherit immediately and directly the lands of the deceased in this state.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, §§ 102, 103, 116, 117.]

(Syllabus by the Court.)

Error from District Court, Butler County. On rehearing. Affirmed.

For former opinion, see 79 Pac. 1066, 1133.

C. C. Coleman, Atty. Gen., J. S. West, and F. L. Williams (Eugene Hagan, amicus curiæ), for the State. Leland & Harris and T. A. Kramer, for defendants in error.

SMITH, J. A statement of the facts pleaded in this case will be found in the opinion herein handed down at the March, 1905, session. The court at that time being divided on some of the important questions involved, to which much consideration had been given, a solution was suggested and adopted with, it seems, too little investigation, and the ruling of the court below sustaining the demurrer to the answer of the state was upheld on the ground that defendants had three years after the death of John Gainer, under the provision of the alien land law, to dispose of the land, and, as that time had not elapsed when this action was commenced, the state could have no right to escheat the land. On consideration of the motion of the state for a rehearing it was determined, as the death of John Gainer occurred shortly before the enactment of the alien land law, the defendant in error could not have acquired the land in question under the provisions of that law. Hence the ground upon which the former decision of this court was based is untenable.

We pause, in sad regret, to note that death has deprived the court and their respective clients of able and conscientious counsel, whose briefs upon the former hearing bespeak the great learning and skill of their lamented authors. Jay F. Close, Assistant Attorney General, and Judge Redden, have passed to that bar where the Great Advocate forever appears to palliate the shortcomings of his redeemed subjects from earth and to urge a reward for every worthy thought and effort. Happily, however, as in all worthy human effort, when one drops exhausted from his post of duty, another steps into his place, and the work ceases not. The former associates and the added counselors, availing themselves of the work already done, with great zeal and ample research have well-nigh exhausted the store of legal learning on the important questions involved in this case.

The question is: Can resident citizen half-

sisters of a resident citizen who died intestate, leaving neither widow nor children, and whose parents both died before him nonresident aliens, inherit immediately and directly the lands of the deceased in this state? The plaintiff in error says, "No; the land is escheat to the state." The defendants say, "Yes." The court below, in sustaining the demurrer to the answer of the state, said, "Yes." Affirming that ruling, this court says, "Yes." It will, of course, be conceded that sister inherits from brother under the same conditions as brother from brother, and sisters of the half blood as sisters of the full blood; also, that, if any of the defendants in error is a legal heir to the deceased, no part of the estate can be escheated. It is also conceded by the plaintiff in error that for about 200 years, ever since the decision by Lord Hale in *Collingwood v. Pace*, 1 Keble, 65, the rule there announced that brother inherits immediately and directly from brother, and not mediate through the father, has been uniformly recognized as the common-law rule. It is also the well-recognized rule of the common law that an alien cannot inherit the lands of a deceased citizen. In *Collingwood v. Pace*, supra, the father and one brother of the deceased were aliens, and one brother was a citizen. It was held that the alien brother could not inherit, and the inheritance passed immediate to the citizen brother, notwithstanding the alienage of the father.

The provision of our statute as to the descent from one who dies intestate, leaving neither widow nor children, is as follows: "If one of his parents be dead the whole of the estate shall go to the surviving parent; and if both parents be dead, it shall be disposed of in the same manner as if they or either of them, had outlived the intestate and died in the possession and ownership of the portion thus falling to their share, or to either of them, and so on through ascending ancestors and their issue." At the time the statute was enacted, and for many years thereafter, the Constitution of Kansas provided that no distinction should ever be made between citizens and aliens in reference to the descent of property. By permitting aliens to inherit the same as citizens, this constitutional provision abrogated the common-law rule so far. Then, since alien and citizen stood upon equal footing as to the right of inheritance in this state, is it to be supposed that, in the enactment of the statute above cited, it was the purpose of the law-makers to abrogate the common-law rule as to inheritance from brother to brother? If not abrogated by the statute, it will be conceded that this common-law rule is a part of the law of this state. If the language of the statute unequivocally prescribes another and inconsistent rule, we must apply the statutory rule, regardless of consequences, and leave it to the Legislature, in its discretion, to make good any injustice that may result. In this

country there is no attainder of blood for crime. Alienage is nowhere a crime, and it cannot even be a fault in a state in which no citizen can go far back in his lineage till he traces to alien ancestry—a state whose Constitution from its organization till a few months before the death of the intestate provided there should never be any discrimination between citizens and aliens as to the right to inherit property.

It is urged that this case is of great importance, in that much land within our commonwealth is in similar situation to the land in question; and if the view held by plaintiff is declared to be the law of the state, the school fund, which should at all times be guarded and viewed with favor, will receive great accretions. It is sufficient answer to say that the state exists for the common benefit of all residents, citizen and alien, within its borders, and should not prey upon any individual or class for the benefit of the whole. If these premises are true, and they cannot be questioned, we are more than justified in going all reasonable lengths to adopt a construction of our statute that is in accord with the beneficent spirit of the jurisprudence of the state from its very origin. In 1888 section 17 of our Bill of Rights was amended so as to read: "No distinction shall be made between citizens of the state of Kansas and citizens of other states and territories of the United States in reference to the purchase, enjoyment or descent of property. The rights of aliens in reference to the purchase, enjoyment or descent of property may be regulated by law." Not till 1891, and after the death of Gainer, was any legislation had looking to the regulation of the rights of aliens in reference to the descent of property, when the act known as the "Alien Land Law" was supposed to have been enacted. That this act was lawfully passed by one branch of the Legislature is questioned. As, however, the rights of the defendants, if any they have, became fixed immediately upon the death of Gainer, after the amendment to the Bill of Rights, and before the attempted enactment of the alien land law, it is immaterial to this case whether that law was legally enacted or not.

What, then, is the meaning of the portion, above quoted, of the statute of descents? Does it simply furnish a guide to determine who are the heirs of a deceased who dies intestate, leaving no widow or children; or does his estate become immediately a part of the estate of his last surviving parent, or one-half to the estate of each, regardless of which was the last survivor? Upon his death is his estate liable for the debts of either or both of his deceased parents, or may it pass to strangers under the will of one or both? If his father had children by a former wife and died before his mother, who had no other child, but who was again married and died before him, leaving only a

widower, does his estate go to this widower in exclusion of his half brothers and sisters by his father's first marriage? These and many other questions arise under the construction we are asked by the state to adopt. We only mention these to show how indefinite is the suggested meaning in comparison with the remainder of the statute of descents, which is quite plain and specific. The sentence next preceding the portion of the section under consideration is: "If one of his parents be dead his entire estate shall go to the other." Then follows: "If both parents be dead the estate shall be disposed of as if one or both were living and had died in the possession thereof." Since, "the dead can neither inherit nor transmit anything," this seems to have been adopted as the shortest and most definite manner of designating who, under the circumstances, would be the heirs of the deceased intestate. If the parents of the intestate had been living, and had died in the possession of his estate under the Constitution as it was when the statute of descents was enacted, the land would have gone to their surviving children and to the children of their deceased children; that is, to his brothers and sisters surviving and to the children of those brothers and sisters who may have died before him, and if there were none of these then to his grandparents, if any were surviving, and if not to his aunts and uncles, if any were surviving. In short, almost the entire chapter of the statute would have had to be repeated to direct specifically what should be done with this estate, and the result would have been the same as would follow from the few words which were used, and identically the same as would have resulted from the application of the rule promulgated in *Collingwood v. Pace*, supra.

"Things which are equal to the same thing are equal to each other." For 20 years or more the common-law rule and the provision of our statute were in effect the same. How, then, shall it be said that the amended section 17 of the Bill of Rights has changed the meaning of this statute and disinherited these defendants? There is no possible conflict between the amended section and the statute. The new section of the Constitution authorizes the Legislature to regulate, not to prohibit, the right of aliens to inherit lands. The language of itself seems to recognize a right in aliens to inherit lands. Shall this mild grant of power be construed to be self-executing, and ipso facto to abolish the right of a certain class of citizens to inherit lands? We cannot so construe it. It is believed that this is the first time this court has been called upon to decide whether the rule in *Collingwood v. Pace* obtains in this state. Inheritances have been affirmed where the rule would apply, but the question has not been specifically raised or discussed. The following are some of the cases: *Smith v. Lynch*, 61 Kan. 609, 60 Pac. 329; *Sarver v. Beal*, 36

Kan. 555, 13 Pac. 743. In the latter case it is said: "It [the property] could not pass to any deceased person or through any deceased person. It could not pass through the mother, for she was dead. * * * She is mentioned only for the purpose of indicating, or of fixing a rule for determining, to whom the property of the son directly went when he died." On the other hand, this court has said that brothers do not inherit from brothers because they are brothers, but because the one who inherits is the heir of the father. *McKinney v. Stewart*, 5 Kan. 384; *Couch v. Wright*, 20 Kan. 103; *Head v. Spier*, 68 Kan. 386, 71 Pac. 833. Other expressions repugnant to the adoption of the rule have been used in cases where the question was not raised and was not involved. In Iowa, under a statute substantially like ours, the immediate descent of property from brother is held to obtain. *Wilcke v. Wilcke*, 102 Iowa, 173, 71 N. W. 201; *Meler v. Lee*, 106 Iowa, 303, 76 N. W. 712.

In the very able and interesting brief of Mr. Eugene Hagan, appearing as *amicus curiæ*, it is contended that if the intestate died without heirs the probate court had jurisdiction of the estate, as provided in sections 6382-6384, Gen. St. 1901; that the state in no event could acquire title to the land in question, and could only acquire title to the proceeds thereof after holding the same for 21 years, subject to the right of any person to appear and prove heirship; that the

right of aliens to inherit lands is recognized by the amended section 17 of the Bill of Rights, and that the defendants at least, upon the death of Gainer, took a defeasible estate in his lands; that their rights could only be forfeited by the decree of a court of competent jurisdiction, and no such decree had been made after intestate's death and prior to August 6, 1900, when a treaty between the United States and Great Britain was proclaimed, and became a part of the law of the land, which gave the defendants three years, and under some circumstances longer, to dispose of these lands. These defendants, however, are not subjects of Great Britain, but are citizens of the United States. This treaty, therefore, does not apply.

It might be interesting to discuss other questions raised in this and other briefs, but it is regarded as unnecessary. With every section of the constitutional and statutory law of Kansas, enacted since the birth of the state, granting to aliens rights and privileges in the most generous spirit possible, we cannot separate a portion of one section of the statute from the mass of these beneficent provisions and so construe it as to disinherit citizens of the United States and of Kansas on the sole ground that their parents were aliens, especially when a construction which preserves their rights is equally open to us.

The order and judgment of the district court is affirmed. All the Justices concurring.

NOBLE et al. v. DOUGHTEN.

(Supreme Court of Kansas. Dec. 9, 1905.)

1. BANKS AND BANKING—DEPOSIT OF CHECK—OWNERSHIP.

If the payee of a check drawn on a bank in the city other than that of his residence indorse it and deposit it in his home bank in the usual and ordinary manner, and without any agreement or understanding in reference to the transaction other than such as the law implies, the check becomes the property of the indorsee.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, §§ 303-309.]

2. SAME.

The fact that the indorsee may have the right to charge the check to the depositor's account, if it should be dishonored after due diligence has been exercised to collect it, does not affect the character of the transfer or render the bank any the less the owner of the check.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, §§ 303-309.]

3. SAME—REINDORSEMENT FOR COLLECTION.

If a bank, holding title to a check under the circumstances stated, indorse it to the order of its correspondent in the city where the drawee bank is located, with a guaranty of the previous indorsement, and forward it with a deposit slip attached for credit as a deposit to such correspondent, who accepts it on the terms proposed by the indorsement and the deposit slip, and undertakes to collect it, the title to the check, no further facts appearing, vests in the second indorsee.

4. SAME—ACCEPTANCE OF OTHER CHECK IN PAYMENT—DILIGENCE.

If a bank, holding title to a check under the circumstances stated in the last paragraph, presents it for payment on the day of its receipt to the drawee, who then has funds of the drawer on deposit to meet it, and who is ready to pay it in money, but, instead of taking cash, surrenders the check for the drawee's own check on another bank, it must use the utmost diligence to collect the second check, or bear any loss which may be occasioned by the delay in case the drawer should become insolvent.

5. SAME—RE-PRESENTMENT AFTER DISHONOR.

Under circumstances of the character indicated in the last paragraph the presentment for payment of the first check, and the substitution of the second check in lieu of payment in money, fixes the rights of the parties; and after the insolvency of the drawee of the first check has occurred the negligent holder cannot charge the drawer and indorsers with liability by repossessing itself of the instrument, presenting it for payment a second time, and protesting it for nonpayment; and this is true, even although the first presentment might have been rightfully delayed for a longer period of time than that during which the drawee remained solvent.

6. SAME—DILIGENCE.

In this case presentment was made and a substituted check taken before noon of a business day closing at 3 p.m. The substituted check could have been collected within 20 minutes. It was not presented for payment at all, but on the following day an attempt was made to collect it through the clearing house. The drawer failed at 2:45 p.m. of that day, and the check was then thrown out. *Held*, no diligence in collecting it appears.

7. SAME—CUSTOM.

A local custom of banks to take up checks drawn upon them by their depositors with their own checks on other banks will not excuse holders from exercising the utmost diligence in collecting the substituted checks.

8. BILLS AND NOTES—SUFFICIENCY OF DEMAND—DISCHARGE OF DRAWER—GIVING OF SECOND CHECK—RECOVERY OF AMOUNT.

Under the facts of this case a drawer whose check was not collected because of the negligence of an indorsee is equitably entitled to recover from the payee, on the ground of mistake, the amount of a second check, issued on account of the supposed dishonor of the first one, and duly paid.

(Syllabus by the Court.)

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Action by George M. Noble and others against William Doughten. There was judgment for defendant, and plaintiffs bring error. Reversed.

Noble & Co., of Topeka, Kan., being indebted to William Doughten, of Philadelphia, made remittance by means of their check on Gilman, Son & Co., bankers, of New York. The check was forwarded from Philadelphia to New York, and, when presented, was taken up by Gilman, Son & Co. with their own check on the Western National Bank of New York. Before the Western National check was presented Gilman, Son & Co. failed. The payee of the Western National check then repossessed itself of the Noble & Co. check and caused it to be presented and protested. Without knowledge of the facts Noble & Co. issued a second check for their original indebtedness, which check was duly collected. Upon obtaining full information concerning the manner in which their first check had been handled, Noble & Co. sued Doughten for the amount of the second remittance. Judgment was rendered against them on the following findings of fact and conclusion of law:

Findings of Fact.

"(1) At and for some time prior to the times mentioned in these findings of fact, the plaintiffs George M. Noble, A. D. Washburn, and J. H. Noble, constituted a partnership, were doing business under the firm name of George M. Noble & Co., and were engaged in business in the city of Topeka, and among other things said partnership made collections for nonresidents.

"(2) Prior to the 11th day of October, 1902, the plaintiffs made a collection for the defendant, William Doughten, amounting to \$1,548.75, and on said October 11, 1902, the plaintiffs drew their check upon Gilman, Son & Co., of New York City, for \$1,543.75, payable to William Doughten, who then and for a long time prior thereto had resided in the city of Philadelphia, Pa.; this being the amount due on said collection after plaintiffs had deducted their commission for making the same. Said check was in due course of mail forwarded to the defendant. A copy of said check is in words and figures as follows, to wit: 'Geo. M. Noble & Co., Financial Agents. No. 5,022. Topeka, Kans., Oct. 11, 1902. Pay to the order of Wm. Doughten \$1,543.75 Fifteen Hundred Forty-

three and 75/100 Dollars. Geo. M. Noble & Co., by A. D. Washburn. To Gilman, Son & Co., New York.'

"(3) The check described in finding No. 2 was received by the defendant, Doughten, on October 14, 1902, and on the same day was duly indorsed by him and deposited in the City Trust Safe Deposit & Surety Company of Philadelphia; that being the banking house in which the defendant transacted his business, and said check being deposited in the usual and ordinary course of business pursued in transactions of that kind.

"(4) At the time the defendant received said check from the plaintiffs there was no agreement or understanding between him and plaintiffs that said check should be received in payment of the amount due from plaintiffs to defendant.

"(5) The City Trust Safe Deposit & Surety Company of Philadelphia referred to in finding No. 3, on the same day said check was received by it for deposit, forwarded the same to its New York correspondent, the Produce Exchange Bank of New York, and the same was received by said Produce Exchange Bank on the morning of October 15, 1902, at about 8:30 o'clock a. m. No letter of instruction accompanied said check, but a deposit slip was inclosed in the envelope therewith. Before forwarding said check, as above recited, the City Trust Safe Deposit & Surety Company placed thereon the following indorsement: 'Pay New York Produce Exchange Bank, or order. Indorsements guaranteed. The City Trust Safe Deposit & Surety Company of Philadelphia. Jas. F. Lynde, Secretary & Treasurer.'

"(6) The Produce Exchange Bank referred to in finding No. 5 presented said check to Gilman, Son & Co., of New York, on October 15, 1902, some time before noon, and Gilman, Son & Co. drew their check in favor of said Produce Exchange Bank for an equal amount, upon the Western National Bank, and took up the check drawn by plaintiffs. At that time there was no agreement or understanding between Gilman, Son & Co. and said Produce Exchange Bank that this transaction should constitute a payment of the check drawn by plaintiffs as described in finding No. 2, but was the usual and ordinary method of transacting business of that character in the city of New York.

"(7) At the time the check described in finding No. 2 was presented to Gilman, Son & Co. said last-named company had on hand more than sufficient funds belonging to the plaintiffs to pay said check, and doubtless would have paid the same if the cash had been demanded by the party presenting the check. At the time, and for a long time prior thereto, Gilman, Son & Co. had been engaged in the banking business in New York City, and was a reputable banking house in good standing.

"(8) Said banking house of Gilman, Son & Co. closed its doors and ceased to do busi-

ness at about 2:45 o'clock p. m. on October 16, 1902, suspended payment of all checks, and executed a deed of assignment on the evening of that day. The preparation of said deed of assignment was commenced immediately after said banking house had closed its doors.

"(9) The check drawn by Gilman, Son & Co. upon the Western National Bank in favor of said Produce Exchange Bank, as recited in finding No. 6, was presented in due course of business, passing through the clearing house, and payment thereof was refused for the reason that Gilman, Son & Co. had closed their doors, and had no deposit in said Western National Bank out of which said check could be paid.

"(10) All of the New York banks referred to in these findings of fact were members of the Clearing House Association of the city of New York, except the banking house of Gilman, Son & Co. There are about sixty banks in New York City which belong to said association, and about 25 or 30 private banks and banking institutions in said city which do not belong to said Clearing House Association.

"(11) The method in which the business of said Clearing House Association of New York City is done, as between the banks belonging to said association, is substantially as follows: The checks deposited in a bank on any particular day are assorted and distributed into a rack in which each bank belonging to the Clearing House Association has a pigeonhole, so that the checks upon different banks are collected together and made into packages. The next morning thereafter the packages so made up are sent to the clearing house and delivered to the representatives of the several banks. There is a regular system or practice of delivering the checks at the various desks, so that, when the checks are all delivered or exchanged, clearance is made, and each bank receives all checks drawn upon it, and each bank delivers to the representatives of all other banks checks drawn upon such other banks and paid through it. Each bank then foots up its debit and credit amounts, and, if the result is a debit balance, it is required to send to the clearing house by half past 12 o'clock that day the cash necessary to provide for said debit balance; but, if such bank has a credit balance, it receives its cash credit about half past 1 o'clock that day.

"(12) Where a check is drawn by one bank upon another bank, either being a member of the clearing house association, the custom is for said check to go through the clearing house for collection. The aggregate amount of checks passing through said Clearing House Association of New York City each day would amount approximately to \$250,000,000. The number of checks so handled through the clearing house per day is ordinarily numbered in the millions. There is no charge made by New York banks for the

collection of checks in the city of New York.

"(13) When the check of plaintiffs was presented to Gilman, Son & Co., and that bank issued its check therefor, the plaintiffs' check was stamped 'Paid,' and after the check of said Gilman, Son & Co. had been dishonored by the Western National Bank, and after Gilman, Son & Co. had closed their doors and made assignment for the benefit of their creditors, the Produce Exchange Bank sent its representative to Gilman, Son & Co., and procured the check which had been drawn by the plaintiffs, described in finding No. 2, to be protested for nonpayment.

"(14) The check drawn by Gilman, Son & Co. upon the Western National Bank in favor of the Produce Exchange Bank, as recited in finding No. 6, was received at the Produce Exchange Bank about 2:30 o'clock p. m. on October 15, 1902, was charged to the Western National Bank, the stamp of said Produce Exchange Bank was placed upon the check, and the same was assorted and distributed, as any other check that came in, after being stamped 'Paid.' Said check remained in said Produce Exchange Bank assorted and distributed as above recited, until 5 o'clock on October 15th, when it was placed in the safe overnight, and on the morning of the 16th of October the same was taken from the safe and placed in the pigeonhole where it had been after assorting and distribution on the day before. Said check went through the usual course of the clearing house, and went into the hands of the Western National Bank. The representative of said Produce Exchange Bank left said bank with said check and others about 20 minutes before 10 o'clock a. m., and reached the clearing house at about 15 minutes before 10 o'clock on October 16th, and said check then passed to the hands of the Western National Bank at about 8 minutes after 10 o'clock. It takes about 10 minutes to walk from the banking house of Gilman, Son & Co. to the Produce Exchange Bank at the ordinary rate of speed, and would take about 10 minutes to walk from the Western National Bank to the Produce Exchange Bank.

"(15) The usual closing hour for all banking houses in the city of New York at the time of the transaction referred to in these findings of fact was 3 o'clock p. m.

"(16) When the defendant, Wm. Doughten, was notified that the plaintiffs' check had been dishonored, he issued his personal check for the amount of said dishonored check, and the same was presented and paid. Thereafter, and on October 17, 1902, the defendant, Doughten, notified the plaintiffs by telegram of the dishonor of their check, and the plaintiffs immediately issued their checks to the defendant for the same amount, which check was promptly paid. At the time that plaintiffs issued their second check, above referred to, to the defendant Doughten, the individual members of plaintiffs' firm had

no notice or knowledge of the various transactions which had taken place after the plaintiffs' original check had been received by the defendant; and said second check was issued by plaintiffs to the defendant, Doughten, while plaintiffs still believed that their check on the banking house of Gilman, Son & Co. in favor of the defendant had been dishonored in the regular course of business. The check drawn by the defendant, Doughten, to take up the dishonored check referred to above was dated October 17, 1902, and after taking the usual course of business it was paid on the 24th day of October. Under the statutory law of New York a check must be presented for payment within a reasonable time after its issuance, or the drawer thereof will be discharged from liability thereon to the extent of the loss caused by the delay."

Conclusion of Law.

"Upon the foregoing facts the plaintiffs are not entitled to recover, and judgment should be rendered in favor of the defendant."

Rossington & Smith, for plaintiffs in error.
J. W. Gleed and J. L. Hunt (Gleed, Ware & Gleed, of counsel), for defendant in error.

BURCH, J. (after stating the facts). This controversy arises over a bank check. The instrument was an order upon a banking house for the unconditional payment instantly upon demand of a specified sum of money to the order of a person named, and purported to be drawn upon a deposit of funds. *State v. Warner*, 60 Kan. 94, 96, 55 Pac. 342; 7 Cyc. 529. The check was sent to the payee for the purpose of satisfying an obligation due him from the drawer. The delivery of the check did not pay the debt, and its acceptance did not constitute even prima facie evidence of payment. *Kermeyer v. Newby*, 14 Kan. 164; *Mullins v. Brown*, 32 Kan. 312, 4 Pac. 305. But the acceptance of the check imposed upon the payee the necessity of using due diligence to realize upon it in order to escape responsibility for loss, if, in the meantime the drawee should become insolvent. *Anderson v. Rodgers*, 53 Kan. 542, 36 Pac. 1067, 27 L. R. A. 248; *Kilpatrick v. B. & L. Association*, 119 Pa. 30, 12 Atl. 754; *Freeholders of Middlesex v. Thomas & Martin*, 20 N. J. Eq. 39. And if he should be guilty of laches in this respect, resulting in loss or damage to the drawer, satisfaction of the original debt, to the extent of the injury, would follow. 22 A. & E. Encycl. of L. (2d Ed.) 572. The payee indorsed the check, and deposited it in the Philadelphia bank, with which he was in the habit of dealing, according to the business forms under which transactions of that character are usually conducted. The legal effect of such conduct, where no reservations are made or limitations are imposed by either party, and no agreement or understanding appears other

than that which the law implies, is well settled by the best-considered cases. When the payee of the check received credit for it, the bank became indebted to him in a sum equal to the amount of the credit, his funds in the bank subject to immediate withdrawal upon his check were augmented to the same extent, the check itself became the property of the indorsee, and the payee's relation to it became that of one who had transferred title to it by indorsement. If the depositor had desired to establish the relation of principal and agent between himself and the depositor, he should have indorsed the paper for collection merely, or otherwise should have indicated his purpose; and, if the bank did not intend to accept the check as money, it should have entered it as paper, and not as cash, or otherwise should have made manifest its intention to collect merely. 2 Morse on Banks & Banking, § 583. The law upon this subject is quite fully considered in the recent case of *Burton v. United States*, 25 Sup. Ct. 243, 49 L. Ed. 482, in which Mr. Justice Peckham says: "There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check, which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant, and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank, and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank, it became the owner of the check. It could have torn it up or thrown it in the fire, or made any other use or disposition of it which it chose, and no right of defendant would have been infringed."

It may be conceded that if, after due and legal effort to collect the check, it should be dishonored, the bank would have the right to charge the amount of it to the depositor's account. Whether this right may be said to rest merely on the custom of banks, or whether the custom has been crystallized into a rule and the right now may be said to be an implied condition attaching to the transfer of the paper, makes no difference. It is, nevertheless, in strictness the right of an indorsee against an indorser, and hence is not in any sense inconsistent with ownership. "The testimony of Mr. Brice, the cashier of

the Riggs National Bank, as to the custom of the bank, when a check was not paid, of charging it up against the depositor's account, did not in the least vary the legal effect of the transaction. It was simply a method pursued by the banks of exacting payment from the indorser of the check, and nothing more." *Burton v. United States*, 25 Sup. Ct. 243, 49 L. Ed. 482. "If paper be deposited in or forwarded to a bank for collection, and, in pursuance of a prearranged mode of dealing, the bank immediately places the amount to the credit of the depositor, and the depositor thereupon draws, or is entitled to draw, against the same as cash, this works a transfer of title, so that the depositor cannot afterwards claim the paper; and it is immaterial that, if the paper is not paid, the bank has the right to charge it back." *Ayers v. Farmers' & Merchants' Bank*, 79 Mo. 421, 49 Am. Rep. 235. "The agreement to charge back, if any draft was not paid, did not affect the character of the transaction. That was nothing more than would have resulted without any such agreement, unless the indorsements to the Fidelity were expressly without recourse. If the drafts were purchased by the Fidelity out and out with a general indorsement, the case would differ from the case presented to the court only in the respect that, upon the failure of the drawee to meet the draft, protest would have been necessary, whereas it may be that, by virtue of the agreement, protest was not necessary." *First Nat. Bank v. Armstrong* (C. C.) 39 Fed. 231, 233. The payee having received the equivalent of cash for the check, and having parted with title to it, the indebtedness of the drawer to him was satisfied, subject only to the contingency that he should be held liable as an indorser of the paper in the event of its dishonor; due diligence having been exercised to protect the drawer and to charge him. "It is true no express agreement was made transferring the check for so much money, but it was delivered to the bank and accepted by it, and the bank gave Murray credit for the amount, and he accepted it. That was enough. The property in the check passed from Murray and vested in the bank. He was entitled to draw the money so credited to him, for as to it the relation of debtor was formed, and the right of Murray to command payment at once was of the very nature and essence of the transaction. On the other hand, the bank, as owner of the check, could confer a perfect title upon its transferee, and therefore, when, by its directions, the plaintiff received and gave credit for it upon account, it became its owner and entitled to the money which it represented. The check, therefore, for every purpose material upon this inquiry, as between these parties, was money." *Metropolitan Bank v. Loyd*, 90 N. Y. 530, 535.

Under the same rules the indorsement of

the check to the order of the transferee's New York correspondent, its delivery with a deposit slip, attached for credit as a cash deposit, and its acceptance upon the terms proposed by the indorsement and the deposit slip, without more appearing, doubtless operated to transfer title, and the Produce Exchange Bank of New York became the owner of the check. The check was received at Philadelphia on October 14th, and on that day forwarded to New York, where it was received on the morning of October 15th. As the holder of the check the Produce Exchange Bank might have delayed making demand for payment until just before 3 o'clock p. m. (the hour for closing business) on October 16th, and had it done so, any loss occasioned by the drawee's insolvency (which occurred at 2:45 o'clock p. m. of that day) would have fallen upon the drawer. *Anderson v. Rodgers*, 53 Kan. 542, 36 Pac. 1067, 27 L. R. A. 248. But it did not exercise its privilege and remain quiescent. It chose to act, and before noon of October 15th it presented the check for payment. When the check was presented, the drawee might have assumed an attitude which for some purposes would not have amounted to either a compliance with, or a refusal of, the demand for payment, but it did not do so. It undertook by positive and affirmative conduct to meet the obligation which the check imposed. The situation then required further action on the part of the holder, and it responded in a definite and unequivocal way. Although the drawee had funds of the drawer on deposit at the time to meet the check, the holder surrendered it to the drawee, who stamped it paid, and accepted the drawee's own check on the Western National Bank of New York in place of the cash to which it was entitled, and which it might have had for the mere taking.

It is true that the law is not so rigid in respect to the conduct necessary to preserve the liability of the drawer of a check as it is in the case of draft. Failure to make demand within a reasonable time, and to give notice of nonpayment, does not peremptorily discharge the drawer of a check. Unless he suffer some loss on account of the lack of diligence displayed, he is not ordinarily released from liability. "In order to charge the drawer of a check, the same strict rule of diligence in making demand and giving notice of nonpayment does not obtain as in cases of ordinary bills of exchange. As a general rule, he is not discharged, unless he suffers some loss in consequence of the delay of the holder." *Gregg v. George*, 16 Kan. 546. A failure to demand payment of a check from a suspended bank could scarcely result in damage to the drawer, and hence laches of the holder in this respect would not release him. "I think that the plaintiff was not guilty of laches in not presenting the check of the defendant to the bank before

it was closed on the morning of the day following its delivery. The authorities are abundant that the holder of a check has the day after it is delivered in which to make a presentment for payment. * * * The rule is settled that in case of a check the drawer is to be treated the same as a principal debtor, and he is not discharged by any laches of the holder in not making due presentment thereof, or in not giving him notice of dishonor, unless he has suffered some loss or injury thereby, and then only pro tanto. * * * As the defendant was not discharged by the failure to present the check to the bank before it stopped payment, it is difficult to see how a neglect afterward to make a presentment to and demand of a confessedly insolvent party could occasion any loss or injury to the drawer. It would not prevent a recovery of the bank by the defendants of the amount in their possession which they had neglected to pay, and for which no demand had been made, and hence how could the defendant be damaged?" *Syracuse Railroad Company v. Collins*, 3 Lans. 29. See, also, *Cawein v. Browinski*, 6 Bush, 457, 90 Am. Dec. 684.

But, because the drawer of the check in controversy may not have been discharged by the mere fact that the holder upon presenting it did not require payment in money, it does not follow that the same time remained to the holder, after the drawee's failure in which to make presentment, as would have remained to him if he had chosen to remain passive in the first instance. Before the suspension of the drawee, not only had a formal presentment for payment been made, but the holder and the drawee had substituted and put into operation in place of payment a scheme of their own, which was not expressed in, and could not be implied from, the terms of the check when it left the drawer's hands. This factor in the relations of the parties cannot be overlooked. The drawer's guaranty is that the drawee shall remain solvent until the check with due diligence can be presented, but he grants no authority to the payee to extend that obligation. The holder is allowed the day after the receipt of the check in which to make presentation in order to meet contingencies and the reasonable requirements of his business needs. But this time is not allowed to him for purposes of experiment, and when demand once has been made upon the drawee, who is in funds and ready to pay, and money is not taken, a point of departure in the rights of the parties has been established, which cannot be ignored or repudiated at the will of the holder, to the detriment of the drawer. "If presentment for payment be actually made on the very day the check is drawn, and payment tendered, the holder cannot then change his mind and leave the funds at the drawer's risk until the next day. He is allowed until the next day as matter of con-

venience and accommodation to him, and, while he need not hurry to make presentment the same day, having once done so, he has fixed the money at his own risk." Daniel, *Negotiable Instruments*, § 1598. To the same effect is *Morse on Banks & Banking*, vol. 2, p. 759, § 426. These texts are based upon the case of *Simpson v. Pac. Mutual Life Ins. Co.*, 44 Cal. 139, in which the conduct of the holder in presenting a check to the drawee is analyzed and its legal effect stated as follows: "The presenting of a check for payment implies that the holder of it desires and is ready and willing to accept payment. It would be a contradiction in terms to say that the holder of a check presented it for payment, intending and averring at the time that he would not accept payment. If he should present it for the sole purpose of ascertaining whether the signature was genuine, or whether the drawer had funds to his credit, or merely for the purpose of being identified as the person entitled to payment, not intending then to present it for payment, it is clear that this would not constitute a demand of payment, which, in its very nature, imports a willingness on the part of the holder to accept the money at that time. But if the check is presented for payment with the present intention in the mind of the holder, to accept the money if tendered, this must be deemed to be a demand of payment for all purposes affecting the rights of the drawer, even though the holder should afterwards change his purpose and decline to accept the money when tendered by the bank. Having once demanded payment in due form and within the proper time, and the bank being then and there ready and willing and offering to pay the check, the holder is not at liberty after this to retract or waive his demand and decline to accept payment, without thereby releasing the drawer from further liability on the check. If the holder declines to accept payment when it is tendered on a proper demand, the liability of the drawer ceases, for the reason that his undertaking was that the check would be paid when payment should be first demanded in due form and within the proper time; but he does not undertake that it will be paid on a second demand, when payment has been tendered and refused on a prior demand made in due form and within the proper time." Page 143. It is true that in *Simpson v. Pac. Mutual Life Ins. Co.* cash was tendered and declined, but the principle invoked applies equally to a holder who might have had cash, but who, for purposes of his own, surrendered his paper for the drawee's check.

Such is the view of the editors of the two leading series of reports of selected cases. "A check on a banker calls for money, and, if money is not taken when it is presented to the drawee, it must be either because some other mode of payment or course of dealing is more convenient to the payee, or

because it is more advantageous to the bank that money should not be paid. In the former case—i. e., where the payee for his own convenience accepts something besides money for the checks—he surely should not be allowed to charge the drawer with loss resulting from such election, and, if it is for the convenience of the bank, the very fact that the bank makes the request is so suspicious that it ought to put the payee upon inquiry and incite him to diligence to secure the money, which, unless satisfied of the safety of some other means of payment, would require him to demand the money at once." 25 L. R. A. 201, note. "The holder of the check need not hurry to make presentment for payment on the same day it is received, but, if he does so, it fixes the rights of the parties. He cannot then change his mind and leave the funds at the drawee's risk until the next day. If he, on the first presentment, takes a substituted check on another bank in lieu of cash, it amounts to payment, and, if the drawee fails on that day, the payee cannot, after neglect to use the utmost diligence in presenting the substituted check for payment, put himself, by a subsequent demand upon the original drawee, in the same position he would have occupied had he not made the first demand." *Comer v. Dufour*, 51 Am. St. Rep. 89, 94, note. Such is the specific holding in the case of *Anderson v. Gill*, 79 Md. 312, 321, 29 Atl. 527, 530, 25 L. R. A. 200, 47 Am. St. Rep. 402, in which *Simpson v. Mutual Life Ins. Co.* is cited as an authority, and in which it is said: "Whilst the Old Town Bank was not bound to have made demand upon *Nicholson & Sons* when it was made, still having made it, and, by its own choice, not having received the cash, it cannot, if it has not used due diligence, claim the right to undo what it had done, and by a subsequent demand put itself in the position it would have occupied had it not made the first demand at the time it did make it, or done the act it then did." And such is the doctrine upon which the decision in the case of *Comer v. Dufour*, 95 Ga. 376, 379, 22 S. E. 543, 544, 30 L. R. A. 300, 51 Am. St. Rep. 89, was rested. "If the check is received at a place distant from the place where the bank upon which it is drawn is situated, and is forwarded by due course of mail to a person in the latter place for presentment, the person to whom it is thus forwarded has until the close of banking hours on the next secular day after he has received it to present it for payment, unless there are special circumstances which require him to act more promptly. 2 *Morse, Banks* (3d Ed.) § 421; *Daniel, Neg. Inst.* (4th Ed.) § 1591. The holder, cannot, however, after having once presented the check, derive any advantage from the fact that he could, without being chargeable with unreasonable delay, have held it longer before making presentment. The first presentment fixes the rights of the parties.

If the drawee is then ready and willing to pay, and the holder allows the fund to remain longer in the hands of the drawee, or if he accepts in lieu of money a check of the drawee, he does so at his peril." In the case of *Burkhalter v. Second Nat. Bank*, 42 N. Y. 538 (which professes to rely upon the case of *Turner v. Bank*, *42 N. Y. 425), and the case of *Kelty v. Second National Bank of Erie*, 52 Barb. 328, checks were taken in lieu of cash on the presentation of bills of exchange proper. The checks were dishonored, and the bills were then recovered, presented a second time, and protested, all within the time allowed in the first instance for presentment and protest. In each of these cases the decision was made to depend upon the question of whether or not acceptance of the check amounted to payment of the draft, and considerable effort was expended to show that such was not the result—a proposition concerning which there is no longer any dispute. It was virtually assumed in each case that, if the draft were not paid by the taking of the check, its vitality was not suspended; that it continued to be a valid obligation; and that protest within the time allowed by the rules of commercial law fixed the status of all parties. The subject now under consideration was neither pressed upon the attention of the court by counsel nor discussed by the justices delivering the opinions. In the case of *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618, all that is said upon the question of the liability of the drawer is dictum; and, if it were necessary to distinguish the earlier New York cases, a principle of discrimination might be found in the difference of purpose between checks and drafts and the difference in treatment usually accorded them. But so far as the briefs of counsel disclose, and the court is aware, no satisfying reason has yet been given for allowing the holder of a check, which calls for cash, voluntarily to disregard its legal intent, attempt to settle the drawee's liability upon other terms than those proposed by the drawer, and then, after disaster has occurred, to rescind in toto, and escape responsibility, even though he has had abundant opportunity to protect the drawer while following the course he first elected to pursue.

It is the sole function of a check to effect the transfer of money. It is of the essence of its definition that it is payable in money. "Where a check is drawn for a given number of dollars, without in any other manner designating in what kind of money it is to be paid, it is payable in coin, if demanded, or current money. Nor can such a check be explained, either by verbal agreement or by custom or any mercantile or other usage, to have any other or different meaning than that." *Hovew v. Austin*, 35 Ill. 896. None of the parties to the instrument contemplate

payment in anything else than money, and whenever a check is presented against funds on deposit to meet it, which the drawee is then ready and willing to deliver, the contract of the drawer has been fulfilled. To extend the drawer's liability further without his knowledge or consent would seem to be unjust. The acceptance by the holder of any other medium of payment than that expressed in the contract apparently ought to be at his own risk, and the doctrine that the acceptance of a substituted check is not payment unless it be paid seemingly should be limited in its application to the arrangement between the holder and drawee, and should be of no force to extend the liability of the drawer and indorsers. This is the effect of the decision in *Simpson v. Pac. Mutual Life Ins. Co.* as to an accommodation indorser. The point is clearly made by Mr. Farnham in his note to the case of *Anderson v. Gill* (Md.) 25 L. R. A. 201, already quoted, and it is suggested in the case of *Comer v. Dufour*, 95 Ga. 376, 22 S. E. 543, 80 L. R. A. 300, 51 Am. St. Rep. 89. Such undoubtedly is the law, where the new arrangement takes the form of a certification of the check. *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634, 27 N. E. 533, 12 L. R. A. 492, 31 Am. St. Rep. 403, and authorities there cited; *Girard Bank v. Bank of Pennsylvania Tp.*, 39 Pa. 92, 80 Am. Dec. 507; *First Nat. Bank of Washington v. Whitman*, 94 U. S. 843, 24 L. Ed. 229; 22 A. & E. Encycl. of L. (2d Ed.) 572. Upon principle it would seem that the holder of a check, which speaks of nothing but money on deposit payable on demand, ought to have no greater license to jeopardize the drawer by receiving a mere obligation to pay in place of money than an agent for collection would have as against his principal. See 5 Cyc. 505. The language of Treat, J., in *Mer. Nat. Bank v. Samuel* (C. C.) 20 Fed. 664, appears to be quite pertinent: "The payment of the draft was to be in cash, and if anything except cash was received, and in consequence thereof the drawer of the draft was damaged, then the damages sustained he has a right to be indemnified for by the negligent party. In this case the plaintiff bank having received the draft and presented the same, and received a check for the amount thereof, instead of cash, the drawee having had funds to meet his check, which would have been paid if presented that day, and before the said check passed through the clearing house on the next day the drawers, Parks & Co., whose check had been received, had failed, whereby the check was dishonored, the loss so caused must fall on the plaintiff, and not on the defendant. The draft should have been paid in cash; and if the plaintiff chose to receive, instead of cash, the drawee's check, it did so at its own risk, and, if any loss followed, the plaintiff must bear the same."

However, in deference to the reluctance of the commercial world and of the courts to relieve the drawers of checks from liability without actual payment having been received, this matter, although directly involved and proper to discuss, may be passed without decision and attention be directed to a fair question, lying beyond it, of what the holder ought to do to protect the drawer and indorsers from loss in case he should accept a second check. Upon this proposition the law is clear. Nothing but the utmost diligence will suffice. *Anderson v. Gill*, already referred to, is the leading case upon the subject. The facts were so similar to those under review that no distinction can be made in the application of the controlling principle. In the course of the opinion, which collates and discusses the authorities, it is said: "The rule fixing the close of business hours of the next secular day as a reasonable time within which a check may be presented, so as to hold the drawer, when drawn on a bank in the same place where it is delivered, has relation only to the contract and liability of the parties to the instrument, and does not apply to a check given by the drawee to the payee, or to the agent of the payee, of the original check, upon its surrender. * * * The holder of a substituted check, taken upon the surrender of the original check to the drawee thereof, must use such diligence in presenting it for payment as a prudent man would, under like conditions, use. This imposes no hardship upon the person who voluntarily accepts the drawee's check instead of cash. If he has had ample and abundant time to convert the drawee's check into money, and still omits to do so, he obviously has not used due diligence, and the results of such negligence should not be visited upon the original drawer, who was in no way responsible therefor. Whether a delay to present the drawee's check till the close of business hours is due diligence cannot be asserted as an invariable rule. In some instances it might be, whilst in others it would manifestly not be. * * * That a higher degree of diligence is demanded under facts like those before us than that which obtains between the parties to the instrument is obvious, because, as we have said, the drawer of the original check must be held to have contemplated that, when presented, it would be paid in money only, and the payee and drawee have no right, except at their own peril, to substitute some other mode of settlement which results in injury to the drawer. * * * We hold, then, that when the payee of a check, or his agent, takes from the drawee, who has ample funds of the drawer, a check of the drawee on some other bank or banker, instead of money, he (the payee), or his agent, must use the utmost diligence to present the substituted check for payment.

* * * That Anderson was in fact injured by what was done is manifest, and it is no answer to say he might or would have been equally injured, had the holder of the check remained passive until after the failure of *Nicholson & Sons*. In the one case the injury was the direct result of the payee's negligence after the presentation of *Anderson's* check to the drawees. In the other, had it occurred, it would have been only incident to a mere permissive or lawful inaction or passivity." Pages 319-322 of 79 Md., pages 529, 530 of 29 Atl. (25 L. R. A. 200, 47 Am. St. Rep. 402). The case of *Comer v. Dufour*, 95 Ga. 376, 379, 22 S. E. 543, 30 L. R. A. 300, 51 Am. St. Rep. 89, expressly approves the doctrine of *Anderson v. Gill*, and in the same connection states: "If his [the holder's] acceptance of the drawee's check does not of itself discharge an indorser of the original check, the indorser should certainly be held discharged, if the substituted check is not presented promptly, and the collection is thereby defeated. Such presentment cannot be delayed at the risk of the indorser for any time beyond that within which, with reasonable diligence, the presentment can be made. In this case it appears that presentment of the substituted check could have been made in about five minutes from the time it was received, the bank upon which it was drawn being only three squares distant from the bank of *J. J. Nicholson & Sons*, the drawees of the original check; but it was not presented for two hours and a half or more after it was received by the collecting bank, and by reason of this delay the collection was defeated. Under these circumstances we think the collecting bank failed to exercise due diligence, and its principal, the plaintiff in this case, was not entitled to recover against the defendant, the indorser of the original check." In this case the *Gilman & Co.* check upon the *Western National Bank* was received by the *Produce Exchange Bank* before noon of October 15th. It was not thrown out at the clearing house until after the *Gilman & Co.* failure had occurred, at 15 minutes before the close of business on October 16th. It could have been cashed within 20 minutes from the time it was issued, or more than 24 hours before the drawer suspended. Under these circumstances it must be held that the holder and owner of *Noble & Co.'s* check was negligent in not taking the necessary steps to collect the second one, and that as a result of such negligence the deposit of *Noble & Co.* in the *Gilman* bank was lost.

Some attempt is made to justify the conduct of the holder under the custom of the banks of New York, disclosed by the findings of fact. It is not entirely clear that reasonableness should be conceded to a local custom which would subvert the character of a bank check to the extent claimed for

the custom disclosed (see *National Bank of Commerce v. Am. Ex. Bank*, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527), although the volume of business to be transacted daily in New York, and the dangers incident to filling the streets with messengers carrying cash, argue strongly in its favor. The danger incident to cash collections, however, could be avoided by obtaining a certification of substituted checks, and in no event can a custom contravene an established rule of law, such as that requiring the utmost diligence to collect substituted checks (29 A. E. E. Encycl. of L. [2d. Ed.] 383), or justify negligence in the collection of such checks. "The conclusion to be drawn from these cases and the text-books cited by counsel is that a draft may be surrendered and a check taken therefor, but all reasonable diligence must be used in presenting such check for collection, and if such diligence be used, and the check is not promptly paid or certified, then that the draft may be at once reclaimed. No general custom, if such custom existed, would excuse the collecting bank from exercising all reasonable diligence in collecting such check, and certainly a special usage would have no greater effect in excusing the bank than would a general custom. *National Bank of Commerce v. Am. Ex. Bank*, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527; *Minneapolis Sash & Door Co. v. Metropolitan Bank*, 76 Minn. 136, 78 N. W. 980, 44 L. R. A. 504, 77 Am. St. Rep. 609; *Marine Bank v. Chandler*, 27 Ill. 525, 81 Am. Dec. 249; *Webster v.*

Granger, 78 Ill. 230." *Bank of Commerce v. Miller*, 105 Ill. App. 224, 233.

The holder of the check having fixed the funds at its own risk by failure to take possession of them, subsequent efforts to bind the previous parties by protest and notice were nugatory, and the only remaining question is if equity will permit the plaintiffs to recover; their action being founded upon mistake. The plaintiffs did nothing to influence the conduct of any of the parties who dealt with their check. The Produce Exchange Bank could not charge its negligent conduct upon the Philadelphia bank, nor that bank aid the Produce Exchange Bank to avoid the consequences of its carelessness by charging the check to Doughten. So far as the Produce Exchange Bank is concerned, the check was paid, and because of that fact the original debt for which the check was issued was paid. Doughten could not, by a voluntary payment to his bank, carry the holder's fault back to Noble & Co., and impose its consequences upon them. Noble & Co. acted alone upon the information Doughten gave them, and this information did not disclose the true state of affairs. Therefore, to deny relief against Doughten would be to permit him to profit by his own conduct, the effect of which was to mislead, and to compel Noble & Co. to pay their debt twice.

The judgment of the district court is reversed, with direction to enter judgment for the plaintiff upon the findings of fact. All the Justices concurring.

38 Colo. 315

CREIGHTON et al. v. PEOPLE, to Use of TOWN OF MANITOU.

(Supreme Court of Colorado. Feb. 5, 1906.)

1. PLEADING—WAIVER OF DEFECTS.

Under 2 Mills' Ann. St. § 4433, authorizing actions in the name of the state for violation of city ordinances regulating the sale of intoxicating liquor, such a proceeding is a civil action, so that alleged defects in the complaint, consisting of entitling the action in the name of the state, to the use of the town, and failing to name the persons to whom the alleged illegal sales were made, were cured by going to trial on the merits.

2. APPEAL—HARMLESS ERROR—FORMAL DEFECTS IN COMPLAINT.

It appearing that defendants were not surprised, nor deprived of any defense, and that judgment was entered appropriating the recovery in the manner required by 2 Mills' Ann. St. § 4435, permitting a recovery on such a complaint was not prejudicial error.

3. INTOXICATING LIQUORS—SALE WITHOUT LICENSE—VIOLATION OF ORDINANCE—ACTION—DIRECTING VERDICT.

Where the managers of an alleged social club operated without a license sold liquor to persons who were not members, it would have been proper for the court, in an action under 2 Mills' Ann. St. § 4433, for violation of the ordinances of the city where the sales were made, to have instructed the jury to find for plaintiff.

Appeal from El Paso County Court; James A. Orr, Judge.

Action by the people of the state of Colorado, for the use of the town of Manitou, against B. B. Creighton and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Vannatta & Woodruff, for appellants. Ira Harris and J. W. Kriger, for appellee.

GUNTER, J. This action was for a violation of an ordinance of the town of Manitou prohibiting the sale of intoxicating liquors without license. It originated in the police court, where plaintiff had judgment. Upon appeal to the county court plaintiff had a verdict and judgment. From the latter judgment, defendants are here as appellants.

The action was brought in the name of the people of the state of Colorado, for the use of the town of Manitou. The complaint upon which the action was based failed to name the parties to whom the illegal sales charged therein were made. Section 4433, 2 Mills' Ann. St., provides that such actions shall be brought in the name of the people of the state of Colorado. Because of such statute it is claimed the action was not brought in the name of the proper party plaintiff. It is further contended, because the complaint failed to name the parties to whom the illegal sales charged therein were made, that, in such particular, the complaint was indefinite and uncertain. This is a civil action. *City of Durango v. Reinsberg*, 16 Colo. 327, 26 Pac. 820. In civil actions the errors so complained of, if they exist, are cured by pleading over or a trial to the merits. There was a trial to the merits, both in the magis-

trate court and in the county court. Further, there was no possible prejudice to the defendants in either of the particulars so complained of. There was no surprise therefrom, nor were defendants deprived of any defense to the cause of action proceeded on. Further, the judgment by the caption of the complaint, in the particular assigned as error, expressly appropriated the recovery to the particular use provided by statute; that is, to the use of the town of Manitou. 2 Mills' Ann. St. § 4435. There certainly was no prejudicial error in such particulars.

2. It is said error was committed in giving certain instructions and in refusing an instruction tendered. If the court should at the close of the evidence have directed a verdict for the plaintiff, there was no prejudicial error in the charge or in the refusal to charge. The absence of a license was admitted. The evidence showed the serving of liquor for money in quantities prohibited by the ordinance—that is, illegal sales—unless taken out of the ordinance by the special defense presented. Defendants rely upon the law as declared in *State ex rel. v. St. Louis Club*, 125 Mo. 308, 28 S. W. 604, 26 L. R. A. 573, *People v. Adelphi Club*, 149 N. Y. 5, 43 N. E. 410, 31 L. R. A. 510, 52 Am. St. Rep. 700, *Klein v. Livingston Club*, 177 Pa. 224, 35 Atl. 606, 34 L. R. A. 94, 55 Am. St. Rep. 717, and *Black on Intoxicating Liquors*, § 142. While there is some conflict in the authorities as to the serving of liquors by said social clubs to members and guests, it would be obiter for us to align ourselves in this case, because, accepting the law for the purpose of this ruling as counsel for appellants claim it to be, defendants clearly failed to make out a defense. At section 142, *Black on Intoxicating Liquors*, it is said: "On the one hand, if the object of the organization is merely to provide the members with a convenient method of obtaining a drink whenever they desire it, or if the form of membership is no more than a pretense, so that any person, without discrimination, can procure liquor by signing his name in a book or buying a ticket or chip, thus enabling the proprietor to conduct an illicit traffic, then it falls within the terms of the law. But, on the other hand, if the club is organized and conducted in good faith, with a limited and selected membership, really owning its property in common, and formed for social, literary, artistic, or other purposes to which the furnishing of liquor to its members would be merely incidental, in the same way and to the same extent that the supplying of dinners or daily papers might be, then it cannot be considered as within either the purpose or letter of the law." In *State ex rel. v. St. Louis Club*, supra, it is said: "The facts of this case remove it entirely from that class in which the club was used as a mere scheme to sell liquor in defiance of law. In those cases the prime object and purpose was the sale of liquor,

and the club was a mere evasion of the law; in this case the use of wine and liquor, as shown in the agreed case, was a mere incident, subsidiary to the higher and chief purpose of the association, to wit, the advancement by social intercourse of the bodily and mental health of its members." And therein it is further said: "Applying the test that commends itself to our best judgment, in view of the conflict in the decisions, we think that where a social club, as in this case, is clearly a bona fide organization, with a limited membership, and admission into which cannot be obtained by any person at his pleasure, and its property is actually owned in common by its members, a distribution of wine or other liquors belonging to such club among its several members is not a sale of liquor by retail or in original packages, within the meaning and purview of our dramshop act, although technically the act does amount to a sale for some purposes."

There was an attempt to defend under the authorities so cited. As stated, the facts clearly did not sustain the defense. Creighton applied to the authorities of the town of Manitou for a license to operate a saloon. This was refused. Immediately thereon he, together with defendant Wagoner and one other party, formed a corporation under the name of the "Arcade Club," the purpose of which, according to the articles of incorporation, was the organization and operation of a social club. The furniture and fixtures of a former saloon were acquired, and in a room formerly occupied by a saloon the Arcade Club was located. Creighton, Wagoner, and the third incorporator, Brinkenhoff, were the directors of the club according to the articles of incorporation. Wagoner was chosen its president and manager; Creighton, its secretary and treasurer. They were present in and about the clubroom, managing its operations. A porter was employed, who usually served the customers. Sometimes this office was performed by Wagoner. A stock of liquors was secured. Liquor in prohibited quantities was served to patrons of the bar and paid therefor in cash at current prices. It does not appear that these patrons were even alleged members of the club. At other times liquor was served to a pretended member, together with some guest, and paid for by the member. Later the guest paid to the member the amount so expended. Whether the club was a social organization or not, it was a violation of the law to sell liquors to nonmembers or to the guests of nonmembers. Further, the practical operations of the club were a clear evasion of law, and it seems to have been organized for that purpose. The appointments of the room used for the operations of the club were simply those of an ordinary saloon, and consisted largely of a bar, bar furnishings and glassware, card tables and chairs, a pool table, and a billiard table. The

chief characteristic of the club was not social, and the dispensation of intoxicants was not merely incidental, as the service of them at the family board. The dispensation of liquor was the chief characteristic purpose and occupation of this so-called social club. The membership was practically without limitation, its membership might become unlimited, and practically anybody could drink at its bar.

We think it clear that the court at the conclusion of the evidence should have charged the jury to find for the plaintiff.

Judgment affirmed.

The CHIEF JUSTICE and MAXWELL, J., concur.

34 Colo. 454

SPAR CONSOLIDATED MIN. CO. v. CASSERLEIGH et al.

(Supreme Court of Colorado. Dec. 4, 1905.)

1. QUIETING TITLE—RIGHT OF ACTION—CLOUD ON TITLE—UNLAWFUL LEVY.

An owner in fee of mining claims may maintain a suit for the removal of a cloud from his title against a judgment creditor of third persons who asserts that his debtor is the owner of an interest in the mining claims, and also has levied an execution on such pretended interest and advertised the same for sale.

2. INJUNCTION—DISSOLUTION OF TEMPORARY INJUNCTION—DISMISSAL OF ACTION.

Where a complaint for an injunction states a cause of action for injunctive relief, it is error for the court to dismiss the complaint upon dissolving the preliminary injunction on a motion based simply on the pleadings, although the answer is verified.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 280.]

Appeal from District Court, Arapahoe County; P. L. Palmer, Judge.

Action by the Spar Consolidated Mining Company against John H. Casserleigh and another. From a judgment dismissing the action, plaintiff appeals. Reversed.

Thomas, Bryant & Lee, and H. L. McNair, for appellant. Geo. W. Taylor, C. P. Butler, and Frank J. Mott, for appellees.

GUNTER, J. This was an action by appellant against appellee to secure a preliminary writ of injunction restraining the sale of certain mining claims under a writ of execution, and upon final hearing to cancel any lien thereon, created by the levy of said writ or the judgment upon which it was based. The preliminary writ was issued, and appellees moved its dissolution. Upon the hearing of this motion, the court dissolved the writ and dismissed the action. This motion and the rulings thereon were based upon the pleadings. No question is made of the provision of the judgment dissolving the preliminary writ. The error urged is the dismissal of the action.

1. Appellees attempt to justify the judgment of dismissal by the contention that the complaint did not state facts sufficient to

constitute a cause of action. We do not concede that the court has the right to dismiss an action upon a motion to dissolve a temporary writ of injunction, even though the complaint does not state a cause of action, because, for example, the plaintiff might desire and be entitled to amend; but it is unnecessary to go into this. The reason assigned by appellant why the judgment should stand, we repeat, is that the complaint does not state a cause of action. The allegations of the complaint are: In 1894 a decree for a large sum was entered in the United States Circuit Court for the District of Colorado, in behalf of Margaret Billings, James O., Charles E., Thomas E., Hiram H., and William Wood against Jerome B. Wheeler and the Aspen Mining & Smelting Company; the latter being the then owner of the claims levied upon under the writ of execution sought to be enjoined herein. This decree, through the filing of a certified copy thereof in the proper office, became a lien upon said claims. Later, upon appeal, the amount of the decree was reduced. Pending this appeal Wheeler and the Aspen Company, said judgment debtors, satisfied the claim of Margaret Billings, Charles E., Thomas E., and Hiram H. Wood in the decree by conveying to them certain undivided interests in said mining property. The conveyances made in effecting this settlement were by express agreement subject to the lien upon said claims of said decree as to the interest therein of William and James O. Wood as judgment creditors. These conveyances were made in February, 1895. January, 1899, William Wood secured a writ of execution on said decree for his proportion thereof, which writ was levied upon all of said mining property, and the same was sold to him. Later James O. Wood secured a writ of execution for the collection of his part of the decree, and assigned his interest therein to G. E. Ross-Lewin. Under this writ Ross-Lewin levied upon said property, redeemed it from the sale under the execution of William Wood, and sold it under his execution, receiving a certificate of sale therefor. Later, there being no redemption, and the certificate of sale having been assigned to appellant, a deed in pursuance thereof was issued to it. Under this deed appellant entered into possession of said property, and ever since has been in possession thereof as its owner in fee, claiming priority in right by virtue of the lien foreclosed by said executions in favor of William and James O. Wood to the conveyances made by the Aspen Company to T. E. and C. E. Wood. September 12, 1900, appellee Casserleigh obtained a decree in the district court of Arapahoe county against T. E. and C. E. Wood for a certain sum. This decree provides that the amount to be paid thereunder shall be a lien upon the interest in said property conveyed to C. E. and T. E. Wood in February, 1895, and shall relate back to August, 1895, the date of the institution of the suit in which such de-

cree was rendered. Casserleigh procured writs of execution and was proceeding to sell thereunder the said interests of C. E. and T. E. Wood in said property.

It is further alleged that said C. E. and T. E. Wood have no interest in said property, and that a sale under the Casserleigh execution of any interest therein as belonging to them would cast a cloud upon the title of appellant. The prayer was for a preliminary writ of injunction temporarily restraining the threatened sale, and, upon final hearing, for a decree setting aside the pretended lien of the Casserleigh judgment and the execution levied thereunder, and perpetually enjoining the sale of said property under said decree. The answer traversed the allegations of the complaint and presented a cross-complaint. A reply put in issue the averments of the answer. The gist of the allegations of the complaint is: Appellant is the owner in fee, and in possession of certain mining claims. Appellee Casserleigh, a judgment creditor of C. E. and T. E. Wood, alleges them to be the owners of certain undivided interests therein, and under an execution in his favor on said judgment has had the pretended interests of said C. E. and T. E. Wood in said property levied on and advertised for sale. If said sale is effected, it will cast a cloud upon the title of appellant in said premises and injure him by impairing the market value of his said property. These facts showed such a threatened cloud upon the title of appellant as justified the interposition of a court of equity. This question was ruled in *Bell v. Murray*, 13 Colo. App. 217, 221, 223, 57 Pac. 488. There the sheriff, under a writ of execution issued upon a judgment against a third party, P., had levied upon and was threatening to sell as the property of P. a certain mining claim, which was owned by, and the record title of which was in, the plaintiff. The action was to obtain a decree holding the judgment against P. to be no lien upon the said claim, canceling the pretended lien through the levy of the execution and permanently restraining the threatened sale. The contention of the defendants therein was: "That it appeared from the complaint itself that the record title to the lode claim was not in Palmer, and the complaint further averring that Palmer had no right, title, or interest in the claim, the mere levying of an execution upon the right, title, and interest of Palmer in the claim, and a sale thereunder, would constitute no cloud upon plaintiff's title." And that, therefore, the complaint failed to state a cause of action. The court held that, notwithstanding such allegations, the complaint stated facts sufficient to constitute a cause of action, and, inter alia, said: "Neither upon principle nor reason must the plaintiff, claiming to be the real owner of all of the property, be compelled to sit back and wait until the claim of the judgment creditor had ripened into a complete and perfect

claim, and he had attempted to enforce it. This would be a most unreasonable requirement, and would work great injustice to a plaintiff. Before he could, under such a contention, be permitted to institute a suit to settle the disputed question, months or years might elapse, and in the meantime the plaintiff, if the true owner, might be absolutely deprived of the highest and most important privilege and attribute of ownership; that is, the power to sell at the highest price. No one would purchase and pay the same amount were this threatened cloud pending over the title as he would if it were entirely removed."

Speaking of the results of a contrary holding, Mr. Pomeroy, in his *Equity Jurisprudence* (volume 3 [2d Ed.] § 1399), says: "It leads to the strange scene, almost daily in the courts, of defendants urging that the instruments under which they claim are void, and that therefore they ought to be permitted to stand unmolested, and of judges deciding that the court cannot interfere, because the deed or other instrument is void, while from a business point of view every intelligent person knows that the instrument is a serious injury to the plaintiff's title, greatly depreciating its market value, and the judge himself who repeats the rule would neither buy the property while thus affected nor loan a dollar upon its security. This doctrine is, in truth, based upon mere verbal logic, rather than upon considerations of justice and expediency." See, also, *Day Company v. The State*, 58 Tex. 528, 536, 4 S. W. 865.

We think the complaint stated facts sufficient to constitute a cause of action.

2. Contention is also made that the amended answer setting up an affirmative defense was not traversed, and that for this reason the judgment should stand. As to this, we think it clear from the record, especially the motion stating the grounds upon which the court was asked to dissolve the temporary writ, that either the amended answer was not before the court when the order of dissolution was made, or, if it was, that it was considered by the court and the parties as traversed by the replication to the original answer. We are satisfied that the court did not dismiss the action upon the theory that the allegations of the amended answer had been admitted by the failure of appellants to plead thereto.

3. It is clear from the record that the court below, upon a motion to dissolve a temporary writ of injunction, dismissed the action. This motion was based, as we have stated, on the pleadings. The purpose of this suit was to obtain a preliminary writ of injunction restraining the sale threatened by appellees under the writ of execution until the final hearing of the cause, and at the final hearing to cancel the alleged lien of the Casserleigh judgment and to perpetually restrain a sale of the said property of appellant thereunder. Appellant had the right upon

final hearing to prove the allegations of his complaint, and, if he proved them, to have the relief prayed. A dismissal of the action upon a motion to dissolve the temporary writ of injunction, which motion was based upon the pleadings, manifestly deprived appellant of the right to try its case on the merits. The fact that the answer was verified is not a justification of the action of the court in dismissing the case. Whatever the law once was as to the conclusive effect of a verified answer to a bill in chancery, it is not now the law that a verified answer is conclusive upon the merits of the action, and entitles the defendant to a dismissal. Even on an application to secure a temporary writ, or to dissolve it by giving proper notice, evidence may be adduced by the parties. *Mills' Ann. Code* 1905 (Rev. Ed.) §§ 151, 152. "If the bill itself states a cause which would, if proven, entitle plaintiff to an injunction or other relief upon final hearing, it is error to dismiss the bill upon dissolving the injunction, and it should be retained until the final hearing." *High on Injunctions* (3d Ed.) § 1477. See, also, *Russell v. Wilson*, 37 Iowa, 377; *Maury v. Smith*, 46 Miss. 81.

The verification of the answer did not justify the court in dismissing the action. No question is made of the order dissolving, upon the pleadings, the preliminary writ of injunction, and for this reason such ruling is not considered.

Judgment reversed.

MAXWELL and BAILEY, JJ., concur.

35 Colo. 1

TABOR v. BANK OF LEADVILLE (TRIMBLE, Garnishee.)

(Supreme Court of Colorado. Nov. 6, 1905.)

1. CORPORATIONS—RIGHTS OF STOCKHOLDERS—ACTION AGAINST CORPORATION—EMPLOYING ATTORNEY.

The mere fact that one was a stockholder in a corporation did not give him authority to employ an attorney to defend an action against the corporation.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1593.]

2. JUDGMENT—VALIDITY—AUTHORITY OF ATTORNEY.

A judgment against a corporation on a stipulation between plaintiff and an attorney, representing the corporation, employed by one who had no authority, was void.

3. GARNISHMENT—DEFENSES BY GARNISHEE—JURISDICTIONAL DEFECTS IN PRINCIPAL SUIT.

The assertion of jurisdictional defenses as concerns the main action by a garnishee is proper, and not a collateral attack upon the judgment against the principal defendant.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, § 249.]

4. SAME—SET-OFF BY GARNISHEE.

The attachment and garnishment act (*Mills' Ann. Code*, § 130) allows a garnishee to retain or deduct out of the property or credits of the defendant all demands which he could have availed himself of, had he not been summoned as garnishee. *Held*, that a garnishee may plead

as a defense or set-off whatever he might have pleaded were the suit directly against him.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, §§ 248, 255.]

5. RECEIVERS—COMPENSATION—VOID RECEIVERSHIP.

A majority of the board of directors of a bank participated in a directors' meeting, at which the cashier was directed to obtain a certain person's consent to act as receiver, and the cashier in behalf of the bank applied for a receiver, and such person was appointed, and the officers and directors of the bank, without protest, permitted such receiver to go on in the administration of his trust for more than five years. *Held* that, although the receivership was void, the bank was accountable to the receiver for reasonable compensation for his services and expenditures.

6. GARNISHMENT—BURDEN OF PROOF.

The usual rule is that the burden of establishing a garnishee's liability is upon the plaintiff.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, § 300.]

Appeal from District Court, Arapahoe County; Samuel L. Carpenter, Judge.

Action by Elizabeth B. Tabor, as executrix, against the Bank of Leadville; George W. Trimble being garnishee. From a judgment discharging the garnishee, plaintiff appeals. Affirmed.

In 1889 plaintiff's testator brought an action in the district court of Arapahoe county against the Bank of Leadville, a domestic corporation doing a banking business in the city of Leadville, to recover the amount of various deposits made in and wrongfully withheld by the bank. The summons was served upon one of the bank's stockholders in the county of Arapahoe, who, on the same or next day employed an attorney to represent the defendant in said action, and the attorney entered into a stipulation with plaintiff's attorney, before time for pleading expired, that judgment might be rendered against defendant in the sum of \$54,412. Upon this stipulation judgment was, the next day after the complaint was filed, rendered by the court against the defendant for the plaintiff, and on the same day execution was issued, afterwards returned nulla bona, and notice of garnishment served upon George W. Trimble, garnishee and appellee herein. To the interrogatories propounded, the first three of which were in the statutory form, and three others which were deemed pertinent by the plaintiff, the garnishee made answer which, for the purposes of this review, may be summarized as consisting of (1) a plea to the jurisdiction of the court; (2) a plea of the statute of limitations; (3) a defense that the garnishee, at the time of service upon him, did not have any property or effects or money of any kind in his possession belonging to the defendant; (4) an offset. The plaintiff replied to these various answers or pleas, and upon the issues thus joined, evidence was heard by the court without a jury, and findings made in favor

of the garnishee, upon which a judgment discharging him was rendered. From this judgment discharging the garnishee, the plaintiff brings the case here by appeal. To elucidate the different questions involved, the material facts bearing upon what we consider the important questions of the case are recounted. In 1883 the Bank of Leadville, the defendant in the pending action, was insolvent. Its board of directors deemed it to be to the interest of its creditors to have a receiver appointed to take possession of its property and adjust its affairs, and to this end, at a special meeting of the board, a resolution was passed requesting the cashier to obtain the consent of Trimble, the garnishee in this action, to act as receiver, and then to make proper application to the district court of Lake county for that purpose, and also instructed its cashier to assign the bank's property and assets to Trimble for the benefit of its creditors. In pursuance of this authority, and for such purpose, the cashier, in behalf of the bank, made the application, and the garnishee herein was appointed receiver and accepted the appointment. The cashier, also, in the name and under the seal of the bank, executed a written assignment to Trimble purporting to convey to him all the property and assets of the bank for the benefit of its creditors, and this deed was duly recorded. Possession of all the bank's property of every kind was taken by Trimble, apparently as receiver and assignee and as trustee or agent of the bank, and in the course of years he proceeded to realize upon the assets, bringing a large number of suits for that purpose, and succeeded in thus collecting \$69,204.61. In the receivership proceeding, and before the same was adjudged void, as hereinafter noted, various orders were made by the district court, among others one allowing the receiver, as compensation for his services, and for expenses of administering the trust, the total sum of \$24,123.68. After Trimble was appointed receiver and the deed of assignment executed, and after he had so taken possession of the bank's assets, two actions were brought directly against the Bank of Leadville, one by Jones and the other by Breene, in which judgments were duly rendered, and attachments were sued out in aid thereof, and Trimble was garnished thereunder. In the district court of Lake county, where the suits were begun and then pending, the garnishee was discharged; the court holding that Trimble's possession as receiver, antedating the levy of the writs, was superior to the lien of the attachment and garnishment. Upon review of the Jones Case in this court, which was taken up as a test case, the receivership was held void, and the judgment of the district court in favor of the garnishee was reversed, and the cause remanded, with instructions to sustain the attachment and garnishment proceedings,

and to make the lien thereby acquired upon the bank's property in the garnishee's possession a first lien as against any rights claimed under the receivership. In pursuance of such instructions, the district court proceeded with these cases, which involved the same question, and with the consent and approval of Jones and Breene, the defendant bank being a party and having an opportunity to be heard, rendered judgment against the garnishee in favor of the bank for the use of the plaintiffs Jones and Breene to the extent of the value of the bank's property which he held in his possession, less the amount of the demands which the garnishee claimed he was entitled to deduct from the defendant's property in his possession, for his costs, expenses, and attorney's fees, and compensation for his own services for reducing defendant's property and assets to money, which was for the same sum that was previously allowed him in the receivership proceeding. Trimble carried out the judgment by turning over to the sheriff, to be applied on the Jones and Breene judgments, this balance, thus ascertained, and thereupon was discharged from further liability to the bank. Jones and Breene, the judgment creditors, whose judgments aggregated about \$100,000, thus received, to be applied thereon, the sum of \$45,140.93, and expressly consented that the remainder of the property and money of the bank which the garnishee Trimble had in his possession, amounting to \$24,123.68, should be retained by him out of which to pay the aforementioned demands which he claimed against the bank. We do not find that the bank gave its consent, or made any objection. The amount thus retained, together with that turned over to the sheriff to be applied upon the Jones and Breene judgments, included everything which the garnishee had received from the sale of the bank property, and covered all its assets which came into his possession. It is for this sum of \$24,123.68 which plaintiff in this action claims judgment should have been rendered against the garnishee in the bank's favor for plaintiff's use.

Philo B. Tolles, Thomas D. Cobbey, and Charles H. Burton, for appellant. Chas. Cavander, L. M. Goddard, and S. C. Warner, for appellee Trimble.

CAMPBELL, J. (after stating the facts). This action was against a bank organized as a corporation under the laws of this state. Its business, so long as the same was prosecuted, was carried on exclusively in Lake county, Colo. This action was begun in the district court of Arapahoe county. The service of summons was made upon one of the bank's stockholders who was found in Arapahoe county. On the day of the service, or the one next succeeding, this stockholder in such capacity employed a lawyer to represent the bank in the action, and this lawyer imme-

diately entered into a stipulation with plaintiff's counsel which amounted to a compromise judgment against defendant for \$54,412. The garnishee here claims that this judgment was void, and for that reason alone he should be discharged as garnishee, even though he have assets of defendant in his possession. It is said, first, that the service of process upon a stockholder, in the circumstances, was invalid; and, second, that as the result of a corrupt bargain with plaintiff the stockholder was induced to come from his own home into Arapahoe county for the express purpose of having summons served upon him, and that as the result of a like corrupt contract with the plaintiff he wrongfully secured the stipulation to be made by the attorney for the entry of the judgment. Plaintiff denies these charges, but we do not propose to consider them, if for no other reason than that the judgment is palpably void on other grounds. The service of the summons was made upon the stockholder as such; and in that capacity, without any authority from the president or cashier, or any officer or director or authorized agent, of the bank, he proceeded to employ counsel for the bank and directed him to stipulate for judgment. A mere stockholder of a corporation is not its agent, and cannot bind it by his own acts, or by the acts of the attorney whom he employs. *Union G. M. Co. v. R. M. Bank*, 2 Colo. 565; 10 Cyc. 700, 936.

But the plaintiff says that in the very action the court which rendered the judgment on the stipulation had authority to determine and as a matter of law did favorably pass upon, the authority of the attorney to make such a stipulation, and give his consent in the name of the bank for the entry of the judgment; and such declaration is conclusive upon the garnishee. Our Court of Appeals in *Everett v. Conn. Mut. L. Ins. Co.*, 4 Colo. App. 509, 36 Pac. 616, held that it is necessary for a plaintiff to obtain a valid judgment against the principal defendant in order to charge the garnishee; and it is further therein held, in accordance with what we consider to be the law, that the garnishee at his peril is bound to assert all jurisdictional defenses in order to protect himself in case suit is brought against him by his original creditor. The assertion of such defenses by a garnishee is not a collateral attack upon the judgment against the defendant. It is a direct attack which he is permitted to make in the action in which he is sought to be held, and if he neglects to assert jurisdictional defects in the judgment against his creditor which are known to him, he does so at his peril, and a judgment rendered against him as a result of a failure to assert them will be no protection to him in case the defendant subsequently brings an action against him upon the same demand. The garnishee, therefore, in this action is in a position to, and he did, assert the jurisdictional defect in the judgment obtained

against the defendant in this action. He was aware of it, and so pleaded it. Since a stockholder has no inherent authority to act as agent of his corporation, or to employ counsel to stipulate for judgment against it, and it appearing here that the stockholder had no special authority from the bank either to employ counsel, or by himself or through the attorney to confess judgment, we hold that the judgment entered upon the stipulation is, as against the defendant and this garnishee, entirely void. For this reason, also, the judgment below discharging the garnishee may be upheld. 9 Enc. Pl. & Pr. 810 et seq.; *McPhee v. Gomer*, 6 Colo. App. 461, 41 Pac. 836.

2. But there is another reason based upon the merits, why the garnishee should not be held. The receivership proceeding, in which an award to the present garnishee was made of the same sum which plaintiff claims here, was declared void by this court. *Jones v. Bank of Leadville*, 10 Colo. 464, 17 Pac. 272. We may concede, for our present purpose, that the allowance therein made to the receiver (the garnishee here) was also void. It may be that the assignment by the bank to Trimble was voidable, and that he took no steps thereunder. The garnishee, it is true, relies in part upon allowances in his favor in the proceedings referred to. He also insists on his demand against defendant for compensation and disbursement, irrespective of the former judgment therefor in his favor. We shall assume, but not decide, that the plaintiff in this action is not bound or affected by the assignment, or by any order or judgment in Trimble's favor made in the receivership, or in the *Jones* or *Breene* Cases. We therefore proceed with this case as though the garnishee had in his possession, when served with process in this action, \$24, 123.08 which belonged to the defendant, unaffected by any previous allowance. By section 130 of the attachment and garnishment act of the Civil Code (*Mills' Ann. Code*) the garnishee is allowed to retain or deduct out of the property or credits of the defendant in his hands all demands against the defendant of which he could have availed himself had he not been summoned as garnishee, and this court has ruled that the garnishee may plead as a defense or set-off whatever he might have pleaded were the suit directly against him by his own creditor. *Sauer v. Town of Nevada*, 14 Colo. 54, 23 Pac. 87. In the opinion in that case was cited with approval section 462 of *Drake on Attachments*, where the learned author says that under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in any worse condition than he would be if the defendant's claim against him were enforced by the defendant himself. See, also, 14 Am. & Eng. Enc. Law (2d Ed.) 845 et seq. This is the rule in the absence of fraud, and no question of fraud is here involved. The garnishee's liability in this ac-

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tion, therefore, is precisely what it would be were he defending against an action brought directly against him by the bank to recover upon the claim made here against him by the plaintiff. It is the plaintiff's contention that, because the receivership and assignment were void as to the bank's creditors, and because the possession of the bank's property which Trimble took, and all of his acts with reference thereto, were under an invalid possession, he is not entitled to any compensation for his own services, or for disbursements made by him in converting into money the bank's property. It is the law that, where a receiver is appointed without authority by a court, the court making the appointment has not the power, and ought not, to award him in that proceeding compensation for his services out of the trust property. It may be and has been conceded that neither in the receivership proceeding nor under the assignment could the court have made such allowances to Trimble. It is well settled—and the plaintiff so concedes, but says the doctrine does not here apply—that in a proper action a receiver thus appointed may recover compensation for his services against the person responsible for his appointment. *German Nat. Bank v. Best*, 32 Colo. 192, 75 Pac. 398. In perfect good faith, and under the advice of counsel, and with the approval and order of the district court, and at the direct instance, and upon the petition, of the bank itself, Trimble took possession of its property, and administered its affairs. So far as his rights are concerned, it makes no difference if the assignment and the receivership were void. All of his acts with reference to the bank's property were done at its instance and request and with its knowledge.

But plaintiff says that the meeting of the board of directors of the bank, at which were passed the resolutions requesting Trimble to act as receiver and assignee, and to take possession thereunder, and administer its assets, was illegal in that all of the directors did not receive notice, and all were not present and participating. Not only for this reason, but also because a receiver could not be appointed upon the petition of the bank itself, counsel say it follows, as a matter of law, that the bank itself was not responsible for, and did not and could not secure, Trimble's appointment. Let us see what are the facts: There were five directors of the bank, one of whom, the president, had permanently removed from and was not in the state at the time. The evidence tends to show that the other four had notice of and that three were present at and participated in, the meeting. Three constituted a majority of the board, and of the three present one owned 490 of the 500 shares of the capital stock of the bank and the other 10 shares were owned by the other two participating directors. In addition to this, not only did the officers and directors of the

bank stand by without protest or objection, but, on the contrary, gave their consent and approbation while Trimble proceeded for more than five years to give his services, employ counsel and clerical assistance in administering upon and collecting its assets. \$45,140.93 which Trimble collected of the bank's assets he turned over to the bank's judgment creditors under a valid order of the court in an action to which the bank itself was a party, without any objection or protest on its part, or that of its managing officers. Other indebtedness of the bank was also paid by Trimble in the same way. In these circumstances, therefore, especially since the bank has had the benefit of Trimble's services, it should be held accountable for a reasonable compensation for his own services and his expenditures. This is not a case where, under its charter, the bank was acting *ultra vires*. It may be and doubtless is true, and for the purposes of this case we have so assumed, that the bank did not through its officers properly exercise its power in securing the appointment of a receiver, or in making the assignment. But undoubtedly the bank had the power to make an assignment of its property for the benefit of creditors, and to give Trimble possession of its assets for such purpose. Merely because it improperly exercised an undoubted power that it possessed does not constitute its act *ultra vires* in the sense that it can escape all liability therefor. Having apparently clothed Trimble, and as he believed, with the power to administer its assets, the bank, even though in the particular exercise of the power to that end it did not proceed regularly, must compensate him for his services, since it has reaped their benefits, and must be held to have ratified the action. This conclusion is clearly warranted by *Jones v. Langhorue*, 19 Colo. 206, 34 Pac. 907, particularly by the opinion on rehearing of Mr. Justice Elliott, wherein he says, referring to the same void order of appointment as that involved here, that where it appears that the bank not only received, but has hitherto retained, the fruits of a void order, it is held estopped to question the validity of the proceedings by which it obtained money. 5 Thompson on Corp. §§ 5975, 5978; *Brice on Ultra Vires* (3d Ed.) § 27 et seq.; 10 Cyc. 1068-1078.

In thus disposing of this case in favor of the garnishee upon two substantial grounds, it has not been necessary to consider his plea of the statute of limitations and the offset asserted. It may be well to add that, in reciting as facts that which we think the record discloses, we have not overlooked plaintiff's contention that they are not in all respects as we have expressed them. But the stipulation which was entered into by counsel and used upon the trial constitutes a part of the bill of exceptions which the plaintiff herself has prepared. It therefore is binding upon her, and together with the evi-

dence which was produced, which is also embodied in the bill, tends to show the facts to be as we have outlined them, and upholds the findings of the trial court upon which its judgment was founded. The discussion of counsel as to the burden of proof we do not consider important, though the usual rule is that the burden of establishing the garnishee's liability rests upon the plaintiff. But here the preponderance of the contradicted evidence is so clearly in the garnishee's favor, not only as to the reasonableness of the amount claimed by him for allowances, but upon the other material issues in the case, that we deem the question of the burden of proof of no practical moment.

Because the plaintiff's judgment against the defendant is, as to this garnishee, void, and upon the merits the garnishee is entitled, as against the bank and also as against the plaintiff, to retain for his compensation the money of the bank which he had in his hands, the judgment of the court below, which so determined, is affirmed.

Affirmed.

GABBERT, C. J., and BAILEY, J., concur.

35 Colo. 93

CENTRAL TRUST CO. v. CULVER.

(Supreme Court of Colorado. Dec. 4, 1905.)

1. APPEAL—HARMLESS ERROR—PRESUMPTION OF REJUDICE.

The exclusion of material evidence will justify a reversal, unless it appears beyond a reasonable doubt that the refusal of such evidence could not have affected the result.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4041.]

2. EVIDENCE — DECLARATIONS — CHARACTERIZATION OF TITLE.

On the issue of abandonment of a priority in a water right awarded to a certain ditch, declarations of a former owner of the priority, made during the period of his ownership, when using water for irrigating purposes from the river feeding such ditch, but by diverting the water through other head gates than the ditch, to the effect that he then claimed to be the owner of the priority in question and that he was exercising rights thereunder in irrigating from the river, were admissible to show that declarant did not intend, by disusing his ditch, to abandon the water right awarded thereto.

Appeal from District Court, Boulder County: James E. Garrigues, Judge.

Action by Cary Culver against the Central Trust Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Talbot, Denison & Wadley, for appellant. H. M. Minor and Albert Dakan, for appellee.

GUNTER, J. This was an action by appellee against appellant to restrain appellant from diverting from the Little Thompson river water for the purposes of irrigation awarded to ditch No. 9 under priority No. 10. After issue joined the case was tried to the court without the aid of a jury. The only issue involved was one of fact; that is, whether or not the rights awarded as priority No.

10 under a decree rendered in May, 1883, to the predecessors in title of appellant to such priority had been abandoned. There was evidence for appellee that ditch No. 9 had not been used since the date of said decree in 1883. There was also evidence for appellee tending to show that the priority so awarded—that is, priority No. 10—had not been used in any manner since the date of said decree. There was evidence on behalf of appellee tending to show that such priority had been abandoned. There was evidence for appellant tending to show that the priority in question had been claimed, owned, and applied to a beneficial use by the predecessors in title of appellant until 1897, and that such priority had been availed of by diverting the waters represented by the priority through the Culver and Mahoney ditch, the supply lateral, the Meinig ditch, and the Blore ditch No. 1.

Appellant contends that, although the original ditch might have been disused, the priority awarded to it had been availed of by diversions and applications to a beneficial use made through other adjacent head gates. The court found this issue (abandonment), upon evidence substantially conflicting, for the plaintiff below, appellee here. In the course of its summing up the trial court observed: "I will say that there are many things in connection with this case not clear to my mind; many things that are unsatisfactory, but I have to do the best I can with what I have before me." This, from the court's opinion, goes in support of our conclusion that its finding and judgment was based upon evidence substantially conflicting; and while we disclaim any intent to assume the function of the trial court and pass upon the weight of the evidence, and disclaim any intention of intimating what the judgment of the court should have been, yet we are justified in saying that the evidence was substantially conflicting. This being true, we are unable to say what effect was had upon the finding and judgment of the court by the exclusion of certain material evidence to which we will hereinafter refer. The courts of this state have gone to the extent of holding that the exclusion of material evidence will justify a reversal, unless it appears beyond a reasonable doubt that the refusal of such evidence could not have affected the result. In other words, it must appear beyond doubt that the exclusion of material evidence could not have worked prejudice. *Henry v. Colorado Land & Water Company*, 10 Colo. App. 14, 51 Pac. 90. We cannot declare that, had this evidence been admitted, the court would have reached the same conclusion that it did, without our invading the province of the trial court.

The material and competent evidence rejected was the following: W. R. Blower was the owner of priority No. 10 and ditch No. 9 at the time the decree fixing the priority was entered; that is, in 1883. According to testimony offered for appellant Blower availed

himself of this priority as the owner thereof until some time in 1896. Appellant offered evidence of declarations made by Blower at various times during this period when using water for purposes of irrigation from the Little Thompson river; such declarations being to the effect that at such dates he claimed to be the owner of the priority in question, and that he was exercising the rights thereunder in his then irrigating therefrom. This evidence was for the purpose of showing that he did not intend to abandon, and had not abandoned as late as 1896, the rights decreed to ditch No. 9 under said decree. Other declarations of like character by Blower at the time of his use of the water in question were excluded by the court as self-serving declarations. These declarations were admissible as an exception to the general rule excluding hearsay statements. They were admissible as declarations evidencing the mental condition of the declarant; that is, that he did not intend, by a disuse of his ditch, to abandon the water right decreed thereto, and that he was intending to exercise such water right by his diversion through other head gates. The rule is that when it is material to prove the state of a person's mind, or what were his intentions, you may prove what he said, because that is a means by which you can find out what his intentions were. *Greenleaf on Evidence*, vol. 1 (16th Ed.) §§ 162a, 162c.

Application of this principle of evidence has been made in this state. *Starr v. People*, 17 Colo. 458, 30 Pac. 64, was an injunction against obstructing a public highway. The defendant claimed the locus in quo as his private property, and denied the same was a public highway. The court held the acts and declarations of the owner in his own favor connected with the matter of the alleged dedication of the highway were admissible. In *City of Denver v. Jacobson*, 17 Colo. 498, 30 Pac. 246, trespass was brought against the city for tearing down a fence built by plaintiff, Mrs. Jacobson, upon a certain strip of land of which she claimed ownership. The city justified upon the ground that the strip of land had been dedicated by the plaintiff's husband. The declarations of plaintiff's deceased husband in his own favor, made in connection with the acts which were claimed to constitute the dedication, were rejected by the lower court. Because of this exclusion the case was reversed; the upper court holding that such declarations were admissible for the purpose of showing the intent of the declarant at the time the acts were done, which were claimed to constitute the dedication.

In *Mutual Life Insurance Company v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706, the question before us was considered at length. The action was upon a life insurance policy; the insured being one Hillmon and the action being by the beneficiary, his wife. It was claimed that Hill-

mon had died. The vital question was whether the dead body produced as that of the insured was so in truth, or was that of one Walters. On March 2d Walters wrote letters to his betrothed and others declaring his intent to accompany Hillmon and a third party. It was contended by the insurance company that Walters died on March 5th in company with Hillmon and that his body had been buried as that of Hillmon. The letters written on March 2d were introduced for the purpose of showing his intent to travel with Hillmon, and as tending to show that he was with Hillmon on March 5th, and that the body in question was his body, and not that of Hillmon. The lower court excluded the evidence as hearsay. The case was reversed for error in this ruling. The court in the course of its opinion said: A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But whenever the intention is of itself a distinct and material fact in a chain of circumstances it may be proved by contemporaneous oral or written declarations of the party. The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation."

We do not find it necessary to consider the other questions presented as grounds for a reversal.

Judgment reversed.

The CHIEF JUSTICE and MAXWELL, J., concur.

34 Colo. 393

CITY AND COUNTY OF DENVER et al. v. HALLETT.

(Supreme Court of Colorado, July 3, 1905. On Rehearing, Nov. 6, 1905.)

1. MUNICIPAL CORPORATIONS—ISSUANCE OF BONDS—SUBMISSION OF QUESTION TO POPULAR VOTE.

The question of the issuance of bonds by a municipal corporation, as submitted to the elec-

tors, was: "Shall the city * * * issue bonds * * * bearing interest at the rate of 4 per cent. per annum and maturing in not less than 15 years nor more than 30 years, the principal to be payable in equal annual installments." The ordinance providing for the issuance of the bonds provided that they "shall be payable at the option of the city and county 15 years after date and absolutely due and payable 25 years after date. *Held*, that the bonds proposed by the ordinance are not responsive to the question submitted.

2. SAME—ERECTION OF AUDITORIUM—ISSUE OF BONDS.

Const. art. 20, granting home rule to Denver, and providing that the people of Denver shall always have the exclusive power of making, altering, revising, or amending their charter, bestowed upon the people of such city every power possessed by the Legislature, and it is within its power to provide by charter for the erection of an auditorium, to purchase a site therefor, and to issue bonds to discharge the indebtedness.

3. SAME—PAYMENTS IN INSTALLMENTS.

The question submitted to electors was "Shall the city and county of Denver issue bonds * * * bearing interest at the rate of 4 per cent. per annum and maturing in not less than 15 years nor more than 30 years, the principal to be payable in equal annual installments." *Held*, that bonds maturing in 15 years after date, providing for the payment of one-fifteenth of the principal of the bonds in annual installments, or bonds maturing each year through the period of 15 years, so that one-fifteenth of the entire debt would be extinguished each year, would be responsive to the question submitted.

4. SAME.

Under Const. art. 11, § 8, providing that "No city * * * shall contract any debt by loan in any form except by means of an ordinance * * * specifying the purposes to which the funds to be raised shall be applied and providing for the levy of a tax * * * sufficient to pay the annual interest and extinguish the principal of such debt within 15, but not less than 10 years from the creation thereof," a city may issue bonds maturing in 15 years after date, and providing for payment thereof in 15 annual installments, or bonds maturing each year through the period of 15 years, so that one-fifteenth of the entire debt will be extinguished each year.

The Chief Justice and Campbell and Maxwell, JJ., dissenting in part.

En Banc. Appeal from District Court, City and County of Denver; Booth M. Malone, Judge.

Action by Moses Hallett, executor of the will of George W. Clayton, deceased, against the city and county of Denver and others, to restrain the issuance of certain bonds. From a judgment for plaintiff, defendants appeal. Affirmed.

Henry A. Lindsley and Halstead L. Ritter, for appellants. Macbeth & May, for appellee.

STEELE, J. The plaintiff alleges: That there was submitted to the taxpaying voters of the city and county of Denver the following question: "Shall the city and county of Denver issue bonds to an amount not exceeding \$400,000, bearing interest at a rate of 4 per cent. per annum, and maturing in not less than 15 years nor more than 30 years, the principal to be payable in equal annual installments, commencing the next year follow-

ing the issuance of said bonds, for the purpose of erecting a public auditorium, including the purchase of the site therefor, if desired?" That subsequently to the submission of said question, the city council of the city and county of Denver passed an ordinance providing for the issuance of \$400,000 in bonds for the purpose of erecting a public auditorium, including the purchase of a site therefor. Section 4 of the ordinance provides that the bonds "shall be payable at the option of the city and county 15 years after date, and absolutely due and payable 25 years after date. They shall be of the denomination of \$1,000, and shall bear interest at the rate of 4 per centum per annum, payable semiannually." The complaint further alleges that the city and county of Denver has no power or authority to construct or have an auditorium, nor to issue bonds for the payment of the cost thereof, and that the officers of the city and county are about to issue bonds in accordance with the terms of said ordinance, and prays that an injunction issue restraining the city and county, and the officers thereof, from issuing or signing the bonds proposed to be issued, or from entering into any contract for the sale thereof, from acquiring a site for the erection of said auditorium or taking any steps relating thereto. It appears that the plaintiff, in his capacity as executor, is the owner of large tracts of real estate in the city, upon which large taxes are annually paid, which will be subjected to very heavy additional burdens for the payment of the principal and interest of the bonds, if issued. The complaint does not state the result of the vote on the question submitted, but, from the fact that the case is here, we conclude that the vote was in the affirmative. Demurrer to the complaint was overruled. The defendants elected to stand by the demurrer; judgment was rendered in accordance with the prayer of the complaint; and the defendants appealed to this court.

The judgment of the district court was right. The power to direct the issuance of bonds for the erection of an auditorium was granted by the people when they voted affirmatively upon the question submitted; but the people granted the power to issue bonds "bearing interest at the rate of 4 per cent. per annum, maturing in not less than 15 nor more than 30 years, the principal to be payable in equal annual installments commencing the next year following the issuance of said bonds," not bonds "payable at the option of the city and county 15 years after date, and absolutely due and payable 25 years after date." The people vested in the city council the discretion of determining when, after 15 years and within 30 years from their date, all the bonds should mature, but they required that the principal should be made payable in equal annual installments. The bonds authorized by the ordinance are not the bonds authorized by the people; and it follows that the issuance of the bonds under

the ordinance was properly enjoined. The city attorney urges that bonds providing for the payment of the principal in equal annual installments are unsalable, and that the will of the people in voting for an auditorium will be overthrown unless bonds such as proposed are held to be in accordance with the question submitted. The city council derives all its powers to issue bonds for an auditorium from the people. The plain, unambiguous mandate was that the bonds, when issued, should be payable in equal annual installments. If the bonds then authorized cannot be sold, we know of no authority that can direct the issuance of another and different character of bond.

It is also said that the charter requires a sinking fund to meet the bonded indebtedness, and that the annual deposit in that fund is the equivalent of payment, and that the bonds are made "payable in equal annual installments," when annual deposits in the sinking fund are made. The word "payable," in this connection, is not susceptible of any such construction. "Payable in equal annual installments" means that an equal amount of each bond or of the whole debt shall become due each year; that the payment thereof shall become legally enforceable against the city; that it is the right of the city to make annual payments of the principal, and the duty of the holders of the bonds to accept such payment. The words are in daily use by the English-speaking people and need no interpretation, and to construe them as meaning that the city may place annually in its sinking fund an amount to meet the obligations at maturity would be without justification.

In holding, as we do, that the bonds proposed are not the bonds directed by the people to be issued, we have determined the case, and might well refuse to decide the other questions involved. But, inasmuch as the power of the city to erect a public auditorium is challenged, and the question is of public moment and concern, and as much time and expense will be saved by a determination of this, the main question, we are constrained by the force of the public interests to give our opinion upon this subject.

This court, in passing upon the authority of the city of Leadville to license certain occupations, said (*Bernheimer v. City of Leadville*, 14 Colo. 520, 24 Pac. 332): It is a well-settled elementary principle that the charter of a municipal corporation, or, if organized under a general law, that such general law, is the instrumentality by means of which the Legislature of the state delegates to the municipal body the right to exercise such franchise, and such legislative power and authority, as may be essential to the safety, well-being, and prosperity of the community. It is equally well settled that the charter or the law by which the municipal body is created is to be strictly construed, and that no powers are to be exercised ex-

cept those which are expressly conferred, or which exist by necessary implication. This principle of law is expressed with extraordinary clearness in 1 Dill. Mun. Corp. 389: 'It is a general and understood proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, doubt concerning the existence of power is resolved by the court against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby. All acts beyond the scope of the powers granted are void.' And upon the authority of this case counsel contend that the municipality known as the city and county of Denver has no power to build an auditorium, because power to do so is not conferred by the twentieth article of the Constitution; because power to do so is not incident to, nor can it be fairly implied from, the powers expressly conferred; because an auditorium is not essential to the declared objects and purposes of the municipality. We agree with counsel that no power to build an auditorium is expressly granted by the twentieth article; that such power is not incident to the powers expressly conferred, nor can it be necessarily or fairly implied therefrom; and that an auditorium is not indispensable to the objects and purposes of the municipality as declared in the twentieth article. But we do not agree with him that the stinted grant of power contained in section 1 and other parts of the article is the only power possessed by Denver. It seems very clear that the statement contained in the first section was not intended to be an enumeration of powers conferred, but simply the expression of a few of the more prominent powers which municipal corporations are frequently granted. The purpose of the twentieth article was to grant home rule to Denver and the other municipalities of the state, and it was intended to enlarge the powers beyond those usually granted by the Legislature; and so it was declared in the article that, until the adoption of a new charter by the people, the charter as it then existed should be the charter of the municipality; and, further, that the people of Denver shall always have the exclusive power of making, altering, revising, or amending their charter; and, further, that the charter, when adopted by the people, should be the organic law of the municipality and should supersede all other charters. It was intended to confer not only the powers specially mentioned, but to bestow upon the people

of Denver every power possessed by the Legislature in the making of a charter for Denver.

It is therefore necessary to determine whether the Legislature could have conferred upon the city of Denver power to purchase a site, erect an auditorium thereon, and issue bonds to discharge the indebtedness. In a number of cases before this court, as well as the court of appeals, it has been held that, with respect to municipal corporations, except as limited by the Constitution, the General Assembly has plenary power; that it is clearly a legislative function to determine what power shall be granted, what withheld, and what restrictions shall be imposed in the exercise of the powers granted. *Deltz v. City of Central*, 1 Colo. 323; *Darrow v. People*, 8 Colo. 426, 8 Pac. 924; *People ex rel. v. Hall*, 8 Colo. 485, 9 Pac. 34; *Valverde v. Shattuck*, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208; *Trimble v. People*, 19 Colo. 187, 34 Pac. 981, 41 Am. St. Rep. 230; *City of Denver v. Coulehan*, 20 Colo. 471, 39 Pac. 425, 27 L. A. 751; *Johnson v. People*, 6 Colo. App. 163, 40 Pac. 576; *Dillon's Municipal Corporations*, 44. The supremacy of the legislative authority over municipal corporations is not, however, in all respects unlimited, but the limitation must be sought in the national or state Constitution. *Dillon's Mun. Corp.* § 9. The same author, at page 79, says: "Permitting the voters of a municipality to decide upon questions of local interest or expediency, such as those mentioned in this section and in the notes, seems to the author to be conformable to those ideas of self-government and self-regulation by the people concerned, which lie at the basis, not only of our municipalities, but of our institutions."

The general purpose of all general municipal corporations is to promote the general welfare and happiness of the people; and provisions are generally made for the suppression of vice and immorality, and the advancement of public health and good order, and the promotion of trade and industry. For many years Denver has had power under her charter to appropriate funds for the entertainment of visitors and for the expenses of funerals, power to take an enumeration of the inhabitants, to foster and encourage manufactories, for laying out and ornamenting grounds for a cemetery and for the sale of lots therein, and to support or own a public library. Not one of these powers can be regarded as indispensable to a municipality. Municipalities are permitted to exercise them because they tend to the advancement, the culture, the convenience, and the general welfare of the public. It is not a valid objection to the exercise of such powers that one class of the inhabitants would receive more benefit than another. The test is whether the power, if exercised, will promote the general objects and purposes of the municipality, and of this the Legislature is the judge in the first instance; and, un-

less it clearly appears that some constitutional provision has been infringed, the law must be upheld.

An act of the Legislature of the state of New York, authorizing the cities of New York and Brooklyn to build a bridge connecting the two cities, was upheld by the Court of Appeals. The act, it was urged, was in conflict with the Constitution of the state, which ordains that no city " * * * shall be allowed to incur any indebtedness except for * * * city purposes." In passing upon the validity of the act, the court said: "It is impossible to define in a general way, with entire accuracy, what a city purpose is, within the meaning of the Constitution. Each case must largely depend upon its own facts, and the meaning of these words must be evolved by a process of exclusion and inclusion in judicial construction. * * * The Legislature, when legislating in view of this constitutional limitation, must determine in the first instance what is a municipal purpose. * * * When its act is challenged as in conflict with the constitutional limitation, the courts must determine whether debt is authorized to be incurred for a purpose not municipal. But, as the dividing line between what is a municipal purpose, and what is not, is in many cases shadowy and uncertain, great weight should be given by the courts to the legislative determination, and its action should not be annulled, unless the purpose appears clearly to be one not authorized. As said by Judge Folger, in *Weisner v. Village of Douglas*, 64 N. Y. 91, 21 Am. Rep. 586: 'If the purpose designed by the Legislature lies so near the border line that it may be doubtful on which side of it it is domiciled, the courts may not set their judgment against that of the lawmakers.'" *People v. Kelly*, 76 N. Y. 475.

In *Cooley on Taxation*, at page 185, it is said: "Public and private interests are so commingled in many cases that it is difficult to determine which predominates; and the question whether the public interest is so distinct and clear as to justify taxation is often embarrassing to the Legislature, and not less so to the judiciary. All attempts to lay down general rules whereby the difficulties may be solved have seemed, when new and peculiar cases arose, only to add to the embarrassment, instead of furnishing the means of extrication from it." After quoting from several cases which we shall presently cite, he further says: "These are very strong and sweeping assertions, but they are supported by many others equally emphatic and comprehensive, which are to be met with in the adjudications of courts. The very emphasis, however, with which the principle is declared renders it peculiarly liable to mislead, unless it is examined in the light of the adjudicated cases in which it has been applied, generally with explanations, and often with necessary qualifications."

In sustaining an act of the Legislature

authorizing the city of Cincinnati to construct the Cincinnati Southern Railroad, a road several hundred miles in length, having Cincinnati and Chattanooga its northern and southern termini, respectively, Chief Justice Scott, in *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24, said: "Courts cannot, in our judgment, nullify an act of legislation on the vague ground that they think it opposed to a general 'latent spirit,' supposed to pervade the Constitution, but which neither its terms nor its implications clearly disclose in any of its parts. To do so would be to arrogate the power of making the Constitution what the court may think it ought to be, instead of simply declaring what it is. The exercise of such power would make the court sovereign over both Constitution and people, and convert the government into a judicial despotism. Whilst we declare that legislative power can only be exercised within the limits prescribed by the Constitution, we are equally bound to keep within the sphere allotted to us by the same instrument." And in speaking of the power of the Legislature said: "But we must bear in mind that the question is one of legislative power, and not of the wisdom, or even justice, of the manner in which that power, if it exists, has been exercised. Had we the jurisdiction to pass upon the latter question, we should probably have no hesitation in declaring the act under review to be an abuse of the taxing power." And recognizing that legislation authorizing municipal aid to railroads was unwise, said: "Were the question a new one, and properly determinable by the judgment of a court, we should perhaps concur in opinion with Judge Redfield that subscriptions for railway stock, by cities and towns, do not come appropriately within the range of municipal powers and duties. Yet he is constrained to add that 'the weight of authority is all in one direction, and it is now too late to bring the matter into serious debate.'" The Chief Justice then says: "And upon the question of fact whether a particular road is thus essential to the interests of the city, this court, in the case of the C. W. & Z. R. R., already referred to [1 Ohio St. 77], quote approvingly from the case of *Goddin v. Crump*, 8 Leigh, 120, in which it was said: 'If then the test of the corporate character of the act is the probable benefit of it to the community within the corporation, who is the proper judge whether a proposed measure is likely to conduce to the public interests of the city? Is it the court, whose avocations little fit it for such inquiries? Or is it the mass of the people themselves—the majority of the corporation, acting (as they must do, if they act at all) under the sanction of the legislative body? The latter assuredly.'"

It is held in Illinois that a public purpose is a corporate purpose, and that a tax imposed for a corporate purpose is one to be expended in a manner which shall promote the general prosperity and welfare of the mu-

municipality which levies it. *Johnson v. County of Stark*, 24 Ill. 75; *Taylor v. Thompson*, 42 Ill. 9; *C. D. & V. R. R. Co. v. Smith*, 62 Ill. 268, 14 Am. Rep. 90; *Burr et al. v. City of Carbondale*, 76 Ill. 455; *Q. M. & P. R. R. Co. v. Morris*, 84 Ill. 411.

Judge Dixon, in *Brodhead v. City of Milwaukee*, 19 Wis. 652, 88 Am. Dec. 711, says: "The Legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. It cannot in the form of a tax take the money of the citizens and give it to an individual; the public interest or welfare being in no way connected with the transaction. The objects for which money is raised by taxation must be public, and such as subserve the common interest and well-being of the community required to contribute. To justify the court in arresting the proceedings and declaring the tax void, the absence of all possible public interest in the purposes for which the funds are raised must be clear and palpable—so clear and palpable as to be perceptible by every mind at first blush. In addition to these, I understand that it is not denied that claims founded in equity and justice, in the largest sense of those terms, or in gratitude or charity, will support a tax. Such is the language of the authorities." And in *Whiting v. Sheboygan & Fond du Lac R. Co.*, 25 Wis. at page 186, 3 Am. Rep. 30, speaking of municipal aid to railroads, he says: "The principle upon which taxation has been sustained will readily appear by a reference to the opinion in *Curtis' Adm'r v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187. The city, town, or county becomes a part owner of the road, to the extent of the stock taken, and, the work being one which the public might have engaged in as the sole owner, and paid for entirely out of public funds, it has been considered that there was no valid objection to its becoming a part owner thereof as a stockholder in a private corporation which has undertaken to do the same work. To the extent of the stock taken, the city, town, or county is directly interested and benefited by the money expended in the work, the same being a matter of public concern; and it is, in our judgment, upon this principle, and this alone, that the taxation in that class of cases can be sustained. In saying this, we, of course, do not intend to exclude the idea, found in all the cases, that the road must be one situated within, or passing through, the corporate limits of the municipality to be taxed, and so promoting the general prosperity and welfare of the people who pay the taxes."

The Legislature of New York conferred upon the city of Brooklyn the power to establish and maintain public baths, and the city was held liable for the use of a private pier at which place a public bath had been established. *Pollon v. Brooklyn*, 101 N. Y. 132, 4 N. E. 191.

The Legislature of Nebraska authorizes

counties to participate in interstate expositions, to issue bonds for such purpose, and to erect and maintain suitable buildings with which to make a county exhibit. The act was upheld and the bonds declared to be for a public purpose. *State v. Cornell*, 53 Neb. 556, 74 N. W. 59, 39 L. R. A. 513, 68 Am. St. Rep. 629. The opinion cites many cases upholding the validity of laws appropriating money for state and municipal exhibits at expositions, from Pennsylvania, California, Kentucky, and Tennessee. The citation from the case *Shelby County v. Exposition Co.*, 96 Tenn. 653, 36 S. W. 694, 33 L. R. A. 717, is as follows: "To our minds it is entirely clear that an exhibition of the resources of Shelby county at the approaching State Centennial Exposition is a county purpose. In view of the fact that the event to be celebrated is one of no less note and importance than the birth of a great state into the American Union, and of the further fact that the exposition is reasonably expected to attract great and favorable attention throughout the country, and be participated in and largely attended by intelligent and enterprising citizens of numerous other states at least, it is beyond plausible debate that such an exhibition is well calculated to advance the material interests and promote the general welfare of the people of the county making it. It will excite industry, thrift, development, and worthy emulation in different avenues of commerce, agriculture, manufacture, art, and education within the county, thereby tending to the permanent betterment and prosperity of her whole people. In short, it will encourage progress, and progress will insure increased intelligence, wealth, and happiness for her people, individually and collectively. Undenially, that which promotes such an object and facilitates such a result in any county is, to that county, a county purpose in the truest sense."

In the case *Sun Printing Company v. New York*, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788, in which was involved the power of the Legislature to invest the city of New York with authority to build a railroad within the limits of the city, and issue bonds to meet the indebtedness, the court said, with reference to a city purpose: "We are aware that the expenditures of our city governments have become enormous, and that appropriations have been made for a great variety of purposes, many of which may be open to criticism, and that a complete definition of a 'city purpose' may not be possible, in view of the fact that many reasons may arise which we are unable to foresee or now consider. The authorities, in so far as they have spoken upon the subject, have only attempted a definition as to certain specified purposes. We shall not now attempt a definition, except in general terms, further than is necessary to determine the meaning of the acts which we have under review. Generally,

we think, the purpose must be necessary for the common good and general welfare of the people of the municipality, sanctioned by its citizens, public in character, and authorized by the Legislature."

In Massachusetts, towns have power to raise money by taxation for celebrations (*Hill v. Easthampton*, 140 Mass. 381, 4 N. E. 811, and may appropriate money for public concerts by a band (*Hubbard v. Taunton*, 140 Mass. 467, 5 N. E. 157). The erection of a memorial hall to be used and maintained as a memorial hall to the soldiers and sailors of the War of the Rebellion may properly be deemed a public purpose, for which the Legislature may authorize the raising of money by taxation. *Klingman v. Brockton* (Mass.) 28 N. E. 998, 11 L. R. A. 123. It was said by the writer of the opinion in this case: "This may properly be deemed to be a public purpose, and a statute authorizing the raising of money by taxation for the erection of such a memorial hall may be vindicated on the same grounds as statutes authorizing the raising of money for monuments, statues, gates or archways, celebrations, the publication of town histories, parks, roads, roads leading to points of fine natural scenery, decorations upon public buildings, or other public ornaments or embellishments, designed merely to promote the general welfare, by providing for fresh air or recreation, or by educating the public tastes, or by inspiring sentiments of patriotism, or of respect for the memory of worthy individuals. The reasonable use of public money for such purposes has been sanctioned by several different statutes, and the constitutional right of the Legislature to pass such statutes rests on sound principles."

It is within the power of the officers of a school district in Vermont to build a hall in connection with a schoolhouse, designed to accommodate the schools and the inhabitants of the district, for the purpose of examinations and exhibitions, and such other things as are proper and customary in connection with district schools. *Greenbanks v. Boutwell*, 43 Vt. 207. The town organizations, particularly in the New England states, do not act through representative bodies, but the few corporate powers they possess are exercised by the citizens through town meetings; yet the authority of these towns to build town halls is recognized, and the town is held to have discretionary powers and that it may anticipate its wants and may rent a portion of the town building not in use. A Vermont town had built a two-story building for town purposes, the upper story was known as the "Opera Hall," which was fitted up for the accommodation of theatrical troupes. The court held the building of the town hall was a valid exercise of power, and that, as the primary object of the building was for municipal purposes, the fact that the building was incidentally used for theatri-

cal purposes did not have the effect of rendering the action invalid. *Bates v. Bassett*, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 166.

It was held in Tennessee, where the Constitution authorizes municipal corporations to appropriate money for corporate purposes, that the city of Knoxville could legally appropriate money in aid of a college located without the city limits. *East Tennessee University v. Knoxville*, 6 Baxt. 166.

It is held that Philadelphia has power to entertain distinguished visitors at public expense. *Tatham v. Philadelphia*, 11 Phila. 276.

The *Century Dictionary* defines "auditorium" as: "A hall of audience. In a church, theater, public hall, or the like, the space allotted to the hearers or audience." If the primary object of a building is to provide a place for public meetings, the building itself may properly be designated an auditorium, although other portions of it are devoted to other uses than that of an auditorium in the strict sense of that term, and this is what the framers of the charter had in mind when the question submitted was proposed.

It is said that one of the principal purposes for which the proposed building is to be used is that of providing a place of meeting for the national conventions of the various organizations throughout the country; that even though it should appear that in other cities there are commodious places for the meeting of such national conventions, and that Denver has been highly favored by these bodies, but that unless suitable accommodations are provided the organizations will not select Denver as a place of meeting, still that the erection of a building such as is proposed, to meet the competition of other cities, cannot be regarded as a proper exercise of municipal power, and that a building so used would be for a private, and not a public, use, and that the benefits accruing therefrom, if any, would be private and not public. We are not prepared to say that the erection of a building for the sole purpose suggested would not be within municipal authority, nor that the benefits accruing therefrom would not be public. It is not a valid objection to the exercise of municipal power that the public will not make exclusive use of the building. Judge Cooley, in his work on *Taxation*, at page 223, says: "The purposes to be accomplished by taxation need not be exclusively public in order to warrant an exercise of the power. There are sometimes cases in which the public have equally with private parties an interest, and in which, therefore, an apportionment of the burden between the public and such individuals might be appropriate. In such cases public interest may properly invoke legislative action for the levy of a tax; and the legislative determination as to the just proportion to be borne by the public must be conclusive, so far at least as the public are concerned."

It will not be disputed that the public buildings in Denver are not now suited to the demands of the public. They are poorly ventilated, and crowded, and a wise and economical administration of public affairs will require that an auditorium, if erected, be so constructed as to provide accommodations for a portion of the public officers and public records. Moreover, as the power is now vested exclusively in the people themselves of making, revising, altering, or amending their charter, and as they have the power to petition for any measure or charter amendment or for a charter convention, and may have referred to them, upon petition, any ordinance passed by the council, or may have by petition ordinances submitted to the qualified electors, and as other matters must be submitted to them, it would seem to be within their power to provide a place where matters of municipal policy and expediency may be proposed, considered, and acted upon. We have cited authorities holding that school districts have authority to provide a public place designed to accommodate the schools and the inhabitants of the district, for the purpose of examinations and exhibitions, or such other things as are proper and customary in connection with district schools. Without considering the question as to what power should provide the place, the power exists; and it would seem to be entirely proper for the city to own a place where the public can witness the exercises of commencement day of the various high schools of the city. Such a place does not now exist in Denver, and never has existed. At no time in the history of Denver have one-half of the persons desiring to do so been able to witness the commencement exercises of our high schools, and no good reason is apparent why the city should not provide a suitable place for the accommodation of the public.

If Cincinnati may build a railroad connecting it with a city in another state; if Philadelphia may appropriate public money for the entertainment of visitors; if Brooklyn may enjoy a public bath; if New York may build a bridge over water not owned by it, to connect it with another city; if Knoxville may appropriate money to aid a college located outside its limits; if the municipalities of Nebraska, Tennessee, and Pennsylvania may appropriate money to exhibit their resources; if towns in Massachusetts may erect memorial halls; if Vermont towns may build halls for schools exhibitions; if New England towns may build town halls for the accommodation of their citizens, under constitutional provisions limiting the power of levying taxes to "city purposes," to "county purposes," to "public purposes," or to "corporate purposes," as the case may be—there is no apparent reason why the taxpayers of Denver may not, under a constitutional provision limiting the power to assess and collect taxes to the "purposes of such corporation," by vote order the erection of an auditorium

for public purposes, even though it be incidentally used for conventions and national associations. As power to erect an auditorium is not granted by the twentieth article, the provisions of that article relating to the issuance of bonds to carry out the powers and purposes enumerated in section 1 of the article, however they may be construed, have no application to the case at bar. Bonds for the building of an auditorium must be issued under the limitations of section 8 of article 11 of the Constitution, and the question, if again submitted, should be drawn with reference to that article and section.

Our conclusions, therefore, are: (1) That the bonds proposed are not responsive to the question submitted. (2) That the question submitted not being in compliance with section 8 of article 11 of the Constitution, the bonds proposed would be illegal; and therefore nothing can be done under the present charter provision. (3) That it is within the power of the city and county of Denver to provide by charter for the erection of an auditorium and to purchase a site therefor.

The judgment of the district court is affirmed.

In arriving at the conclusion that the judgment of the district court should be affirmed, the Justices all agree. From that portion of the opinion which holds that the people of the city and county of Denver have the power to direct the erection of a public auditorium at public expense, to purchase a site therefor, and to direct the issuance of bonds to pay for the same, the CHIEF JUSTICE and CAMPBELL and MAXWELL, JJ., dissent; it being their opinion that the purpose mentioned is not a "corporate purpose."

On Rehearing.

In behalf of the city and county of Denver, we are urged to modify the opinion, and to hold that the city and county may issue bonds under the question submitted, so that the entire debt will be extinguished at the expiration of 15 years. Counsel stated in submitting the case that bonds which provided for an annual payment of the principal, or bonds maturing annually through the period of 15 years, were unsalable; and, that unless depositing the required amount annually in a sinking fund could be regarded as a payment, the charter must be amended. Because of these statements we gave to the question now presented no serious consideration. We have held that article 20 does not expressly confer power upon the municipality to erect an auditorium, and, as that article does not purport to amend section 8 of article 11 with respect to bonds for the purpose of erecting an auditorium, bonds issued for such purpose must be issued under the limitation of that section.

Section 8 provides: "No city * * * shall contract any debt by loan in any form, except by means of an ordinance * * * specifying the purposes to which the funds to

be raised shall be applied, and providing for the levy of a tax * * * sufficient to pay the annual interest and extinguish the principal of such debt within fifteen, but not less than ten years from the creation thereof." The question submitted to the electors was: "Shall the city and county of Denver issue bonds * * * bearing interest at the rate of four per cent. per annum, and maturing in not less than fifteen years nor more than thirty years, the principal to be payable in equal annual installments?" We are asked to determine whether, in view of the limitation of section 8 of article 11, and under the question thus submitted, the city and county may issue bonds maturing in 15 years. If the question submitted had been, "Shall the city and county issue bonds maturing in ten years?" or had been, "Shall the city and county issue bonds maturing in fifteen years?" an affirmative vote upon either question would have authorized the issuance of bonds and have met the requirements of the Constitution. And we are satisfied that, although the people, in directing the issuance of bonds maturing in not less than 15 nor more than 30 years exceeded the authority conferred upon them through the Constitution, they did thereby confer power upon the council to issue bonds maturing in 15 years; and that, if the council shall direct the issuance of bonds providing for the annual installments of principal, so that the entire debt will be extinguished at the expiration of 15 years, the bonds will conform to the question submitted and will meet the requirements of section 8 or article 11 of the Constitution. The mandate of section 8 that the ordinance shall provide for the levy of a tax sufficient to extinguish the principal of such debt, within 15 but not less than 10, years, does not mean that no part of the principal of the debt shall be paid within 10 years, but does mean that provision shall be made by the levy of a tax for the extinguishment of the entire debt within not less than 10 nor more than 15 years. We see no legal objection to the municipality providing for annual payments of the principal. It is a more economical manner of discharging the debt than that of making annual deposits in a sinking fund, and decidedly safer, for even sinking funds have been known to take unto themselves wings; and these considerations, perhaps, induced the framers of the Constitution to not prohibit the payment of the public indebtedness in installments. We therefore decide that the council may provide for bonds maturing annually during the period so that one-fifteenth of the whole debt will mature each year.

We find support for our decision that the words "not more than thirty years," in the question submitted to the electors, should be regarded as surplusage, and that they do not invalidate the whole submission, in an opinion by Mr. Justice Brewer, when a member of the Supreme Court of the state of Kansas, in

the case of *Turner v. Commissioners of Woodson County*, 27 Kan. 314. The people of one of the townships in Woodson county, Kan., voted bonds in an amount exceeding that authorized by statute. The bonds were held valid to the amount authorized by statute. In the course of the opinion, it was said: "However excessive the authority apparently granted by the vote to the commissioners, that authority is good up to the statutory limit. The vote of the township was simply an authorization by a principal to its agent, and the agent may perform the act authorized, except so far as it is restrained by some provision of law. Generally speaking, a grant of excessive authority is good up to the legal limit, and an authorization to do more than can legally be done is void only as to the excess." One of the sections of the act under which the bonds were voted was unconstitutional, and counsel contended that, as the section was written in the act, it must be presumed to have been considered by the voters and to have influenced their votes. Answering this point, Judge Brewer said: "The idea of counsel seems to be that in this section 10 there is presented an extra inducement to the voters of the township to incur this indebtedness; that but for such inducement the bonds would not have been voted, and as the inducement falls, the vote must also fall. Yet as all persons are presumed to know the law, the presumption of course is that the voters all knew that this section is unconstitutional, and were therefore uninfluenced in their action by this apparent inducement." The objection here is that the people cannot be said to have understood that the minimum limit of time was in fact the maximum, nor can it be told how they would have voted if the question had been put and had been ordered to be put in this restricted form. The objection is, we think, disposed of by the decision of the case we have cited.

It is suggested that this opinion is contrary to that in the case *City of Denver v. Hayes*, 28 Colo. 110, 63 Pac. 311; but we do not so regard it. In the *Hayes* case the court held invalid the proceedings of the city council in submitting to the electors of the city of Denver the proposition of creating a debt for 11 distinct purposes, without giving to the voter an opportunity to express his will as to any one of them.

Our conclusions therefore are: (1) That the bonds proposed are not responsive to the question submitted. (2) That it is within the power of the city and county of Denver to provide by charter for the erection of an auditorium, to purchase a site therefor, and to issue bonds to discharge the indebtedness. (3) That bonds maturing in 15 years after date, providing for the payment of one-fifteenth of the principal of the bond in annual installments, or bonds maturing each year through the period of 15 years, so that one-fifteenth of the entire debt will be ex-

tinguished each year, will be responsive to the question submitted to the people, and will not be in conflict with section 8 of article 11 of the Constitution, and that when so issued will be valid obligations of the city, authorized by the charter.

That portion of the former opinion stating our conclusions is withdrawn.

In arriving at the conclusion that the judgment should be affirmed the Justices all agree. From that portion of the opinion which holds that the people of the city and county of Denver have the power to direct the erection of a public auditorium at public expense, to purchase a site therefor, and to direct the issuance of bonds to pay for the same, the CHIEF JUSTICE and CAMPBELL and MAXWELL, JJ., dissent; it being their opinion that the purpose mentioned is not a "corporate purpose." The CHIEF JUSTICE and CAMPBELL and MAXWELL, JJ., also dissent from that portion of the opinion which holds that it is not necessary to re-submit the question to the people, and that the city may by ordinance issue bonds under the authority already given.

(148 Cal. 741.)

SWEM et al. v. MONROE, Judge.
(L. A. 1,855.)

(Supreme Court of California. Feb. 21, 1906.)

1. JUSTICES OF THE PEACE—APPEAL—BONDS—STATUTES—AMENDMENT—IMPLIED REPEAL.

As the amendment in 1880 of Code Civ. Proc. § 978, relative to appeals from justices' courts, did not alter the provisions of that section relative to the filing of an undertaking for \$100 to secure the costs on appeal, that part of the section is to be construed as of the date of the original enactment of the section in 1872, and hence the section as amended could not be regarded as repealing section 926, relating to the same subject and enacted in 1873, even though the provisions of the two sections were inconsistent.

2. SAME—APPEAL—BOND—DEPOSIT IN LIEU—STATUTES.

Code Civ. Proc. § 978, providing for the execution of undertakings in the sum of \$100 on appeals from a justice of the peace, is not inconsistent with section 926, providing that in all civil cases in justices' courts, wherein an undertaking is required, the plaintiff or defendant may deposit a sum of money equal to the amount required by the undertaking, which sum shall be taken as security in place of the undertaking.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 556.]

3. SAME—AMOUNT OF DEPOSIT.

Under Code Civ. Proc. § 978, providing that an appeal from a justice's court is not effectual unless an undertaking be filed in the sum of \$100, and section 926, providing that a deposit in gold coin equal to the amount required in the undertaking may be made in lieu thereof, a deposit of less than \$100 is ineffectual, though the judgment and costs do not exceed the sum deposited.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 562.]

In Bank. Petition by Ella Swem and another for a writ of prohibition to restrain Charles Monroe, as judge of the superior

court of Los Angeles county, from taking any further proceedings in an action brought by petitioners against Anna Blumberg and pending before respondent on appeal from a justice's judgment in favor of petitioners. Writ granted.

J. Marion Brooks, for petitioners. H. S. Rollins, for respondent.

SHAW, J. This is an original proceeding for a writ of prohibition. The proceeding was begun in the District Court of Appeal for the Second District, and the judges of that court being unable to agree upon a judgment, the cause has been transferred to this court in accordance with section 4, art. 6, of the Constitution. The case was considered on the merits in the district court, although not decided. We therefore disregard all technical objections to the issuance of the preliminary writ.

Ella Swem recovered judgment in a justice's court of Los Angeles county against Anna Blumberg for \$86.30, including costs of suit. Thereafter, Anna Blumberg gave due notice of appeal to the superior court, but instead of giving the bond on appeal as the law provides, she endeavored to perfect the appeal by making a deposit of money, and for that purpose deposited with the justice of the peace the said sum of \$86.30 for which the judgment was given. The papers were then transferred to the superior court, and assigned to the department over which the respondent presides as judge thereof. A motion was then made to dismiss the appeal on the ground that no bond had been given for costs on appeal, and that the superior court was without jurisdiction to proceed with the case. The motion was denied, whereupon this proceeding was begun to prohibit further proceedings in the superior court in the cause.

This court, in *Laws v. Troutt* (Cal. Sup.) 81 Pac. 401, decided that, under section 926 of the Code of Civil Procedure, an appeal could be perfected from a judgment of a justice's court, by making a deposit with the justice in the sum of \$100, as security "for the payment of the costs on the appeal" instead of giving the undertaking or that purpose required by section 978 of the same Code, and that an appeal so perfected would give the superior court jurisdiction of the case. Section 926 was enacted on February 25, 1873, and section 978 was amended in 1880 by an act amending a number of sections of the Code of Civil Procedure, and concluding with a clause repealing all acts and parts of acts in conflict therewith. The amendment did not, however, make any change in the portions of the section, as originally enacted in 1872, relating to the undertaking for \$100 to secure the costs on appeal. Those provisions, therefore, are to be considered as if they were enacted in 1872, and are not to be given effect as if re-enacted in 1880, either for purposes of re-

peal, or any other purpose. Pol. Code, § 325; Sutherland on Stats. § 237. The effect of such repealing clause is no greater than an express declaration of the rules of law concerning a repeal by implication. There is no such inconsistency between sections 926 and 978 as to work a repeal by implication of section 926 by the amendment of 1880 to section 978, even if the re-enactment of the original provisions would have such effect, much less when they are not to be deemed as enacted at the latter date. *Hellman v. Shoulters*, 114 Cal. 153, 44 Pac. 915, 45 Pac. 1057; 1 *Suth. on Stats.* §§ 273, 256, 267; 26 *Am. & Eng. Enc. Law*, 719, 725; *People v. Durick*, 20 Cal. 95; *District of Columbia v. Sisters*, 15 App. D. C. 308. There is, however, nothing in either section which authorizes an appeal to be perfected by a deposit of a less sum than \$100 as security for the costs on appeal. Neither an undertaking nor a deposit to stay proceedings can be taken in lieu of a deposit or undertaking for the costs on appeal. *McConky v. Superior Court*, 56 Cal. 83; *Coker v. Superior Court*, 58 Cal. 177; *McCracken v. Superior Court*, 86 Cal. 75, 24 Pac. 845. In the present case the deposit of money was less than \$100, which was insufficient to perfect the appeal. The superior court was without jurisdiction and should have dismissed the appeal.

Let the writ issue commanding the respondent to refrain from further proceedings in the case, except to dismiss the appeal.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

148 Cal. 562

CUTLER v. FITZGIBBONS et al.
(Sac. 1,287.)

(Supreme Court of California. Jan. 29, 1906.
Rehearing Denied Feb. 28, 1906.)

1. CANCELLATION OF INSTRUMENTS — FORGED DEED—COMPLAINT.

Where a complaint to quiet title and set aside a deed alleged that the deed was not signed or executed by complainant, or any other person authorized by her to execute it, but was forged, it was not objectionable for failure to state with sufficient fullness facts constituting fraud.

2. SAME.

Where complainant, having the legal title to land, sued to have her title quieted against a grantee, who claimed title without right under a forged deed, which plaintiff prayed should be canceled, a complaint alleging that the instrument under which defendant claimed title was neither signed nor executed by her, nor by any other person authorized by her to execute it, but was forged, stated sufficient facts to constitute a cause of action.

Department 2. Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by Mary Cutler against James F. Fitzgibbons and others. From a judgment for plaintiff, defendant J. J. Rauer appeals. Affirmed.

W. M. Boardman, Louis P. Boardman, for appellant. E. V. Spencer and H. D. Burroughs, for respondent.

McFARLAND, J. Judgment went for plaintiff, and from the judgment the defendant J. J. Rauer appeals. There is no bill of exceptions. The record consists of the judgment roll which includes findings; and appellant's contention for a reversal rests upon the asserted insufficiency of the complaint.

It is averred in the complaint that plaintiff is, and ever since May 25, 1895, has been the owner, in possession and entitled to the possession of certain described land; that defendants claim some estate or interest in said land, which claim is without any right whatever. It is then averred, "for a further cause of action," that defendants base their claim to said land upon a certain written instrument purporting to be a deed, signed, acknowledged, and executed by plaintiff to the defendant Fitzgibbons, dated January 14, 1890, conveying to him said land; that plaintiff did not on said day, or at any time, make, sign, acknowledge, or execute said instrument, or any deed conveying said land to Fitzgibbons or to any other person, and did not authorize any other person to execute it for her; that said alleged deed is false, fraudulent, and forged; that said deed has been recorded, and clouds plaintiff's title to said land. The prayer of the complaint is for a judgment quieting plaintiff's title to the land, adjudging that defendants have no estate or interest herein, and decreeing that said deed be canceled, etc. None of the defendants appeared except Rauer. He demurred to the complaint, and also answered, averring, among other things, that plaintiff did duly make, sign, acknowledge, and execute the said deed to Fitzgibbons, and that the same was not forged, and that Fitzgibbons afterwards conveyed the land to Rauer, and that thus the latter is the owner thereof. His demurrer was overruled; and, after the taking of evidence, the court made findings, and found that plaintiff did not execute the alleged deed to Fitzgibbons, or authorize any persons to do so, and that the deed was forged. A judgment was rendered quieting plaintiff's title to the land and canceling said alleged deed.

We see no reason for reversing or disturbing the judgment. Appellant's contention seems to be that respondent is in the position of one who is trying to overturn a legal title on account of fraud, and that the complaint is deficient because it does not state with sufficient fullness the facts constituting the fraud; and he cites in support of his contention *Burris v. Adams*, 96 Cal. 664, 31 Pac. 565. But the facts in *Burris v. Adams* are different from those in the case at bar, and the principle applied there is not applicable here. The plaintiff in the case at bar is not trying to set aside a deed which conveyed the legal title, on the ground that the deed was procured through fraud, mistake, undue influence, conspiracy, etc. During all the times mentioned in the com-

plaint the plaintiff had the legal title; it certainly did not pass out of her by a written instrument which she did not execute and which was forged. Having the legal title to the land in contest, she brings this action to have her title thereto quieted against appellant, who asserts and proclaims an estate in the land which is without any right, and to have the forged deed under which he claims, and which was recorded, canceled. Moreover, the averments that the instrument under which appellant claims, in form a conveyance of the land by plaintiff, was not signed or executed by her, or by any other person authorized by her to execute it, and was forged, constitute a sufficient statement of the facts, even under appellant's contention. We see nothing in the point that two separate and distinct causes of action are stated in the complaint. There is really only one cause of action; and, under the facts stated, plaintiff was entitled to a judgment quieting her title and cancelling the forged deed under which appellant claims.

The judgment appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

148 Cal. 538

**FIRST NAT. BANK OF MODESTO v.
WAKEFIELD et al. (Sac. 1266.)**

(Supreme Court of California. Jan. 27, 1906.
Rehearing Denied Feb. 26, 1906.)

1. TRUSTS—INVOLUNTARY TRUSTS—CREATION—MISTAKE.

Where money was deposited in bank under the mistaken belief of the depositor that it belonged to a partnership composed of the depositor and a decedent, and it was subsequently judicially determined that the partnership never existed, and that the money belonged to the estate of the decedent, the bank in which the money was deposited was an involuntary trustee thereof for the benefit of the decedent's estate, under Civ. Code, §§ 2223, 2224, defining an involuntary trustee as one who wrongfully detains a thing or gains the same by fraud, accident, mistake, or other wrongful act.

2. ADMINISTRATORS—POWERS—DISCHARGE OF TRUST.

An administrator has no power to relieve an involuntary trustee of money belonging to the estate from his trust relation to the estate.

Department 2. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by the First National Bank of Modesto against O. L. Wakefield, administrator of the estate of Joseph Knowles, deceased, and others. From so much of the judgment as is in favor of defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

W. H. Hatton and Dennett & Walshall, for appellant. C. W. Eastin, for respondents.

McFARLAND, J. This is an action to foreclose a mortgage executed in his lifetime by Joseph Knowles, deceased. By the complaint recourse to any of the property of the estate other than the mortgaged premises,

and attorneys' fees, are waived. O. L. Wakefield, administrator of the estate of Joseph Knowles, is made a defendant, and other persons are also made defendants, some of whom are heirs of the deceased and others creditors of his estate. The defendants by their answer set up certain alleged defenses to the foreclosure of the mortgage, but the court rendered a judgment of foreclosure; and, as defendants have not appealed, we need not inquire into the correctness of that part of the judgment. But the defendants set up a counterclaim of \$1,000 and interest, and pray judgment against plaintiff for that amount; and the court sustained the claim and rendered judgment against plaintiff therefor. From this part of the judgment in favor of defendants, and from an order denying its motion for a new trial, the plaintiff appeals. No point is made by plaintiff as to the propriety of setting up this demand of defendants as a counterclaim in this present action, and the validity of the claim on its merits is the only question presented.

The material facts are these: When Joseph Knowles died, his son, W. H. Knowles, asserted that his father and himself were partners in a certain mill business, and proceeded to conduct that business with the intent of winding it up as the surviving partner. In the progress of thus conducting the alleged partnership business he deposited with the bank, plaintiff herein, various sums of money, amounting in all to \$1,893.56, as the property of the partnership, and this money was placed by the bank to the credit of "Knowles & Son." Afterwards it was determined in a judicial proceeding that there never was any such partnership, and therefore the money so deposited by W. H. Knowles was assets of the estate of Joseph Knowles. The bank notified the administrator that it had transferred the money to his account as administrator of Joseph Knowles, deceased. Thereupon the administrator drew his check on the bank for said sum of \$1,893.56; but the bank repudiated the check upon the ground that the administrator had no funds there. Thereafter there was a conference between the administrator and the bank on the subject of this money, and the former was informed by the latter that it had credited the whole amount on its mortgage. The administrator objected to this, and claimed that the money belonged to the estate, and that the bank had no right to credit it upon the mortgage; and, upon demand being made by the administrator for the money, the bank informed him "that he could not obtain possession thereof except by suit for the recovery thereof." Thereafter, on the 6th day of February, 1894, the administrator and the bank entered into an agreement that the bank might credit \$1,000 of said money in its hands upon the mortgage, and the bank gave to the administrator the remaining \$893.56, and the bank agreed not to prosecute its suit for foreclosure, which had been commenced, during the next nine months. The court found that

"said estate for some time had been and still is wholly insolvent," and that in addition to the said mortgaged premises has not sufficient property to pay its debts, "or more than a small part thereof." There is no express finding that it was insolvent on February 6, 1894, when the credit of the thousand dollars was made.

The appellant invokes the rule, for which there is undoubtedly a good deal of authority, that when an administrator voluntarily makes a payment to a creditor, and it turns out that he has paid him too much, because, the estate being insolvent, the creditor was entitled to only his pro rata share of the assets with the other creditors, the amount thus paid cannot be recovered back, and the other creditors can look only to the administrator and his bonds. But, assuming the rule to be as contended for by appellant, we do not think that it applies to the case at bar. The administrator did not voluntarily pay the plaintiff the \$1,000 within the rule invoked. He never had possession of the money. He tried to get possession of it, but was prevented by appellant from doing so. He drew his check for it, but payment was refused. It is not necessary to determine whether the circumstances constituted a "duress of goods" which made the agreement of the administrator void. See *Mayor of Baltimore v. Lefferman*, 4 Gill (Md.) 425, and notes to that case in 45 Am. Dec. 145. Appellant came into possession of the money by mere accident and mistake—the accident of W. H. Knowles depositing it with appellant, instead of with some other bank, and the mistake of believing it to belong to a partnership and not to the estate. We think, therefore, that the case comes within the provisions of sections 2223 and 2224 of the Civil Code, which are as follows: "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." And "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." And, the appellant being thus an involuntary trustee of the money here involved, we do not think that the administrator, even if not under duress, had the power to relieve appellant from its trust relation to the estate. The trust fund still remained in the hands of appellant.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

2 Cal. App. 422

BILLINGS v. PALMER.

(Court of Appeal, Second District, California. Dec. 12, 1905.)

JUDGMENT—DEFAULT—TIME OF ENTRY.

Under Code Civ. Proc. §§ 432, 472, requiring an amended complaint to be filed, and a

copy thereof to be served upon defendant, who must answer the same within 10 days after service thereof, and authorizing judgment by default upon failure to answer as in other cases, an amended complaint cannot be served in such sense as to require defendant to answer the same until it is filed, and a default judgment entered 10 days after the delivery of a copy of an amended complaint to defendant, but less than 10 full days after the filing of the amended complaint, is prematurely entered.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Emily A. Billings against Truman G. Palmer. From an order vacating a default judgment, plaintiff appeals. Affirmed.

Russ Avery and W. C. Petchner, for appellant. Herbert Cutler Brown, for respondent.

SMITH, J. The case is: The plaintiff under an order allowing him to file an amended complaint delivered a copy of the proposed complaint to defendant's attorney, who indorsed thereon: "Received copy of the within amended complaint this 12th day of October, 1904," with his signature; and the complaint was filed on October 13th. Counting the time from the latter date, the 10th day would fall on October 23d, which was Sunday, and the defendant would have the whole of the 24th on which to file his answer. But the plaintiff, without awaiting the expiration of the time, caused default and judgment thereon to be entered by the clerk on that day. This judgment and default was afterwards set aside on the motion of the defendant, on the ground that the clerk had no jurisdiction to enter the same; and the contention of appellant is that in this the court erred. But this contention, we think, is obviously untenable. "The service of an amended complaint," as required by sections 432 and 472 of the Code of Civil Procedure, *ex vi termini*, implies the filing of the pleading: for, until then, there is no amended complaint and there can be no service of it. Regularly, therefore, the service should follow or be contemporaneous with the filing. *Galliano v. Kilfoy*, 94 Cal. 88, 29 Pac. 416. And though, as is claimed by the appellant, it be the custom among lawyers to deliver the copy prior to the filing, and this may be taken as sufficient where the complaint is afterwards seasonably filed, yet until then there is no service. *Coker v. Superior Court*, 58 Cal. 178. The default and judgment were therefore prematurely entered.

The order appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

2 Cal. App. 426

NISBET v. CLIO MIN. CO.

(Court of Appeal, Third District, California. Dec. 13, 1905. Rehearing Denied by Supreme Court Feb. 8, 1906.)

1. PARTIES—MISNUMBER—AMENDMENT. Civ. Code, § 357, provides that the misnomer of a corporation in any written instru-

ment does not invalidate it, if it can be reasonably ascertained what corporation was intended, and by Code Civ. Proc. § 473, the court may, in furtherance of justice, allow a party to amend any pleading by correcting a mistake in the name of a party. The C. Mining Company of the state of Maine and the C. Mining & Milling Company of New Jersey were doing business in the same county; the former owning the C. mine, with which the latter had no connection. An attachment was levied on the mine, the complaint and summons styling the defendant the "C. Mining and Milling Company," but the complaint alleging that defendant was a corporation of the state of Maine engaged in operating the mine, and a copy of the summons was mailed to the "C. Mining and Milling Company," at the residence of the C. Mining Company in Massachusetts. Plaintiff, without leave, amended his complaint so as to omit the words "and Milling," and by the same attorney both corporations appeared "specially" moving to strike the complaint and quash the summons. *Held*, that it was proper to permit plaintiff to amend the complaint by omitting the words "and Milling," so as to make the action one against the C. Mining Company; such company evidently not having been misled, and the appearance by it, though designated as "special," having confessed jurisdiction.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, § 164.]

2. ATTACHMENT—KEEPER'S FEES.

Where, in attachment, it appears that the property is portable and of considerable value, it is proper to allow keeper's fees for preserving the property.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attachment, §§ 640, 641.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by W. G. Nisbet against the Clio Mining Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Eugene S. Watson and J. P. O'Brien, for appellant. F. P. Otis, for respondent.

McLAUGHLIN, J. There are three appeals in this case: (1) From the judgment; (2) from an order refusing to set the judgment aside; (3) from an order refusing to retax the costs. It appears that two companies, the Clio Mining Company, organized and existing under the laws of the state of Maine, and the Clio Mining and Milling Company, organized under the laws of the state of New Jersey, were in existence and had been doing business in Tuolumne county. The former owned and was operating the Clio mine, while the latter had no connection with said mine. When this action was commenced, an attachment was issued and levied on the Clio mine and tools and machinery thereon, and a keeper was placed in charge of the property. In the original complaint the defendant was styled the "Clio Mining and Milling Company," and this error was also made in the summons. It was, however, distinctly alleged that the defendant corporation was organized under the laws of the state of Maine, and that it was engaged in mining at the Clio mine in Tuolumne county. It is obvious that the description did not exactly fit either of the above-mentioned corporations. Under an order for publication of

summons, publication thereof was made, and a copy of the summons attached to a copy of the complaint was mailed to the Clio Mining and Milling Company at the last known residence of the defendant, which was 53 State street, Boston, Mass. Similar copies were also served upon the Secretary of State. Within the time allowed by law, J. P. O'Brien, Esq., appeared for the defendant by filing a demurrer to the complaint. This demurrer was overruled, and on May 6, 1904, an answer signed and verified by him as "Attorney for Defendant" was filed. This answer contained specific denials of all averments of the complaint, including the covenants as to corporate organization and existence under the laws of Maine, and the operation of the Clio mine. Three days later the plaintiff, without leave of the court, filed an amended complaint, reciting that a mistake had been made in the name of the defendant corporation, and omitting the words "and Milling" wherever they appeared in said name. This amended complaint was served on the attorney for defendant, who five days thereafter gave two separate notices of motions to be made for and in behalf of the Clio Mining Company. One of these motions was to strike the amended complaint from the files, the other to quash the summons and service thereof, and the service of the amended complaint, as far as the Clio Mining Company was concerned. These notices recited that the Clio Mining Company appeared specially for the purpose of making the motions, and for no other purpose, and both were signed by Mr. O'Brien, as "Attorney for the Defendant." An affidavit signed by him accompanied the notices, and it is therein recited that he was the attorney for the Clio Mining and Milling Company, and also appeared as the attorney for the Clio Mining Company for the purpose of making the motions above mentioned. Thereupon the plaintiff gave notice of a motion for leave to amend the complaint by striking out the words "and Milling" wherever they appeared in the name of the defendant corporation, and served such notice upon Mr. O'Brien. This motion was supported by the affidavit of the attorney for plaintiff, reciting the mistake, and that the sole purpose of the amendment was to correct the same.

This last-mentioned motion came on for hearing at the same time the motions previously mentioned were heard, A. A. Smith, Esq., appearing for J. P. O'Brien, "Attorney for Defendant." The motion to strike the amended complaint from the files was granted on the ground that the same was filed without notice to defendant and without leave of the court. The motion for leave to file the second amended complaint was then argued by respective counsel and granted by the court; defendant reserving an exception. Notice of the time fixed for trial was served on the attorney for defendant and the Secretary of State, but the defendant was not

represented at the trial. Judgment was duly entered in favor of plaintiff on July 5, 1904, and on the same day a memorandum of costs was served on Mr. O'Brien, as attorney for the defendant. Four days later the Cillo Mining Company, a defendant in the action, filed its notice of motion to retax the costs and strike certain items from the cost bill. This notice recited that the defendant appeared for the purpose of making said motion, and not otherwise, and was signed by Eugene S. Watson, as "Attorney for said Defendant, for the Purpose of said Motion." On the hearing of this motion, all the papers on file in the action, certified copies of the articles of incorporation of the two corporations, and the certificate of the Secretary of State, that no corporation of either name organized under the laws of Maine had filed a designation of agent in his office, were considered. The plaintiff also testified that tools worth "several hundred dollars" were under attachment. Thereafter the Cillo Mining Company gave notice of a motion to vacate the order permitting the plaintiff to file the amended complaint and to quash the service of the same, and also to vacate and set aside the judgment. This notice was signed by Mr. Watson, as attorney for the defendant, and contained a recital that said company appeared specially for the purpose of said motion. The motion was based on all the papers, proceedings, and records on file in the case, including the articles of incorporation of the two companies, and on the affidavit of Mr. O'Brien. This affidavit recites that affiant was at all times the attorney for the Cillo Mining and Milling Company; that the amendment was an attempt to commence a new action against the Cillo Mining Company without service of summons; that the two corporations were separate and distinct; and that at the time of making the affidavit, and the service of the amended complaint, he was not the attorney for the Cillo Mining Company. The affidavit concludes with a prayer that the relief sought by the motion be granted. It contains no recital that Mr. O'Brien was not the attorney for the last-mentioned corporation at other times than the two particular occasions mentioned. The plaintiff, on the hearing of the motion, introduced a letter from the secretary of the Cillo Mining Company, mentioning the new Cillo Company, and showing that the office of the secretary was at 53 State street, Boston, Mass. The motions last mentioned were denied by the court, and the facts above recited form the basis of the various appeals.

The appellant makes the point that the court never acquired jurisdiction of the Cillo Mining Company. In this connection it is insisted that the Cillo Mining and Milling Company was the sole defendant prior to the amendment, and that service of summons was made upon that corporation. If this be correct, then certainly an amendment to the complaint could not operate to substitute the

Cillo Mining Company for the original defendant, and give the court jurisdiction of that corporation without service of summons in some manner authorized by law. But the contention that the Cillo Mining and Milling Company was the original party defendant upon which summons was served rests entirely on the fact that the words italicized appeared in the name of the defendant as it appeared in the summons and original complaint. Every other fact and circumstance indicates an intention to sue and serve the Cillo Mining Company. That corporation was organized under the laws of Maine, while the other company was organized under the laws of New Jersey. The former owned, and was operating, the property attached, and the latter had no interest in or connection with that property. The causes of action set forth in the complaint were for labor performed and wood furnished at the Cillo mine, and it clearly appears that the copy of summons, attached to a copy of the complaint, was mailed to the office of the secretary of the Cillo Mining Company, mentioned in the affidavit and order for publication of summons as the last known place of residence of the defendant. These facts certainly do not sustain the premise upon which the argument of appellant is based. True the affidavits recite that the affiant appeared for the New Jersey corporation in filing the demurrer and answer, but their general tenor and the course pursued show that a service of papers on him as attorney for the defendant brought a quick response from the appellant corporation. In any event, the extent and purpose of his appearance must be gathered from the record rather than from affidavits. The notices of special appearance in behalf of appellant, in common with the answer, are signed "J. P. O'Brien, Attorney for Defendant," and the affidavits conclude with a prayer that the relief sought by appellant be granted. There is no pretense that copies of summons or complaint were mailed to any office or residence of the Cillo Mining and Milling Company, or that any of its officers or agents ever received such copies. The verified answer clearly demonstrates that the corporation was not misled, and certain it is that no person of ordinary intelligence could inspect the record without knowing which corporation was intended.

There was no necessity for any appearance by the Cillo Mining and Milling Company. If such necessity seemed apparent at first blush, a mere inspection of the complaint or other papers would show that there was no occasion for an appearance even by plea in abatement, much less a plea to the merits. The questions arising by reason of the amendment must therefore be determined under rules which would obtain if the Cillo Mining and Milling Company had not been injected into the controversy. A mistake in the name of a natural person may be corrected by amendment of a pleading (*Allison v. Thomas*,

72 Cal. 503, 14 Pac. 309, 1 Am. St. Rep. 89; McDonald v. Swett, 76 Cal. 259, 18 Pac. 324; and the misnomer of a corporation in a pleading has the same legal effect as the misnomer of an individual. Morawetz on Corporations, §§ 354, 355. "The misnomer of a corporation in any written instrument does not invalidate the instrument if it can be reasonably ascertained from it what corporation is intended." Civ. Code, § 357; Underhill v. Santa Barbara, etc., Co., 93 Cal. 314, 23 Pac. 1049; Donohoe-Kelly Banking Co. v. S. P. Co., 138 Cal. 192, 71 Pac. 93, 94 Am. St. Rep. 28; People v. Sierra Buttes, etc., Mining Co., 39 Cal. 514; Rudy's Beach on Corporations, 99, 99a, 1003. The court may, in furtherance of justice, allow a party to amend any pleading by correcting a mistake in the name of a party. Code Civ. Proc. 473. In Chattanooga, Rome & Columbus R. Co. v. Jackson, 86 Ga. 676, 13 S. E. 109, the name of the corporate defendant contained the word "Carrollton," instead of "Columbus," and the plaintiff was permitted to amend by inserting the latter word. In Johnson v. Central Railroad, etc., 74 Ga. 397, in a suit brought against the Central Railroad & Banking Company, the addition of the words "of Georgia" was sanctioned. In Singer, etc., v. Greenleaf (Ala.) 14 South. 109, the defendant corporation was styled the "Singer Sewing Machine Company," and the Supreme Court of Alabama approved the ruling permitting an amendment by inserting "Singer Manufacturing Company," saying: "There was not an entire change of party, but only a correction of part of a corporate name which had been misconceived. We do not think the change was calculated to mislead." And similar amendments were held proper in the following cases: Maher v. Interstate Switch Co. (Kan. Sup.) 51 Pac. 286; Wilcox v. American Sav. Bank (Colo. Sup.) 40 Pac. 881; Anglo-Am. P. & Prov. Co. v. Turner Casing Co. (Kan. Sup.) 8 Pac. 405.

In the case at bar the complaint shows on its face that the defendant corporation was organized under the laws of Maine, and that the causes of action were against the appellant. The affidavit and order for publication of summons are ample to show that it was the Maine, and not the New Jersey, corporation that was meant. The right party was sued, and the only service of summons attempted was upon the Clio Mining Company. The only mistake was in the addition of the words "and Milling," and the fact that it was a mere mistake must have been apparent to every person making any examination of the record, however superficial or casual such examination might be. The mistake could not abridge the rights or privileges of the plaintiff, unless the New Jersey corporation was actually made a party and served with process. Under the circumstances disclosed by this record it would be sticking in the hark, and sacrificing substance for shadow, to lay down the technical rule that the plain-

tiff was stripped of the privilege or right to amend his pleading by the voluntary appearance of the Clio Mining and Milling Company in an action plainly brought against another corporation of a similar name, but different residence. But, aside from the foregoing considerations, there is another reason why the jurisdiction of the court must be upheld. We think the appellant confessed such jurisdiction by its appearance as a party to the action. "Courts, under the reformed system of procedure, look to the substance of things rather than to form, and to persons and things rather than mere names. This manner of treating things constitutes the life and spirit of the reformed system of procedure." Anglo, etc., v. Turner Casing Co. (Kan. Sup.) 8 Pac. 404. That system was designed to enable courts of justice to brush aside technicalities affecting no substantial right, and decide causes upon the merits. In the case at bar the body of the complaint clearly indicated that the intention was to sue the Clio Mining Company and recover upon its debt, and parties appearing in that action could not close their eyes to substantial facts, and rely upon mere technical omissions in the caption or title of the cause. Wise v. Williams, 72 Cal. 547, 14 Pac. 204; Spear v. Ward, 20 Cal. 676; Lasar v. Johnson, 125 Cal. 555, 58 Pac. 161; Fruit, etc., Co. v. Fresno, etc., Co. (C. C.) 94 Fed. 847. The answer was to the merits, and on its face discloses an intimate knowledge of all the facts and circumstances showing the mistake. Immediately after it was filed the plaintiff took steps to correct the error and served an amended complaint on the attorney who had signed and verified the answer, not as attorney for the Clio Mining and Milling Company, but as attorney for defendant. That attorney, evidently in response to such service, appeared for the Clio Mining Company and made motions, not only to quash the summons and service thereof, but also to quash service of the amended complaint and strike the same from the files, still subscribing himself "Attorney for Defendant." When the motion for leave to file the second amended complaint came on to be heard on the heels of the order striking the first amended complaint from the files, the same attorney, through his representative at the other hearing, resisted the motion and noted an exception for the defendant. When the Clio Mining Company so appeared, it had full knowledge of the mistake and the facts and circumstances connected with the case, for it must be held to have had knowledge of facts known to its chosen attorney. It certainly cannot be pretended that the attorney who had appeared in its behalf changed his allegiance and identity eo instanti, and appeared for the Clio Mining and Milling Company in resisting a motion to amend clearly and unquestionably favorable to that corporation. This would be repugnant to reason, and contrary to the presumptions which aid the ac-

tion of the trial court. Nothing to the contrary appearing, it must be assumed that the motion to amend was resisted on behalf of the Clio Mining Company, and this appears to be in consonance with the facts. This being true, that corporation could not have the benefit of its resistance and still escape the jurisdictional consequences if the motion was granted. After judgment, seemingly in response to a cost bill served on Mr. O'Brien, the same corporation appeared as a party defendant to contest the accuracy of the bill of costs, and later renewed its attack on the amended pleading and summons and moved to have the judgment set aside. True there was an endeavor to make each appearance special, but if a party appears and asks for any relief which could only be given to a party in a pending case, such as preventing amendment of pleadings, or striking papers from the files, or granting relief from excessive costs, "it is a general appearance no matter how carefully or expressly it may be stated that the appearance is special." In *re Clarke*, 125 Cal. 392, 58 Pac. 22; *Security, etc., Co. v. Boston Fruit Co.*, 126 Cal. 423, 58 Pac. 941, 59 Pac. 296.

We have seen that the appearance for the purpose of making a motion to retax the costs and strike certain items from the cost bill necessarily admitted that the court had jurisdiction, and hence the only point to be considered in that connection is the power of the court to allow keeper's fees for preserving the property under attachment. Waiving the point that the motion was not made by the attorney of record or an attorney substituted for him, we think that under the facts disclosed the allowance was proper. It clearly appears that property of considerable value under attachment was portable, and we think the expense of the sheriff in caring for and preserving this property was a proper item of cost. If a levy is made on immovable property, no keeper would ordinarily be necessary, but in our opinion when an attachment is levied on movable property, even though it be classed as fixtures, the sheriff must safely keep and preserve such property and is entitled to the necessary cost of doing so.

The judgment and orders are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

2 Cal. App. 418

HARBY v. BOARD OF EDUCATION OF
CITY AND COUNTY OF SAN
FRANCISCO et al.

(Court of Appeal, First District, California.
Dec. 12, 1905.)

MANDAMUS—LIMITATIONS—LACHES—SCHOOL-TEACHERS—DISCHARGE.

Pol. Code, § 1793, provides that the holders of certain school-teachers' certificates, when

elected to teach, shall be dismissed only for insubordination or other causes, as mentioned in section 1791. *Held*, that a school-teacher's right to mandamus to compel a school board to admit her to the enjoyment of the position of vice principal of a school, to which she had been appointed, and from which she had been summarily removed, was a right created solely by section 1793, and, when not sought to be enforced for more than three years after it accrued, was barred both by laches and by Code Civ. Proc. § 338, subd. 1, requiring an action on a liability created by statute, other than a penalty or forfeiture, to be brought within three years.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Petition by Rosalie Harby against the board of education of the city and county of San Francisco. From a judgment denying the writ, plaintiff appeals. Affirmed.

Arthur H. Barendt, for appellant. Franklin K. Lane and W. I. Brobeck, for respondents.

HALL, J. Plaintiff petitioned for a writ of mandate to compel the defendant to admit plaintiff to the use and enjoyment of the position and employment as vice principal of the Fairmont Intermediate Grammar School of the city and county of San Francisco. A demurrer to the complaint was sustained, and judgment thereupon entered in favor of defendants. The appeal is by plaintiff from said judgment.

It is alleged in the complaint that plaintiff was regularly elected by the board of education of the city and county of San Francisco to the position of vice principal of the Fairmont Intermediate Grammar School on the 28th day of December, 1898. On the 4th day of January, 1899, the said board adopted another resolution removing her from said position, and when on the 8th day of January, 1899, she appeared at the school and demanded the right to enter upon the duties of such position, the right was refused her by the defendants, and she has never been allowed to enter into said position or to enjoy the emoluments thereof. It also appears that before and ever since the dates mentioned she has held a position as teacher in a grammar grade in another school of said city and county. This action was commenced August 23, 1902, more than three years after the accruing of her alleged right. Defendants demurred, pleading insufficiency of facts, and the bar of section 339, subd. 1, and section 338, subd. 1, Code Civ. Proc. We think the action is barred by the provisions of subdivision 1 of section 338, Code Civ. Proc. That the statute runs against applications for writs of mandate cannot be disputed, and it commences to run when the claimant is first deprived of his right. *Barnes v. Glide*, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153; *Barber v. Mulford*, 117 Cal. 356, 49 Pac. 206; *Jones v. Police Com.*, 141 Cal. 96, 74 Pac. 696.

The liability of the defendants to this action depends upon the provisions of section 1793 of the Political Code. If it were not for such statute the board of education would have the right to transfer or remove teachers, being answerable only in damages for a violation of contract in cases of employment for a fixed period. *Kennedy v. Board of Education*, 82 Cal. 483, 22 Pac. 1042. It is only by virtue of the provisions of the statute that the teacher has a right to be protected from removal, or that any liability to this action exists against the defendants. The relief demanded by plaintiff is derived from the statute, and would have no existence if it were not for the statute. The action is upon a liability created by statute, and is therefore barred in three years. Similar views were expressed in *Barber v. Mulford*, 117 Cal. 359, 49 Pac. 206, which was an action for a writ of mandate to enforce the performance by a board of education of a duty enjoined by law, though, as the wrong section was pleaded, the case was not decided on this point. See, also, *Higby v. Calaveras Co.*, 18 Cal. 176; *People v. Hulburt*, 71 Cal. 72, 12 Pac. 43; *Bank of San Luis Obispo v. Pacific C. S. S. Co.*, 103 Cal. 594, 37 Pac. 499.

We are also of the opinion that plaintiff's right of action is barred by laches. She did not bring this action for more than three and one-half years after she was removed from the position she claims. During one year of this time, as appears by her complaint, some one else filled the position, and during none of the time has the public received the benefit of her services for which, if reinstated, she expects the public to pay. In New York state a similar law exists as to the removal of certain public officers, and in that state it has uniformly been held that a person claiming to have been unlawfully removed is guilty of laches, unless he brings his action for a writ of mandate promptly. In *Murphy v. Keller* (Sup.) 70 N. Y. Supp. 405, it is said: "In all proceedings of this character, where a person removed from office is entitled to receive from the public compensation for the services he performs, if he intends to insist that this removal was illegal, or that the law entitles him to be reinstated, his application for reinstatement should be promptly made so as to protect the city from the necessity of paying two persons for the same services. To the same effect are *People ex rel. v. Justices*, etc., 78 Hun, 334, 29 N. Y. Supp. 157; *People v. Welde* (Sup.) 59 N. Y. Supp. 1030; *People ex rel. v. Collis* (Sup.) 39 N. Y. Supp. 698; *In re Vanderhoff*, 15 Misc. Rep. 434, 36 N. Y. Supp. 833; *People ex rel. v. Keating* (Sup.) 63 N. Y. Supp. 71; *People v. York*, 53 App. Div. 429, 65 N. Y. Supp. 1074; *Murphy v. Keller* (Sup.) 70 N. Y. Supp. 405. In several of the New York cases the delay was from four to eight months only, and yet it was held to bar the right to the writ of mandate. A delay of three and one-half

years, we think, evinces such laches and acquiescence in the action of the board as precludes plaintiff from now asking to be reinstated by writ of mandate.

The judgment is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

1 Cal. App. 346

McLEAN v. LLEWELLYN IRON WORKS.

(Court of Appeal, Second District, California. Oct. 25, 1905. On Rehearing, Dec. 5, 1905.)

1. DEDICATION—STREETS—ACCEPTANCE.

There can be no dedication of a street unless there is an acceptance by the public.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 64, 65.]

2. SAME—OFFER TO PUBLIC.

Where one subdivided a tract of land and recorded a map showing streets, they being reserved and laid out for the use of such persons as might thereafter purchase a part of the tract, it did not amount to an offer of general dedication to the public.

3. APPEAL — ORDER DENYING NEW TRIAL — SCOPE OF REVIEW.

On an appeal from an order denying a new trial, the appellate court is restricted to an examination of the record to determine whether the findings are supported by the evidence, or whether errors of law occurred at the trial, and may not consider the sufficiency of the findings to support the judgment.

4. SAME — REVIEW—FINDINGS—CONFLICTING EVIDENCE.

The findings of the trial court based on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3983-3989.]

5. EVIDENCE—RELEVANCY—SIMILAR FACTS.

Where a landowner sued to abate certain structures erected in a right of way in which he had an easement, there was no error in excluding certain testimony in relation to the occupancy by other persons of the right of way in question, especially where no judgment for damages was rendered and only injunctive relief granted.

On Rehearing.

6. MUNICIPAL CORPORATIONS — REGULATION OF STREETS—PUBLIC NUISANCE—RIGHTS OF PRIVATE PERSON.

Civ. Code, § 3479, defines a nuisance as anything which obstructs the free use of property or free passage or use of any street. Section 3493 provides that a private person may maintain an action for a public nuisance, if it is specially injurious to him. *Held*, that the owner of a lot abutting on a street has such an enjoinment over it that he may maintain an action to abate structures erected in the street opposite his lot.

7. LIMITATION OF ACTIONS — OPERATION OF STATUTES AGAINST CITY.

Civ. Code, § 3490, provides that no lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right; and Code Civ. Proc. § 318, declares that no action for the recovery of real estate or the possession thereof can be maintained unless it appear that plaintiff or his predecessor was seized of the property within five years. *Held*, that the right of the owner of a lot abutting on a street to maintain an action to abate an obstruction of the street opposite his lot cannot be barred by section 318.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Sarah E. McLean against the Llewellyn Iron Works. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Jones & Weller, for appellant. J. W. McKinley and Fred E. Burlew, for respondent.

ALLEN, J. The plaintiff is the owner of five lots of land bounded by and fronting on Railroad, Magdalena, and San Fernando streets in the city of Los Angeles. The defendant is the owner or lessee of lands on the other side of Magdalena street. We would give the directions, but the points of the compass are not shown on the plat in the transcript, and nothing is said upon the subject by the witnesses. The suit was brought to abate certain structures erected in the street by the defendant, and other nuisances thereon, and for an injunction. Judgment was for the plaintiff as prayed for. The appeal is from the judgment, and from an order denying the defendant's motion for a new trial; but the former appeal was not filed in due time and must be disregarded.

The complaint alleges that plaintiff is the owner of certain lots, which originally formed a part of tracts subdivided with reference to recorded maps, upon which maps were delineated certain streets; that after the record of these maps the owners of the tracts proceeded to sell the lots to various parties, with an easement and right of way over these delineated streets, in each of which deeds of conveyance special reference was made to such streets; that defendant entered upon such streets and obstructed the same, and has deprived plaintiff of the easement and right of way over and through the same, and threatens so to continue, thereby damaging plaintiff's premises and depriving her of the rights in the easements so conveyed and held. There is no averment in the answer which can be construed into an allegation that the streets alleged to have been delineated on the maps were ever accepted or used as public streets. On the contrary in paragraph 15 of defendant's answer, it alleges that it has been in the adverse possession of the portion of the tract described in plaintiff's complaint, and being a portion of the alleged streets set forth in the complaint. The court finds that these alleged streets mentioned in plaintiff's complaint, and referred to in the answer, were reserved and laid out for the use of such persons as might thereafter purchase a part or portion of said tracts, and that plaintiff by her deeds acquired an easement over, through, and upon such streets, and was in possession thereof until obstructed by defendant. Thus it will be seen that, while the term "streets" is employed in the pleadings and findings, the court finds them to be only private rights of way for the use of purchasers within the tracts. There is no testimony in the record showing any acceptance of these streets or

their use by the public nor any facts from which an acceptance may be implied. "The statement that platting a tract of land, recording the plat, and selling lots by reference to such plat, constitutes a dedication of the streets in favor of the purchasers of these lots, even though a dedication to the public is not perfected and completed, is not correct as a legal principle." *Prescott v. Edwards*, 117 Cal. 301, 49 Pac. 179, 59 Am. St. Rep. 136. "Dedication is the joint effect of an offer by the owner to dedicate land, and an acceptance of such offer by the public. Only two parties are necessary to a dedication, the owner upon the one side and the public upon the other. There can be no dedication without the participation of both." *City of Los Angeles v. Kysor* 125 Cal. 466, 58 Pac. 91. It matters not what may have been the intention of the individuals who filed the plat and made the offer of dedication. The dedication was not complete until the public accepted, either in terms or by some affirmative act indicating an acceptance. The finding of the court in this case goes to the extent of negating even the offer of general dedication, when it finds that the object of laying out the streets was but for the use and benefit of purchasers. If this be true, and there is nothing in the evidence inconsistent therewith, these streets could only have become public by use for such time and under such circumstances as would establish a right by prescription. Nothing in the evidence warrants such finding, and none exists in the record. It follows that the question of public nuisance and the right of an individual to maintain an action in relation thereto is not involved in this case; for the right alleged and found to have been invaded was a private right, in which the public had no concern.

Upon this appeal we are restricted to an examination of the record with a view of determining whether the findings are supported by the evidence, or whether errors of law occurred at the trial. There being no appeal from the judgment, we may not consider the sufficiency of the findings in its support. As we have before stated, the findings are within the issues and have support in the evidence. There is some conflict as to the length of time over which the obstruction of the street extended, and as to the adverse nature of such occupancy; but the court has found that defendant has not for more than five years last past—that is, for the five years preceding June 8, 1903—been in adverse possession of said premises under a claim of right, and under the well-established rule such findings will not be disturbed.

The action of the court in excluding the testimony of John D. Hooker in relation to the occupancy by other persons of the streets is assigned as error. We perceive no error in this ruling. That others were infringing upon the rights of lot-owners was not a justification, nor in any wise mitigating the acts of

defendant, and especially in view of the fact that no judgment for damages was rendered and no relief granted, except the injunctive relief.

Order denying the defendant's motion for a new trial affirmed.

I concur: GRAY, P. J.

SMITH, J. (concurring). I concur in the conclusion of the majority of the court, and also with the reasoning of the opinion generally, but I am not prepared to hold that, upon the pleadings, findings, and evidence, the streets therein referred to are in fact not streets. Whether they are or not, however, I deem immaterial. For it is a settled principle that the owner of land abutting on a public street has an easement or right of way over the street appurtenant to his land; and from this it follows that any interference with this easement that injuriously affects his land must be regarded as "specially injurious to himself" and, therefore, as a proper subject for a personal action. Civ. Code § 3493. A mere interference with the easement not affecting the use or value of the land to which it is appurtenant, would seem to come within the definition of public nuisance, as given in section 3480 of the same code; for all the landowners abutting on the street, and thus entitled to the use of the easement, would be affected in the same manner—that is to say, the interference would be an injury to a common right. But a resulting injury, to the land of any owner is special and peculiar to himself, and he is, therefore, under the provisions of the section of the code cited, entitled to his remedy. Nor does it make any difference that numerous landowners are thus injured; the injury of each in such case is essentially different from that of the others, and each owner is, therefore, specially injured. These positions, I think, are sustained by the authorities cited in the opinion heretofore filed, to which I adhere. See, also, *Bigelow v. Ballerino*, 111 Cal. 559, 44 Pac. 307.

On Rehearing.

SMITH, J. Upon a reconsideration of this case on a second rehearing, we are of the opinion that the judgment and order denying the defendant's motion for a new trial should be affirmed on the grounds stated in the opinion originally filed, which is as follows:

The plaintiff is the owner of five lots of land bounded by and fronting on Railroad, Magdalena, and San Fernando streets in the city of Los Angeles. The defendant is the owner or lessee of lands on the other side of Magdalena street. We would give the directions, but the points of the compass are not shown on the plat in the transcript, and nothing is said upon the subject by the witnesses. The suit was brought to abate certain structures erected in the street by the defendant, and other nuisances thereon, and for an injunction. Judgment was for the

plaintiff as prayed for. The appeal is from the judgment, and from an order denying the defendant's motion for a new trial; but the former appeal was not filed in due time and must be disregarded. It is found by the court that the defendant has "entered upon and taken possession of a part of said Magdalena, Railroad, and San Fernando streets, and has obstructed the same by the construction of various buildings and in other ways, and threatens to and will, unless restrained by this court, continue to occupy and obstruct the said streets and deprive plaintiff of all the benefits and rights to which she is entitled as the owner of the property above mentioned, and the easement and right of way through, upon, and over said streets, and will cause great and irreparable injury to the plaintiff"; also, it is found that by the nuisance described "the value of the plaintiff's property will be greatly and materially diminished," and "the plaintiff will be thereby deprived of the benefits of said streets and of her rights as the owner of the land above described, and the right to use and occupy the said streets and the easement therein for the purposes of passing and repassing over said streets so in possession of the defendant, and will thereby suffer great and irreparable injury, for which she cannot be recompensed in damages." From the evidence it appears that the structures complained of occupy about 15 feet of the streets, leaving on Magdalena street, between them and the plaintiff's land, a space of 45 feet, which space is reduced to 30 feet by other nuisances habitually maintained in the street by the defendant. There is, however, no evidence of special injury to the plaintiff, except such as may be inferred from the above facts.

The principal question in the case, and, indeed, the only question that need be considered, is whether, by these facts, special injury to the plaintiff is shown; and if, in fact, a private right appertaining to her has been invaded, the question must be answered in the affirmative. *Fisher v. Zumwalt*, 128 Cal. 495, 496, 61 Pac. 82; *Lind v. City of San Luis Obispo*, 109 Cal. 343, 344, 42 Pac. 437. But it is a familiar and well-established principle that the owner of a lot abutting on a street has an easement or right of way over it, which in the strictest sense of the word is property. *Prescott v. Edwards*, 117 Cal. 302, 49 Pac. 178, 59 Am. St. Rep. 186; *Schaufele v. Doyle*, 86 Cal. 109, 24 Pac. 834, and cases cited; *Eachus v. Los Angeles Electric Ry. Co.*, 103 Cal. 617, 37 Pac. 750, 42 Am. St. Rep. 149. And though this right is one that he holds in common with the public, yet in so far as it affects the value or use of his property it is a right peculiar to himself, and any interference with it constitutes a private as well as a public nuisance. Civ. Code, § 3479; *Hargro v. Hodgdon*, 89 Cal. 629, 26 Pac. 1106; *Wood on Nuisances*, § 830; *O'Connor v. Southern Pac. R. R. Co.*, 122 Cal. 683, 684, 55 Pac. 688. In the cases of *Schau-*

fele v. Doyle and Eachus v. Railway Co., supra, the special effect of the nuisance complained of was to cut off access to the plaintiff's property. But in the latter case the principle is thus more broadly stated: "The right of the owner of a city lot to the use of the street adjacent thereto is property which cannot be taken from him for public use without compensation; and any act by which this right is impaired is to that extent a damage to his property." And in the former case it is said, citing *Lexington, etc., R. R. Co. v. Applegate*, 8 Dana, 310, 33 Am. Dec. 497: "If it should appear that such use encroaches on any private right, or obstructs the reasonable use and enjoyment of the street, by any person who has an equal right to the use of it, we shall be ready to enjoin all such wrongful appropriation of the highway." And it is added: "Upon the facts appearing in this case, we are of opinion that the reasonable use of the street by the plaintiff is obstructed, and her individual rights are encroached upon, by the defendants, and that an injunction should have been granted." No distinction can be drawn between the obstruction of access to the plaintiff's land, and any other nuisance by which its value or use is injuriously affected. The test is, not the greater or less number of persons who are affected by the nuisance, but whether the particular right of a landowner is affected. *Lind v. City of San Luis Obispo*, 100 Cal. 341, 42 Pac. 437; *Fisher v. Zumwalt*, 128 Cal. 496, 61 Pac. 82, supra. Nor as matter of law can the court say "that 30 * * * feet of the street will answer all the legitimate uses to which it might be put by the plaintiff, an abutting owner, any more than it can say that 10 feet would be amply sufficient for all his legitimate uses." *O'Connor v. Southern Pac. R. R. Co.*, 122 Cal. 683, 684, 55 Pac. 688.

The above observations refer to cases where a right of the party complaining has been affected, which in all cases constitutes a private nuisance. As to obstructions constituting a public nuisance only, "the gravamen of the action is the special damage." *Wood on Nuisances*, § 830. Thus a person not owning land abutting on the street, or otherwise injuriously affected, cannot maintain an action for an obstruction in the street unless he is himself injured by it, as, e. g., where by reason of it he is damaged in his person. Civ. Code, § 3493. In this case it may be observed that it appears from the findings and the evidence that the lots and streets in question were parts of a large tract of land that had been subdivided by the owner, and the lots sold according to the recorded map; and it is argued by plaintiff's counsel that under the deed the grantees took rights of way over the streets, nor can this contention be contested. *Prescott v. Edwards*, 117 Cal. 298, 49 Pac. 178, 59 Am. St. Rep. 186; *Hargro v. Hodgdon*, 89 Cal.

623, 26 Pac. 1106. This, indeed, is not disputed by the appellant's counsel; but it is maintained that, when the streets became public, private rights of this kind are merged in the public right, and that interference with them cannot be the subject of a private action. But we can conceive of no principle upon which this contention can be allowed. The circumstance alleged in support of it is that thereby a multiplicity of suits might be brought; but under the authorities last cited, this is immaterial. To what extent such suits might be brought is to be determined by the simple consideration whether the land of plaintiff has been injuriously affected. The precise limit we need not here determine; it is sufficient that wherever it may be placed, the present case comes within it. Nor need we determine whether any distinction can be made between streets dedicated by private parties, and conveyances made in regard to them, and the streets in the city generally.

It is also claimed by appellant that the plaintiff's action is barred by the provisions of section 318, Code of Civil Procedure. But this cannot be. A public nuisance cannot be legalized by prescription (Civ. Code, § 3490); nor, so long as the streets remain such, can the rights of abutting land owners be thus affected.

The appeal from the judgment is dismissed, and the order denying the defendant's motion for a new trial is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

2 Cal. App. 346

McLEAN v. LLEWELLYN IRON WORKS.
(L. A. 1,517.)

(Supreme Court of California. Feb. 2, 1906.)

In Bank. Action by Sarah E. McLean against the Llewellyn Iron Works. An appeal from a judgment for plaintiff was dismissed by the Court of Appeal (83 Pac. 1082), and petition for rehearing in the Supreme Court denied.

PER CURIAM. The petition for rehearing in this court, after judgment by the District Court of Appeal for the Second Appellate District, is denied. It is, however, proper to say that we are not to be understood as affirming that portion of the opinion of the District Court of Appeal to the effect that the right of action by a private party to abate a public nuisance, because of special injury arising therefrom to him, may not be barred by the statute of limitations. Upon the issue as to the statute of limitations, the finding of the trial court was against the defendant, and that finding has sufficient support in the evidence. The statement of the opinion of the District Court of Appeal referred to above is therefore unnecessary to a correct determination of the appeal.

2 Cal. App. 551

HEWLETT v. BEEDE et al.

(Court of Appeal, Third District, California.
Dec. 29, 1905. Rehearing Denied Jan.
29, 1906.)

1. EXECUTORS AND ADMINISTRATORS—LIABILITIES ON BONDS—CONTRIBUTION.

Code Civ. Proc. § 1613, declares that every executor is chargeable with the whole estate of the decedent which may come into his possession. Section 1391 provides that when two or more persons are appointed executors, the court must require a separate bond of each of them. Pol. Code, § 969, made applicable to executors by section 981, provides for contribution between the sureties on an original, and sureties on an additional, bond of a public officer. Civ. Code, § 2836, provides that a surety cannot be held liable beyond the express terms of his contract. *Held*, that there is no joint liability between the sureties on the separate bonds of co-executors, and no right of contribution by one set of sureties against the other; consequently an executor who is compelled to make good to the heir the default of a coexecutor, whom he negligently permits to waste the estate, cannot in his individual capacity enforce contribution against the sureties of the coexecutor.

2. SAME—LIABILITY OF EXECUTOR—ACTS OF COEXECUTOR.

An executor who permits his coexecutor to handle the money of the estate, because the latter is a lawyer and knows more about the business, is jointly and severally liable with the coexecutor to the heirs, if through his inexcusable neglect he permits the coexecutor to lose the estate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 508, 511.]

3. SAME—DEATH OF EXECUTOR—DUTIES OF SURVIVING COEXECUTOR.

It is the duty of a surviving executor, as such to sue the sureties of a deceased coexecutor for funds of the estate received by the latter and unaccounted for.

4. SAME—LIABILITY OF SURETIES—COSTS OF ACTIONS AGAINST COEXECUTOR.

The right of a surviving executor to recover from the sureties of a deceased coexecutor funds of the estate received and unaccounted for by the coexecutor does not entitle the surviving executor to recover costs of an action brought against him by the heir to compel him to make good the default of the coexecutor.

5. LIMITATIONS—ACTIONS ON BONDS.

Under Code Civ. Proc. § 337, requiring an action on a contract or liability founded upon a written instrument to be commenced within four years, an executor's right of action to recover of the sureties of a deceased coexecutor assets of the estate lost by the coexecutor accrues immediately on the death of the coexecutor, or, at the latest, when the estate is rightfully demanded by the heir, and is barred four years after that time.

Appeal from Superior Court, San Joaquin County; Ansel Smith, Judge.

Action by Samuel Hewlett against W. M. S. Beede and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

See 83 Pac. 1089.

J. B. Webster and C. H. Fairall, for appellant. Nicol & Orr, for respondents.

BUCKLES, J. On June 23, 1893, Alonzo McCloud, a resident of San Joaquin county, Cal.,

died testate, and in due time his will was admitted to probate and the court appointed R. D. Baldwin and Samuel Hewlett, executors. Each, qualifying, gave separate bonds, each in the sum of \$25,000. The sureties on the bond of R. D. Baldwin were J. D. McDougald, Joseph H. Swain, Mary A. Baldwin, Joseph Fyfe, and W. M. S. Beede; each of said sureties qualifying in the sum of \$10,000. The sureties on the bond of the said Samuel Hewlett were Henry Meyers for \$10,000, L. Hewlett for \$10,000, G. W. Trahern for \$15,000, R. S. Johnson for \$10,000, G. Gianelli for \$5,000, and B. Gianelli for \$5,000. On November 11, 1896, a decree was made and entered settling the final account, and the said executors jointly charged themselves with a balance of cash on hand subject to distribution of \$2,503.21. On or about November 24, 1896, Wayne McCloud, then a minor, by his guardian, and Bessie Logan, legatees and devisees under the will of said Alonzo McCloud, filed their petition for a partial distribution, and on January 2, 1897, the court made and entered its decree adjudging that one-half of said \$2,503.21 belonged to said Wayne McCloud and Bessie Logan. The said executors then placed in the Bank of Hollister, under an agreement between them and Wayne McCloud, in their individual names, but in trust for the said Wayne McCloud, the sum of \$598, which was the sum distributed to him after the payment of certain taxes. On October 5, 1897, the said executor, Baldwin, died. On December 19, 1897, the said Wayne McCloud became of age and then demanded of executor Hewlett that he order the said bank to receive and retain the money deposited therein as the money of Wayne McCloud and credit the same on his indebtedness to the bank. After this the said Bessie Logan assigned her interest to Wayne McCloud, and he thereupon made the same request and demand of said executor, Hewlett, in relation to this money, as he had of his own \$598; but said Hewlett neglected to comply with such demand and did not pay the same over to said Wayne McCloud. Whereupon the said Wayne McCloud brought suit against said Hewlett, as executor, and the said sureties on his bond, for the recovery of said moneys; and on the 6th day of December, 1899, the court rendered judgment against said Hewlett and his said sureties in favor of Wayne McCloud for the sum of \$1,191, with interest on \$592.60, for \$50.85 costs, and that the sum of \$598.40, which had been deposited in said bank in the names of Samuel Hewlett and R. D. Baldwin, be paid to the Bank of Hollister for the use of said Wayne McCloud, and that when so paid it should be credited on said judgment. Hewlett appealed to the Supreme Court (McCloud v. Hewlett, 135 Cal. 362, 67 Pac. 333), and the judgment against him was affirmed. The plaintiff paid the same, amounting to \$1,161.25, and, after demanding the same of the said

sureties on the bond of R. D. Baldwin, brought this action to recover the same from them. The judgment was for the defendants. The appeal is from the judgment and from an order denying motion for new trial.

"Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession. * * *" Section 1613, Code Civ. Proc. "When two or more persons are appointed executors or administrators, the superior court, or a judge thereof, must require and take a separate bond from each of them." Section 1391, Code Civ. Proc. In *Re Sanderson*, 74 Cal. at page 214, 15 Pac. at page 762, the court held that: "Coexecutors are not liable to each other, but each is liable to the cestui que trust to the full extent of the fund he received." In the case of *McCloud v. Hewlett*, 135 Cal. 361, 67 Pac. 333, the court held that Hewlett and his sureties were liable to McCloud, who was the cestui que trust. The appellant claims that the case at bar is a parallel case where an officer is required to give additional bond, and quotes section 969, Pol. Code, which reads as follows: "Whenever the sureties on either bond have been compelled to pay any sum of money on account of the principal obligor therein, they are entitled to recover, in any court of competent jurisdiction, of the sureties on the remaining bond a distributive part of the sum thus paid, in the proportion which the penalties of such bonds bear one to the other, and to the sums thus paid, respectively"—and then urges that, where there are two executors who give separate bonds, the same rule applies as to contribution of sureties on each bond, and cites section 981, Pol. Code, to sustain such contention. The section reads as follows: "The provisions of this article apply to the bonds of receivers, executors, administrators and guardians." We do not think that the rule of contribution between sureties on the original bond and those on an additional bond is intended to apply to sureties on bonds of two or more executors. The sureties on the bond of Baldwin only promised to stand good for the acts and defalcations of Baldwin, while the sureties on Hewlett's bond only promised to stand good for his defalcations and acts, and it seems to us there would, in no view which may be taken, be a joint liability between the sureties on their separate bonds, and, if no joint liability, then there could be no right of contribution by one set of sureties against the other.

It must be borne in mind that this action is one in which the plaintiff prosecutes the cause, not in his representative capacity as executor, but in his private capacity against those who were sureties on the bond of Baldwin as an executor of the McCloud will, who is now dead. It is sought to recover from these sureties \$86.75, which plaintiff's sureties paid for him in a suit by the heir, and the further sum of \$300.50, claimed to have been expended by plaintiff as costs in the action the heir

brought against him and his sureties. The plaintiff had repaid his sureties the \$860.75, and therefore brings the suit in his own name. Whatever obligation rests upon the defendants arose upon a bond given by Baldwin, as executor. They were liable, if at all, only upon that bond, and they are entitled to stand upon the precise terms of their contract. Their liability is limited by the terms and conditions of the bond on which they are sureties, and such liability cannot be extended by implication beyond its terms. "A surety cannot be held beyond the express terms of his contract." Section 2236, Civ. Code; *Heinlen v. Beans*, 71 Cal. 295, 12 Pac. 167; *San Luis Obispo v. Farnum*, 108 Cal. 562, 41 Pac. 445; *Heldt v. Minor*, 89 Cal. 115, 26 Pac. 627; *Elder v. Kutner*, 97 Cal. 490, 32 Pac. 563; *County of Glenn v. Jones*, 148 Cal. 518, 80 Pac. 695. So far as the principal in a bond of this kind is concerned, the obligation of the surety is to answer to the heir for his breach of duty and not for a breach of duty to any other person who may have been invested with the same character of trusts with respect to the same estate. As between Baldwin and Hewlett, the former may have become personally liable to the latter for something the latter may have been compelled to do which the former ought to have done. But the defendants, as Baldwin's sureties, did not agree to answer for Baldwin's private obligations to Hewlett. The obligation of the sureties as set out in the bond are: "Now, therefore, if the said Robert D. Baldwin, as such executor, shall faithfully execute the duties of his trust according to law, then this obligation to be void, otherwise to remain in full force and effect." Assume for the sake of argument that Baldwin did receive the moneys of said estate, that he did not pay over, and Hewlett was compelled to make good the amount to the heir, the sureties of Baldwin were not bound to repay Hewlett, for they only agreed to answer to the heir or the state of California for the heirs. In *Hill v. Kemble*, 9 Cal. 72, a constable collected \$185 by execution for Hill and notified Hill that the money was ready for him. Hill said he did not need the money then and loaned it to the constable, and he did not pay the same. Suit was brought against a surety on the constable's bond. The court held: "The sureties upon the official bond of an officer are only responsible for his official acts, and not for private debts he may contract on his individual account." It matters not that Hewlett allowed Baldwin to handle the money of the estate because Baldwin was a lawyer and knew more about the business. Hewlett would still be jointly and severally liable with Baldwin to the heirs if, through his inexcusable neglect, he permitted Baldwin to lose the estate. In *re Osborn*, 87 Cal. 1, 25 Pac. 157, 11 L. R. A. 264. The heirs recovered from Hewlett the whole amount due them.

It is admitted by the pleadings that the

"said executors verified and filed their joint final account of their proceedings in said estate; that the same was upon due notice given, heard, and considered by said superior court, wherein said settlement of said estate was pending and was thereupon duly allowed, approved and settled by the decree of said court, which was then and there given, made, and entered, and recorded on the 11th day of November, 1896"; and that said decree showed the executors had in their hands the sum of \$2,503.21, which was the remainder of said estate after paying all claims and expenses and commissions. Baldwin died October 5, 1897, and the heir demanded his portion of the estate of the appellant on December 19, 1897, and was refused. Hewlett continued to administer the estate after the death of his coexecutor, and all the trusts of the executorship devolved upon him, among which were to collect and safely keep the property of the estate. If Baldwin had received the funds of the estate, and had not and could not account for them, Hewlett, as the surviving executor, had the right, and it was his duty, to bring an action against the sureties on Baldwin's bond for such funds for the benefit of the estate. This right, however, was not vested in Hewlett as an individual. It was an incident of the office he held. But no effort seems to have been made to have Baldwin account for the funds, nor to collect from the sureties after his death.

The appellant had permitted Baldwin to handle the funds of the estate without any reason, further than that he was a lawyer and knew more about it. The funds being lost in part through Hewlett's negligence, as has been shown, he became jointly liable with Baldwin and also severally. The heir ignored the joint liability, as he had a right to do, and sued Hewlett without joining Baldwin's sureties, and recovered judgment, which Hewlett paid, and now Hewlett, in his individual capacity, seeks to recover from these sureties what he was compelled to pay the heir, and also \$300 costs of that action. The costs in no sense could be a charge against the sureties on Baldwin's bond, for the reason that any action the appellant could have maintained would have been one as executor against his coexecutor to recover for the heir the estate lost by Baldwin, and the costs sued for here were not made in such an action, but in an action brought by the heir and against executor Hewlett. This is not an action between joint obligors, or co-sureties, where the right of action would not accrue until payment had been made by one of those jointly liable; but the right of appellant here accrued at least when Baldwin died or immediately on the happening of the default. Baldwin's death occurred more than four years next prior to the commencement of this action, and the demand of the heir on Hewlett was made more than four years before the commencement of this action. If any right of action existed against these defendants as the sureties on

Baldwin's bond, the statute of limitations was set in motion as soon as Hewlett, by his own action, could have made the claim payable in spite of the sureties. Immediately upon the death of Baldwin, Hewlett, as the surviving executor, became entitled to the possession of all moneys belonging to the estate. The duty of administering the estate at once devolved upon him. He knew, or should have known, then what became of the money which had been reported by the final account to have been on hand and held jointly by the two executors. This account, sworn to by Hewlett, as well as Baldwin, had informed these defendants here that the \$2,503.21 was held jointly by the executors. If it was not so held, Hewlett, the appellant, knew it. A suit by Hewlett, executor, then, against Baldwin, executor, to recover the money for the heirs would have made the sureties on Baldwin's bond, the defendants here, liable for whatever default he (Baldwin) might have made. The heirs no longer have any concern in the question whether Baldwin made default or not, for they have received the estate and the matter becomes a purely personal one between Baldwin as an individual and Hewlett as an individual. Did the right of action exist at all against the sureties, the statute of limitations had run against it, and was set in motion as soon as Hewlett, by his own act, could have made the claim payable in spite of the sureties. These defendants had nothing to do with the administration of the estate. If Hewlett saw fit to turn over all the funds of the estate to his coexecutor and to negligently suffer their use in a manner contrary to law, he should not complain when made to suffer the loss his own conduct made possible. If his confidence was misplaced, he is the one who misplaced it. It was not the act of the defendants, but the alleged misplaced confidence of one executor in the other, that has led to the asserted loss. He that places confidence should watch that it is not abused. If he neglects to do so, the maxim applies, "Whose is the negligence, his is the loss."

The case was brought and tried by the appellant upon the theory that the sureties on Baldwin's bond were joint obligors with sureties on Hewlett's bond. This is a mistaken idea, as we have plainly pointed out. The authorities cited by appellant are those relating to contribution by joint or co-obligors and therefore do not apply to this case. Again, appellant proceeds upon the theory that he could not have commenced the action against Baldwin until he had paid over the estate. The all-sufficient answer is he could have sued Baldwin, in his official capacity, the moment he knew Baldwin had passed the estate out of his hands, and surely it was his duty to have sued Baldwin's sureties immediately after October 5, 1897, when Baldwin died, and at the farthest on December 19, 1897, when the heir demanded the estate. He was then the sole executor and en-

titled to the possession of the entire estate. In the first place, Hewlett was not responsible for any more of the estate than what came to his hands until he was negligent in letting his coexecutor keep possession of the estate after he had, by his joint account, notified the defendants that he himself held it jointly with Baldwin, and then, when Baldwin died, it was his duty to take charge of the estate, and he could not delay setting the statute of limitations running by failing to demand of Baldwin's sureties that they make good whatever default he had made to the estate. *Harrigan v. Home Ins. Co.*, 128 Cal. 531, 58 Pac. 180, 61 Pac. 99. Hewlett was not standing in the same position as a creditor. His position was that of executor representing the estate, and as to Baldwin there was no payment for him to make. His duty was to collect the estate, and the statute began to run from October 5, 1897.

For the reasons herein stated, the action, being a personal matter between Hewlett and Baldwin, cannot be maintained against the sureties of Baldwin's bond as executor. Plaintiff's cause of action is barred by the provisions of section 337, Code Civ. Proc.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

7 Cal. Unrep. 246

HEWLETT v. BEEDE et al. (Sac. 1405.)
(Supreme Court of California. Feb. 26, 1906.)

COURTS—TRANSFER OF CAUSE—TIME OF PETITION.

A petition to transfer a cause from the Court of Appeal to the Supreme Court, filed more than 10 days after the judgment in the former court became final, will be stricken from the files.

Action by Samuel Hewlett against W. M. S. Beede and others. Plaintiff petitions to transfer the cause from the Court of Appeal to the Supreme Court. Petition stricken from files.

See 83 Pac. 1066.

PER CURIAM. It appearing that on February 10, 1906, the clerk of this court inadvertently filed the petition of the appellant herein for an order transferring the cause for hearing from the Third District Court of Appeal to the Supreme Court, and that said date was more than 10 days after the judgment in the said District Court of Appeal became final therein, it is therefore now ordered that said petition be stricken from the files of this court.

2 Cal. App. 633

YICK SUNG v. HERMAN et al.
Court of Appeal, First District, California.
Jan. 10, 1906.)

1. SALES—EXECUTORY OR EXECUTED CONTRACT.
A written agreement reciting the receipt by a seller of a certain sum for potatoes delivered

on a river bank, all to be sound and merchantable, shows a present sale, and not a mere agreement to sell in the future, and when the potatoes are delivered at the river bank the title passes to the buyer.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 162-169.]

2. SAME—WARRANTIES—PERFORMANCE—EVIDENCE.

Evidence examined, and held sufficient to sustain a finding that potatoes were delivered by a seller in accordance with the terms of the contract, that they were accepted by the buyer, and that they were of the quality called for by the contract.

3. SAME.

In an action for the price of potatoes sold, in which the defense was breach of warranty, where there was evidence that all the land from which they were taken was of the same quality and the potatoes were all about the same, testimony of a witness that he had seen the seller digging and sacking potatoes and that the potatoes he saw were in good condition was admissible.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1268.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Yick Sung against one Herman and others, doing business as Erlanger & Galinger. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Application to transfer to Supreme Court denied. 83 Pac. 1091.

J. B. Reinstein and W. P. Johnson, for appellants. A. B. Treadwell and Morehouse & Alexander, for respondent.

COOPER, J. Action to recover \$854 for 2,020 sacks of potatoes alleged to have been sold by plaintiff to defendants at the following prices: Twenty sacks at 45 cents per sack, and 2,000 sacks at 42½ cents per sack. The court found for plaintiff, and judgment was accordingly entered. This appeal is from the judgment on the judgment roll and a bill of exceptions.

The appellants contend that the evidence is insufficient to support the findings, and show that the potatoes were not up to the quality specified in the contract. The main discussion is as to whether or not the contract was a present sale by which the title passed, or an agreement to sell in future. The contract is as follows:

"Contract.

"Received from Erlanger & Galinger, the sum of five dollars as part payment for the following described goods, viz.: 2,000 sacks B Bank at 42½ per sack, delivered f. o. b. on Bank, all of which goods I have this day sold to said Erlanger & Galinger, at the above prices on the following conditions: All goods to be sound and merchantable, of fancy quality, on arrival at San Francisco. Sacks to be well filled and in good shipping order. Said Erlanger & Galinger agree on their part to pay balance of purchase price on the receipt of the bill of lading for said goods.

shipped in accordance with the above terms and conditions, and as specifically described. Sack 115 lbs. Yick Sung, Seller. Erlanger & Galinger, Buyer, per F Eshbach. Contract executed in duplicate. Dated November 20, 1902."

The court found: "That it was intended, and so understood by and between plaintiff and defendants, that the said transaction was a sale and not a contract." We are of opinion that the agreement was a sale, by which the title passed from the plaintiff to the defendants when the potatoes were sacked and delivered to defendants on the "Bank" as specified in the agreement. The agreement acknowledges the receipt of \$5 as part payment for "2,000 sacks B Bank at 42½ per sack, delivered f. o. b. on Bank, all of which goods I have this day sold to said Erlanger & Galinger." The words "this day sold" mean a present sale. Of course, there remained something to be done. The plaintiff had to segregate, sack, and deliver at the river bank all of said 2,000 sacks of potatoes that were not already at the bank; but when the plaintiff had done this the title passed, and the potatoes, when so delivered, were the property of defendants. The authorities all hold that where the terms are expressed in a contract of sale by which a present sale is contemplated, and the articles or goods are delivered to the buyer at the place designated in the contract, the title vests in the buyer. Even in an executory contract of sale of articles to be selected from goods in bulk, when the articles or goods are selected and appropriated to the contract and delivered to the buyer, the title passes. A sale is a contract by which, for a consideration, one transfers to another property or an interest therein. Segregating the articles and setting them apart to the vendee by way of delivery fixes the responsibility upon the vendee to pay. The buyer must pay the price agreed upon by the terms of the contract when the goods are delivered. Of course, if the goods, although delivered, are not up to the specifications called for by the contract the vendee has his remedy by way of recoupment in damages when sued for the price. The evidence shows that "B Bank" meant Burbank potatoes, and that "on Bank" meant on the landing at the bank of the San Joaquin river. Our inquiry will then be directed to the question as to whether or not the evidence is sufficient to sustain the finding of the court that "plaintiff delivered to defendants at the time and place and in the conditions agreed upon the said 2,000 sacks, and that the said defendants received and accepted the same on the bank of the river.

The question is not free from difficulty, and there is much conflict in the evidence, but after a careful examination of the evidence we are of opinion that it supports the finding. There is evidence that one Eshbach was the agent of defendants for the purpose of making the purchase of the potatoes; that as such

agent he examined and purchased the first lot of 20 sacks, and shipped them to defendants, and they received them without objection, and there is no controversy here as to the 20-sack lot; that Eshbach was an experienced buyer and lived near the farm of plaintiff and had been upon it often; that when the contract for the 2,000 sacks was entered into about 465 sacks had been dug, of which 100 sacks were at the landing and the balance in the field where plaintiff was engaged in digging; that Eshbach inspected these sacks and went into the field and examined the kind and quality of the potatoes that were being dug; that the remaining portion of the 2,000 sacks was dug from the same field, and was equal in quality and similar to the 465 sacks which Eshbach examined, and the 20 sacks of the first lot; that the potatoes were purchased as river Burbank potatoes, which are much inferior to the highland Burbank potatoes, and sell for a much less price; that the price at which the 2,000 sacks were sold was much less than the selling price of "Highland Burbank" potatoes at the time; that Eshbach was upon and around plaintiff's farm when the balance of the 2,000 sacks was being dug, sacked and shipped, and made no objection to the quality; that the common carrier received the potatoes at the river landing, and shipped them to defendants, who paid the freight upon them. The witness McMillan testified that he lives about a fourth of a mile from plaintiff's farm, and that he saw the potatoes when they were being dug and sacked; that they were river Burbanks in good condition, that the land is of the same character throughout the field, and that the potatoes were dug, not from one part, but across the field. The witness Adams testified that he examined 464 sacks of potatoes on the Jackson Street Wharf after they had arrived in San Francisco; that he also examined the first shipment of 20 sacks, and found them exactly the same; that the potatoes were fancy first-class, but not extra.

The defendants did not rescind the contract, or notify the plaintiff not to deliver the potatoes. The plaintiff testified that he heard not a word of objection to the potatoes until he came to San Francisco to get his money. The principal objection made by the defendants to the potatoes is that they were uneven in size and watery, with soft ends. In view of the fact that the potatoes were purchased as river Burbanks; that the agent saw them when he was purchasing them; that they were of the same quality as the 20 sacks of the first purchase; that they were received by the agent and shipped to defendants, we think the court was justified in its findings. Of course, all presumptions here are in favor of the findings of the trial court, and a finding of fact must not be set aside when there is substantial evidence in its support.

The court did not commit error in overruling defendants' objections to questions

asked of the witness McMillan for the purpose of showing that he saw plaintiff digging and sacking potatoes between November 20 and December 1, 1902, and that the condition of the potatoes he saw was good. In view of the fact that there was testimony tending to show that the land was all of about the same quality, and the potatoes all about the same, the evidence was competent. It was about the time that plaintiff was digging and delivering the potatoes to defendants. We find no other question necessary to be discussed.

The judgment is affirmed.

We concur: HARRISON, P. J.; HALL, J.

YICK SUNG v. HERMAN et al. (S. F. 3,887.)

(Supreme Court of California. March 8, 1906.)

In Bank. Application for order transferring cause from Court of Appeal. Denied.

For opinion in Court of Appeal, see 83 Pac. 1089.

PER CURIAM. The opinion of the District Court of Appeal appears to hold that under the terms of the contract of sale the title to the potatoes sold passed when they were sacked and delivered to the buyers on the "bank," and that they became property of the buyer at that time, instead of at the time when they arrived in San Francisco. Without expressing any opinion on the proper construction of the contract in this respect, we think the judgment of the superior court was properly affirmed upon the other grounds stated in the opinion of the District Court. The application for an order transferring the cause to the Supreme Court is therefore denied.

CHICAGO, R. I. & P. RY. CO. v. ASSMAN.

(Supreme Court of Kansas. Dec. 9, 1905.)

RAILROADS—ACCIDENT AT CROSSING—PLEADING—NEGLIGENCE ALLEGED.

The facts, the petition, and the instruction considered in this case being identical with those involved in the case of *Railway Co. v. Griffith*, 76 Pac. 436, 69 Kan. 130, that case controls this.

(Syllabus by the Court.)

Error from District Court, Marion County; R. L. King, Judge.

Action by Arthur Assman against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

This is a railway crossing case. Defendant in error was driving home from the town of Tampa, Marion county, on the night of August 29, 1903, was struck by a freight train at a crossing, and was thrown from his wagon and injured. He recovered judgment

for \$1,175, and the railway company brings the case here on error. The crossing at which he was injured is about 800 feet east of the depot, upon the main traveled road in the town of Tampa. The highway runs north and south; the railway, in an easterly and westerly direction. Defendant in error started home about 9 o'clock, driving east on Third street, which runs almost parallel to the track until at a point 107 feet from the crossing, where the wagon road turns southeast by a curve into the main highway, leading south over the right of way. He reached the crossing at the same time the train did, without seeing its approach until his team plunged forward, when he saw the engine almost upon him, and was unable to escape. The crossing is at grade, the railway tracks straight, and the ground in all directions level. That part of the town is unimproved, and at the time referred to there was nothing to obstruct his view of the railway tracks from the time the defendant in error started east on Third street until he reached the crossing, except the obstructions which are set out in the petition, hereinafter mentioned, and which consisted of the usual things found upon the right of way at such stations and some trees near the section house. At a point 244 feet west of the crossing, on the north side of the railway, a switch leads to a side track extending past the depot. It was claimed that, among other obstructions, there were upon this side track several box cars.

M. A. Low, W. F. Evans, and Paul E. Walker, for plaintiff in error. W. H. Carpenter, for defendant in error.

PORTER, J. (after stating the facts). Among numerous errors complained of in this record we shall refer to but one, as that requires a reversal. The trial court, of its own motion and over the objection and exception of plaintiff in error, gave the following instruction: "The court instructs the jury that a railway company at its stations has the right to construct necessary side tracks and station houses and other necessary buildings upon its right of way for the purpose of the transaction of its business as a railway company, and the fact that the same may obstruct the view of the railway track at public highway and street crossings would not of itself constitute negligence on the part of the railway company; but you are further instructed that it is the duty of a railway company, in the transaction of its business and management of its side tracks at such stations, and the placing of cars thereon, to use ordinary care and prudence in the placing of cars upon such side track, so as that travelers approaching such streets or highways for the purpose of crossing the same may have as extended view of the railway track as may be possible, in order that they may see an approaching train in at-

tempting to cross a street or highway, and if you find and believe from the evidence that the defendant railway company was negligent, as this term is defined in these instructions, in failing to give proper signals or alarms, and in placing box cars upon its side track, and that such negligence was the proximate cause of the injury of the plaintiff, and if you further believe from the evidence that the plaintiff, in no wise by fault upon his part, contributed to such injury, then in such case your verdict should be for the plaintiff." It is claimed that the petition makes no averment of negligence in the placing of cars upon the side track, or the maintaining of obstructions upon the right of way. The petition charges the railway company with negligence in running its train over the crossing at a high rate of speed, and in failing to sound the whistle, to ring the bell, or to give any signals, and in failing to stop the train after seeing defendant in error. It then describes the various obstructions upon the right of way, as follows: "That said right of way, as herein described, was so obstructed by buildings, being the depot buildings of said defendant company, and other outbuildings of said defendant company, and a side track, which was at the time complained of full of cars then standing upon said side track, which side track was north of the traveled line of said defendant, also the stockyards of said company, located at or near said buildings, with large doors set high upon a foundation, a section house, with its various outhouses and buildings and trees in front of said house and around it, placed there by the said defendant in such a manner that said buildings, cars, stockyards, trees, and other obstacles placed there by said defendant company, as to obscure all view of said defendant's track west of said crossing from one passing from the west to east along said track parallel with said road on approaching said crossing on said section line from the north." The petition also contains the following averment: "Plaintiff alleges that by reason of said defendant company, its agents and employés, so negligently, carelessly, wantonly, and unlawfully omitting and neglecting to ring the bell upon said engine or locomotive, or cause the whistle of the same to be blown, or to sound any other alarm, or to stop said train after seeing plaintiff, and without fault on his part, the plaintiff was unable to hear the approach of said train; and that, by reason of the said defendant's completely obstructing the view by causing to be placed all the objects heretofore set forth upon its right of way along its track, the said plaintiff was unable to see or know of the approach of defendant's said train." There is no charge that the obstructions mentioned were negligently or careless-

ly placed upon the right of way, and the only apparent purpose of their mention in the petition was to furnish a basis for avoiding the imputation of contributory negligence of defendant in error in not discovering the approach of the train. If the pleader had intended otherwise, it was an easy matter to have specifically charged negligence in this respect by the use of the words "carelessly" or "negligently," or some other synonymous words. The exact question was before the court in *Railway Co. v. Griffith*, 69 Kan. 130, 76 Pac. 436, and no attempt will be made here to add to or improve upon the reasoning of Mr. Chief Justice Johnston in that case. The facts, the petition, and the instruction complained of were the same, and the opinion in that case controls this.

Although several special questions were submitted to the jury, they were not asked to make any finding that the railway company was guilty of any specific act of negligence, and found generally for plaintiff below. The prejudice in this instruction is more manifest because it cannot be said that they did not base their verdict upon the very negligence which was not charged in the petition, and to which this instruction challenged their attention. We have carefully examined the record, and cannot agree with counsel for defendant in error that this question is raised for the first time in this court, or that, by failing to object to testimony showing the presence of the obstructions upon the right of way, plaintiff in error thereby admitted that the petition charged negligence in this respect. The instruction complained of was objected to, and the objection raised the question whether the instruction was proper under the issues. It is seldom that instructions are argued, except upon a motion for a new trial, and the record does not disclose what was specifically urged upon the motion. The petition, as we have seen, failed to charge negligence in maintaining these obstructions. The averment that the obstructions existed, however, being a material one for the purposes we have mentioned, it was proper for plaintiff below to offer testimony to prove that there were cars upon the side track upon the night in question, and defendant below had no reason for any objection to such testimony. But by offering witnesses to prove the contrary and to show that in fact there were no cars upon the side track at that time, or to prove that this or that alleged obstruction would not prevent a person from seeing an approaching train, defendant below did not thereby either enlarge the issues or admit that something was charged as negligence in the petition which was not.

The judgment will be reversed and cause remanded. All the Justices concurring.

SHATTUCK et al. v. WOLF et al.

(Supreme Court of Kansas. Dec. 9, 1905.)

1. ABATEMENT AND REVIVAL — ACTION BY GUARDIAN — ATTAINMENT OF MAJORITY.

To secure a loan of his wards' money a guardian took a note and mortgage in his own name, with the descriptive word "guardian" annexed. Afterwards, for the benefit of the wards, he brought suit to collect the note and to foreclose the mortgage, using, however, the same name and addition in designating the plaintiff and in stating the cause of action. Pending the suit the wards became of age and the guardian was discharged. The wards moved to be substituted as plaintiffs in the action, stating the facts and claiming title to the paper. The guardian voluntarily submitted to a trial before the court of the issues tendered by the motion with the result that the substitution was ordered. *Held*, the suit did not abate when the wards became of age and the guardian was discharged, and revivor was neither necessary nor proper.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abatement and Revival, § 235.]

2. PARTIES—SUBSTITUTION.

The wards were entitled to be substituted as plaintiffs in the action in place of the guardian.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abatement and Revival, § 239; vol. 25, Cent. Dig. Guardian and Ward, § 438.]

3. SAME—MOTION.

The proceedings for substitution were properly instituted by motion, and the court had jurisdiction to hear and determine, without further pleadings and without a jury, the facts presented by the motion.

4. APPEAL—WAIVER OF ERRORS.

The guardian waived all objections to the form of the proceeding and is concluded by the result, except for trial errors reviewable as in other civil cases.

(Syllabus by the Court.)

Error from District Court, Sedgwick County; D. M. Dale, Judge.

Action by S. W. Shattuck, guardian, against Catherine Wolf and others. On the coming of age of the wards they applied for leave to be substituted in his place. From an order of substitution, S. W. Shattuck and Sarah G. Shattuck, second mortgagee, bring error. Affirmed.

S. W. Shattuck, Jr., for plaintiffs in error.
Blake & Ayres, for defendants in error.

BURCH, J. In 1882 S. W. Shattuck was appointed guardian of certain minor children. In 1885 he loaned the money of his wards, and took to secure it a note and mortgage running to "S. W. Shattuck, Guardian." In 1893 he brought suit to recover the amount of the note and to foreclose the mortgage. The petition was entitled "S. W. Shattuck, Guardian, Plaintiff," and was signed in the same manner. In 1894 the guardian filed in the probate court his final account in the guardianship proceedings, in which he took credit as guardian for the money loaned, and charged himself as guardian with the note and mortgage. He also took credit as guardian for the expenses of the foreclosure suit to the date of the settlement. The wards had then become of age and contested the

conduct of the guardian; but after a hearing the probate court held with him, approved his accounts, found that the note and mortgage belonged to the wards, discharged the guardian, and made provision for the delivery of the securities to the owners, who, however, at the time declined to receive them. The guardian took no further steps in the foreclosure suit, but Sarah G. Shattuck, a second mortgagee, who had been made a party defendant obtained a judgment enforcing her lien, and after many years' delay caused the land to be sold. A short time previous to the issuance of the order upon which the land was sold, the former wards filed an application to be substituted as plaintiffs in the action in place of S. W. Shattuck, guardian, reciting the fact of his appointment as their guardian, the taking of the note and mortgage in his fiduciary capacity, their arrival at the age of maturity, the guardian's discharge by the probate court, and their ownership of the paper. When the sheriff's return of the sale of the mortgaged property was filed they interposed objections to its confirmation, and later, finding the note and mortgage in the hands of the court stenographer, they filed a motion asking that the documents be turned over to them. The Shattucks objected to the consideration of the motion for substitution, on the single ground that it did not contain facts sufficient to warrant the order prayed for, but the objection was overruled, and on January 7, 1904, the three motions referred to came on for hearing. All parties appeared, all parties announced themselves ready for hearing and trial, and evidence was introduced both in support of the motions and in opposition to them. On the evidence submitted the court found in favor of the substitution of parties, and directed that it be made. The hearing of the motion to confirm the sale was continued, and the note and mortgage were impounded in the possession of S. W. Shattuck, Jr. (the attorney for the ex-guardian), until the further order of court. S. W. Shattuck and Sarah Shattuck prosecute error.

The plaintiffs in error argue that the guardian was a personal representative, whose powers ceased upon his discharge within the meaning of those sections of the Code of Civil Procedure relating to the revivor of actions; that the proceedings in the district court should have been governed by the revivor statute; that the motion for substitution was in effect a motion to revive; that because more than a year had elapsed after the powers of the guardian had ceased the court was without jurisdiction to make the order complained of except by consent, which was withheld, and that the general objection to the motion for substitution should have been sustained. The answer to this argument is that the action in the district court did not abate when the wards became of age and the guardian was discharged. Although the guardian acted for the benefit of his

wards, both in taking the securities, and in bringing suit to enforce them, they were drawn in such a manner that he was, *prima facie*, invested with full title to them, and with full authority to enforce them as his own. Descriptive words in commercial paper may become important, if the matter of notice be involved (*Loan Co. v. Essex*, 66 Kan. 100, 71 Pac. 268; 1 *Daniel on Negotiable Instruments* [5th Ed.] p. 287, § 271), but usually such words as "executor," "administrator," "trustee," "guardian," may be disregarded, and an action may be maintained by the payee in his personal right (7 Cyc. 563). When suit was commenced the petition was carefully drawn to follow the language of the note and mortgage in describing the plaintiff and his cause of action. He did not commit himself to the position that the action was brought in his representative capacity, and in legal theory it was not. 8 Enc. Pl. & Pr. 670; 9 Enc. Pl. & Pr. 939. Therefore, the legal status of the case was not affected by the majority of the wards or the discharge of the guardian, and the action might have proceeded to judgment and execution precisely the same as if only the individual name of the plaintiff had been used, had not the beneficiaries of the trust, who were not necessary parties in the first instance (Code Civ. Proc. § 28), intervened. "The legal right to a promissory note, payable to a guardian in his trust capacity, remains, *prima facie*, in the obligee, notwithstanding his discharge as guardian, and he may sue thereon, unless it be shown that he has parted with the title, so that payment to him would not discharge the obligor. And the title in such case, with the right to sue, will pass, on the guardian's death, to his personal representative; nor does an action on such a note, commenced by a guardian during the ward's minority, abate, because the ward has attained majority before its termination. So a guardian may properly sue for and recover money collected for her as such guardian, notwithstanding the ward's majority before the beginning of the action." *Woerner on Guardianship*, p. 190, § 58. "Where an action is prosecuted by A., guardian of B., on an instrument payable to 'A., guardian of B.' the fact that the ward becomes of age pending the suit affords no ground to abate it." *Gard v. Neff*, 39 Ohio St. 607. "If a ward attain the age of 21, during the pendency of the suit, he may be substituted as party plaintiff in lieu of his guardian." *Sims, Ordinary, v. Renwick and Cobb*, 25 Ga. 58. Since, however, the suit was in fact prosecuted for the benefit of the wards, they are entitled, upon becoming of age, to be made parties to it, to assume its management and control, and to enjoy any benefits which may be obtained by means of it.

One of the issues made by the application for substitution concerns the ownership of the cause of action, and the plaintiff, apparently in utter obliviousness of the fact that a moral

order pervades the universe which legal systems seek to emulate and aid, now undertakes to deny that the note and mortgage belonged to his wards at all. In spite of the circumstance that in a contest in the probate court he proved against his wards that they were such owners, in spite of the fact that he obtained allowances out of their estate, on the ground that they were such owners, and in spite of the fact that he undertook to turn over the paper to them as such owners, he now calmly asserts that his original conduct amounted to a conversion of the funds of the infants whose property he had been appointed to guard, and upon that fraud attempts to build an argument which, if valid, would result in depriving the owners of both their money and their securities. This claim of the plaintiff is stated in order that he may not be under the impression that it has been overlooked. Its legal character and conscientious quality need no elucidation. The finding of the trial court in opposition to it is sustained both by the law and by the evidence. The refusal of the former minors to accept the note and mortgage immediately upon its tender, after their defeat in the probate court, is urged against them. What detriment the plaintiffs in error have suffered on this account, so that it may lie in their mouths to deny to the applicants a right of recovery, is not disclosed. The possession of the note and mortgage by the substituted plaintiffs is not essential to a vindication of their rights, but, under the evidence and the findings, they are entitled to such possession, and the present custodian of the documents will doubtless yield them to the owners without tempting the power of the court.

Finally, it is urged that the court undertook to try and determine the title to personal property in a summary manner, upon a mere motion, without formal pleadings and without a jury, with the result that the plaintiff is turned out of court. The motion, however, distinctly asserted ownership of the note and mortgage and set forth clearly the facts relating to the claimant's title, and when the matter was called up in court for disposition the plaintiffs in error, without making any request that formal pleadings be filed, without making any suggestion that the matter should be tried as if it were of the nature of an interplea, without asking that it should go over to be heard with the merits, without any demand for a jury and without any objection whatever to the form of the proceeding, announced themselves ready for trial and proceeded to try the title to the note and mortgage in controversy. A record was made as in any other case, and the plaintiffs in error have abundantly shown that they have a complete and unhampered right to review in this court. Whether any other practice exists for the determination of such questions cannot be of much importance in this case. The one adopted appears to have been entirely satisfactory to the plaintiffs in error.

The court had jurisdiction to enter upon the inquiry, and the participating parties are effectually concluded by its result, except, of course, for trial errors reviewable as in other civil cases; and aside from the matter of waiver and estoppel by want of objection and by consent to the trial, the question of the finality of the proceeding is to be determined by regarding the substance of what was done rather than the form under which the result was reached. *Com'rs of Wilson Co. v. McIntosh*, 30 Kan. 234, 1 Pac. 572.

The judgment of the district court is affirmed. All the Justices concurring.

HUMBARGER et al. v. HUMBARGER.

(Supreme Court of Kansas. Dec. 9, 1905.)

1. EXCEPTIONS, BILL OF—AUTHORITY TO SETTLE—PROBATE COURTS.

Probate courts have authority to settle and sign bills of exceptions.

2. SAME—INCORPORATION OF EVIDENCE AND RULINGS.

To preserve the evidence and rulings thereon they should be made a part of a bill of exceptions, and where the bill itself recites that certain evidence and rulings are attached to and made a part of the bill of exceptions, and they are so plainly identified that no doubt can arise but that they were settled by the court as a part of the bill of exceptions, they may be so considered.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, §§ 13, 14, 29.]

3. APPEAL—RECORD—CONSTRUCTION—DATE OF PROCEEDINGS.

From a statement in the record that the hearing began on a certain date, where each successive step in the case, including the settling and signing of the bill of exceptions, is introduced by the term "thereupon," without naming any other date, it will be inferred that one step followed another without delay, and that all occurred on the date named in the entry.

4. EXECUTORS AND ADMINISTRATORS—PROCEEDING FOR DISCOVERY—SCOPE OF REMEDY.

The summary proceeding in the probate court, under section 3002 of the General Statutes of 1901, for the discovery and to compel the delivery of property or effects of an estate suspected of having been concealed, embezzled, or conveyed away, is not a proper remedy to enforce the payment of a debt to an estate or to try contested rights to property as between the representative of the estate and others.

5. SAME.

In a hearing upon a charge that a person who had given a promissory note, an asset of an estate, was concealing it, where it was developed that there was in fact no concealment of the note, and it was then proposed to extend the inquiry as to his liability upon the note, the court was justified in closing the investigation and discontinuing the proceeding.

(Syllabus by the Court.)

Error from District Court, Saline County.

Action by John Humbarger against Henry Humbarger and another. A judgment of the probate court for defendants was reversed on appeal to the district court, and defendants bring error. Reversed.

Z. C. Millikin, for plaintiffs in error.
David Ritchie, for defendant in error.

JOHNSTON, C. J. This was a summary proceeding begun in the probate court upon complaint of John Humbarger, an heir at law of Susan Humbarger, deceased, in which he alleged that his brothers, Henry Humbarger, George Humbarger, and Thurston Humbarger, were concealing money, property, and effects of the estate of Susan Humbarger, deceased, and asked that they be cited to appear and answer questions propounded to them by the court touching such concealment. A citation was issued and an examination had, at the end of which the probate court found that there was no concealment of the assets of the estate by the respondents, and the proceeding was discontinued. In the course of the hearing the probate court sustained objections to questions asked of Henry Humbarger, and to these rulings exceptions were taken. A bill of exceptions was presented to, and allowed by, the probate court, and this was made the basis of a proceeding in error in the district court. That court reversed the decision of the probate court, and of these rulings plaintiffs in error complain.

The first contention is that the district court had no jurisdiction to review the rulings of the probate court in the admission of testimony, because such rulings never became a part of the record. The ground of this claim is that the probate court had no power to settle and sign a bill of exceptions. Aside from the right of appeal from a decision of the probate court, express authority is given for the review of its judgments and final orders by a proceeding in error to the district court. Civ. Code, § 541. It is argued, however, that, as the jurisdiction of the probate court is limited, it has only such authority as is specifically conferred, and that the right to prosecute a proceeding in error from that court does not imply that it has authority to settle and sign a bill of exceptions. There appears to be express legislative authority for the settling and signing of a bill of exceptions by the probate court. The statute declares that probate courts are courts of record. Gen. St. 1901, § 1974. By another statutory provision courts of record and the judges thereof at chambers are given authority to settle and sign bills of exceptions, and also for extending time for doing so beyond the term. Laws 1901, p. 502, c. 275, § 1; Gen. St. 1901, § 4753.

It is next contended that the evidence and rulings were attached to, rather than embodied in, the bill of exceptions, and were not so preserved as to make them a part of it. It is true, a mere reference to papers or proceedings, without embodying them in the bill of exceptions, is not sufficient. They must be made a part of the bill of exceptions in some way, and so plainly identified as a part of it that no mistake can be made as to what is included in the bill. Here it is recited in the bill that the evidence is "attached hereto and made a part of this bill of excep-

tions." Since they are fully identified and specifically made a part of the bill, they cannot be ignored because of the manner in which they are incorporated into the bill, or because of the part of the bill in which they are placed. It is a better and safer method to place the proceedings and papers to be preserved in the body of the bill, preceding the signature of the judge, and thus avoid any question as to what is incorporated in it. The courts give a liberal construction to a bill and are inclined to disregard mere formal defects and irregularities which do not cloud the record or violate a statutory requirement. In this case there can be no misapprehension as to what the bill contains, nor that the evidence and rulings in question were settled by the probate court as a part of the bill of exceptions.

Although questioned, it sufficiently appears that the bill was settled in good time. The final hearing began on February 8, 1904, and in the recitals of the subsequent steps, including the order of the court and the settling and signing of the bill of exceptions, each is introduced by the word "thereupon." So used, the word means that one step followed another immediately and without delay, and justifies the conclusion that all occurred on the date of the hearing. *Dewey v. Linscott*, 20 Kan. 684; *Hill v. Wand*, 47 Kan. 340, 27 Pac. 988, 27 Am. St. Rep. 288.

The final question raised in the case is, did the probate court err in rejecting further evidence and in discontinuing the proceeding? The asset of the estate involved in the inquiry was a promissory note given by Henry Humbarger to his father. The only thing charged in the complaint was concealment. Without hesitation Henry Humbarger testified that the note had been given, and he stated the amount for which it was given, and, further, that it had been fully paid and the debt discharged. He went further and stated that it had been paid partly in money, partly in services, and partly in board. The complainant tried to push the inquiry still further as to the payment of the note and as to whether Henry's liability thereon had been discharged. His liability on the note could not be determined in that proceeding by that court. It was a summary proceeding brought under section 3002 of the General Statutes of 1901. That statute provides: "Upon complaint made to the probate court by the executor, administrator, creditor, devisee, legatee, heir, or other person interested in the estate of any deceased person, against any person suspected of having concealed, embezzled or conveyed away any money, goods, chattels, things in action, or effects of such deceased, the said court shall cite the person suspected forthwith to appear before it and to be examined on oath or affirmation touching the matters of the said complaint." The testimony of the parties examined is to be reduced to writing and filed in the probate court, and, if the court is of opinion that the

accused is guilty of either concealing, embezzling, or conveying away any of the assets of the estate, it may order and compel the delivery thereof to the executor or administrator or person entitled to receive the same. Gen. St. 1901, §§ 3002-3006. The purpose of the proceeding is to make discovery and compel production of the property of an estate suspected to be concealed, embezzled, or to have been conveyed away, but it cannot be employed to enforce the payment of a debt or liability for the conversion of property of an estate, or to try controverted questions of the right to property as between the representative of the estate and others. One purpose is to perpetuate evidence against the party charged, to be used if necessary in an action brought for the recovery of the property in a court of competent jurisdiction. In *Moss v. Sandefur*, 15 Ark. 381, it was held under a similar statute that it was intended to compel a discovery and delivery of the assets of an estate which were secretly and unlawfully held, but that it did not invest the probate court with jurisdiction of contested rights and matters of litigation as to the title to property. A like provision was before the Supreme Court of Illinois, in *Dinsmoor v. Bressler*, 104 Ill. 211, 45 N. E. 1086, where it was said: "The summary proceeding in the probate court to compel the production and delivery of property 'is not the proper remedy * * * to try contested rights and title to property between the executor and others.' 2 Woerner, Adm'n. § 325, p. 681. 'Nor does the power conferred upon probate courts to subpoena and examine parties alleged to conceal or withhold property of the estate authorize such courts to try the title to the property in dispute.' 1 Woerner, Adm'n. § 151, p. 347; Schouler, Ex'rs, § 270. If sections 81 and 82 could be used to settle contested rights to property as between executors and administrators on the other, they would operate as an infringement upon the constitutional right to trial by jury, as they contain no provision for a jury trial." See, also, *In re Wolford*, 10 Kan. App. 283, 62 Pac. 731; *Howell v. Fry*, 19 Ohio St. 556; *Ex parte Casey*, 71 Cal. 269, 12 Pac. 118; *Gardner v. Gillihan*, 20 Or. 598, 27 Pac. 220; *Gibson v. Cook*, 62 Md. 256; *In re Beebe*, 20 Hun (N. Y.) 462. Here the charge was concealment, and, when the testimony developed that there was no concealment of the note—the subject of inquiry—the end of the investigation was reached. No doubt existed that there was a note and that it belonged to the estate, and the only question left was whether it had been paid by Henry Humbarger, or whether he was still liable for all or part of it. The proceeding was a proper remedy to compel the delivery of the note itself, if it had been concealed, but not to enforce its payment, nor to try the title to the note as between parties claiming to own it. Courts will not be disposed to hamper such investigations so

long as there remains a question whether effects of the estate have been concealed, embezzled, or conveyed away; but, where, as in this case, the charge is not sustained, and it appears that there was no concealment, further inquiry as to the payment and whether there still existed any liability is useless and beyond the scope of the proceeding.

The probate court rightly refused to go into the question of the respondent's indebtedness, and therefore the judgment of the district court must be reversed, and the cause remanded for further proceedings. All the Justices concurring.

MORELAND v. DEVENNEY et al.

(Supreme Court of Kansas. Dec. 9, 1905.)

1. CHAMPERTY—CONTRACT OF ATTORNEY.

An agreement of attorneys to carry on a litigation for a share of the amount to be recovered at their own costs and expense is contrary to public policy, champertous, and void, and no recovery can be had thereon.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Champerty and Maintenance, § 26.]

2. SAME—SERVICES RENDERED.

Nor can they recover upon a preliminary negotiation which merged into the void written agreement, or upon quantum meruit for the services rendered under the illegal agreement.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Champerty and Maintenance, § 51.]

(Syllabus by the Court.)

Error from District Court, Johnson County; W. H. Sheldon, Judge.

Action by A. Smith Devenney and H. L. Burgess against Jennie C. Moreland. Judgment for plaintiffs, and defendant brings error. Reversed.

S. T. Seaton, for plaintiff in error. H. L. Burgess and A. Smith Devenney, pro se.

JOHNSTON, C. J. This was a proceeding by A. Smith Devenney and H. L. Burgess to recover \$750 from Jennie C. Moreland for legal services rendered in her action against the St. Louis & San Francisco Railroad Company. In their petition they set forth the following contract: "Whereas on the 21st day of December, 1903, near Godfrey, Kansas, my husband, Asa Moreland, was killed by the Saint Louis & San Francisco Railroad Company, and whereas I, his widow and next of kin of the deceased for my benefit and the benefit of my children, desire compensation for his death from said railroad company. Now, in order to obtain such compensation, I hereby employ A. Smith Devenney and H. L. Burgess, attys. at law of Olathe, Kansas, to obtain by suit or compromise, all compensation as damages for the value of the life of my said husband to me from said railroad company, in consideration of their services in the premises they shall have one-fourth of all moneys recovered by suit or otherwise, when same is collected. And it is expressly understood and agreed that I am not required to

advance or pay any moneys for costs or for any other purpose whatsoever. The said A. Smith Devenney and H. L. Burgess, attys. at law hereby agree to accept said employment on the terms and for the consideration above stated. And it is expressly agreed that my said attorneys shall not compromise said case without my consent first having been obtained thereto in writing. Signed in duplicate this December 29th, 1903, at Olathe, Kansas. Jennie Moreland, A. Smith Devenney, H. L. Burgess." On a demurrer to the petition the trial court held the contract to be champertous and void. In an amended petition they set forth the oral negotiations which led up to the written contract, but did not mention or rely on it. They asked a recovery for the value of the services rendered in her behalf, and by the verdict they were awarded \$600.

There is no doubt as to the character of the transaction between the contending parties, and the case may be disposed of on the testimony of the plaintiffs. While there was an attempt to ignore the written contract, its existence and the negotiations preliminary to it were conceded. For a share of the moneys which might be recovered the attorneys agreed to conduct the litigation at their own cost. The express provision in the contract, relieving Mrs. Moreland from paying costs or other expenses, is open to no other interpretation. Such an agreement under our law is champertous, contrary to public policy, and void. At common law champerty was an offense, and from the beginning champertous agreements were deemed to be contrary to public policy and unenforceable. The common-law doctrine has been recognized and applied in this state. In *Railroad Co. v. Johnson*, 29 Kan. 218, attorneys orally agreed with their client to prosecute an action for damages in her name against a railroad company for a portion of the amount recovered, and that they would pay the expense of the prosecution, and later she made a writing assigning to them the portion of the judgment they were to receive. It was said of that contract: "It has every element of champerty in it. It was prosecuted for a portion of the expected judgment, and for no other consideration, and Smith and Douglas agreed to pay all the costs and expenses necessary to be paid in such prosecution. This makes the contract unquestionably champertous." *Aultman v. Waddle*, 40 Kan. 195, 19 Pac. 730, recognizes the legality of contingent fees and sanctions the right of an attorney to carry on a litigation for a percentage of the thing to be recovered, where he does not relieve the client from the costs and expenses of the suit, but it approves the rule of *Railroad Co. v. Johnson*, supra, that an agreement by an attorney to carry on the litigation for a share of the amount to be recovered at his own costs and expenses is against public policy and void. The district court, therefore, rightly held the contract to be

champertous, and we think it should have gone further and held that no recovery was permissible for the value of the services performed.

Counsel contend that they are entitled to recover on the oral negotiations and for the value of the services rendered. It is impossible, however, to separate the oral negotiations from the contract in which they culminated. The terms of the contract were discussed between the parties with a view of entering into a contract, and all the preliminary negotiations merged into the written contract as made. The testimony shows clearly enough that there were not two contracts between the parties, and the attempt to treat some of the preliminary talk as an oral contract apart from the written one is not tenable. There was but one transaction, one contract, and, as that was tainted with the vice of champerty, the negotiations leading up to the contract are likewise affected. It is made clear that Mrs. Moreland insisted that she should be relieved of all costs and expense, and it may be safely said that but for this provision there would have been no employment. The services were rendered under an agreement which was void, not because of a mere want of power to make it, but because it was against public policy, and in such a case it is held that no recovery can be had upon the contract or for the value of the services rendered under it. *Bowman v. Phillips*, 41 Kan. 364, 21 Pac. 230, 3 L. R. A. 631, 13 Am. St. Rep. 202.

In Minnesota an action was brought by an attorney in which he set up a contract which was barratrous and against public policy, but the petition was drawn so as to admit of a recovery either under the written contract or upon a quantum meruit for the services rendered in the litigation. In declaring the law governing the case the Supreme

Court said: "Where the illegality of the conduct of a party enters into the very inception of a scheme by which the litigation itself is illegally instigated, even if the illegal express contract is set aside or ignored, this original vice in the scheme still exists; and a party to it cannot purge his conduct, and obtain the benefit of the litigation which he has thus unlawfully instigated, by ignoring the original special contract, and suing on a quantum meruit. Neither could he accomplish that result by attempting to abandon the original contract, and make a new one in furtherance of the unlawful scheme." *Gammans v. Gulbranson*, 78 Minn. 21, 23, 80 N. W. 779. A contract of a somewhat similar character was before the Supreme Court of Michigan in the case of *Willemin v. Bateson*, 63 Mich. 309, 29 N. W. 734, and the contention was made that, if the contract was void and should be disregarded, a recovery might be had for the value of the services given. The court remarked: "We entirely agree with the claim that such a contract is in direct violation of public policy. It was an agreement which made plaintiff's right to fees depend on whether or not he gave judgment for the party suing before him. It would be difficult to conceive any more palpable violation of judicial duty. But it is a remarkable claim that, where work is done under such a contract, the contract may be treated as null, and the services regarded as rendered properly. No one can use a void contract as a means of getting better terms than he could have claimed under it. The whole transaction is covered by the same taint, and must be treated as beyond the protection of courts of justice."

Under their own testimony the plaintiffs below were not entitled to recover, and therefore the judgment must be reversed, and the cause remanded for further proceedings. All the Justices concurring.

TAYLOR v. MODERN WOODMEN OF AMERICA.

(Supreme Court of Kansas. Dec. 9, 1905.)

1. INSURANCE—BENEFIT CERTIFICATE—CONDITIONS—INTERPERANCE.

A by-law of a fraternal insurance society which provides that, if any member heretofore or hereafter adopted shall become intemperate in the use of drugs, the benefit certificate held by such member shall by such acts become and be absolutely null and void as to benefits, and all payments made thereon shall be thereby forfeited, does not apply to the case of a member who, prior to the enactment of such by-law, had become intemperate in the use of drugs, and continued so thereafter.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Insurance, § 1855.]

2. SAME—ACTION ON CERTIFICATE—PLEADING AND PROOF.

Where, in an action upon a benefit certificate issued by a fraternal insurance society, the answer sets up as a defense a ruling of the clerk of the local camp refusing an assessment on certain grounds, and that no appeal, as provided by the by-laws of the society, was taken, and upon the trial the evidence shows a refusal of the clerk to receive the assessment on the ground that the beneficiary had been suspended by the camp for another and different reason, there is a fatal variance between the answer and the proof as to this defense.

3. TRIAL—DIRECTING VERDICT.

Where plaintiff proves a prima facie case, and defendant introduces testimony which raises a conflict in the evidence, it is error for the court to direct a verdict against plaintiff, notwithstanding there may be some issues upon which the only positive testimony is that introduced by defendant. It is for the jury to determine the credibility of the witnesses and the weight of the testimony.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 342, 343.]

(Syllabus by the Court.)

Error from District Court, Jackson County; Wm. I. Stuart, Judge.

Action by Edna P. Taylor against the Modern Woodmen of America. Judgment for defendant, and plaintiff brings error. Reversed.

John D. Myers, for plaintiff in error. Benj. D. Smith and Ellis, Cook & Ellis, for defendant in error.

PORTER, J. Plaintiff in error is the wife of Dr. T. E. Taylor, who was a member of the local camp of the Modern Woodmen of America at Circleville, Kan. He died in March, 1890, holding a benefit certificate of \$2,000 in the society. This is an action to recover upon the certificate. The same case was before the court in *Modern Woodmen v. Taylor*, 67 Kan. 368, 71 Pac. 806, and was reversed for the reason that there was no allegation in the petition, nor any showing made, that Dr. Taylor had appealed from the ruling of the clerk of the local camp in refusing his assessment, and for error in the instructions which informed the jury that the appeal from the clerk's ruling provided for in the by-laws was permissive and not obligatory. Upon the second trial the court below gave a peremptory instruction to find

for defendant, and plaintiff brings this appeal.

The record presents in some important particulars a case entirely different from the one reviewed before. On the former trial the clerk of the local camp, George Starcher, testified that he refused the assessment "on the ground that he was intemperate and used cocaine or opiates, and therefore, according to the by-laws, we could not receive his assessment." The benefit certificate upon which the action is based contains a provision that it should become null and void if the holder became so far intemperate in the use of alcoholic drinks or opiates as permanently to impair his health or to produce delirium tremens. Section 276 of the by-laws prohibits the clerk from receiving dues or assessments "from a member whom he knows to be addicted to the intemperate use of intoxicants or opiates to such an extent as to be frequently under the influence thereof or intoxicated, or use drugs to such an extent as to injure his health." Section 320 of the by-laws provides for an appeal from the decision of the clerk in refusing dues or assessments to the local camp, and another section (332) makes the decision of the clerk in refusing an assessment final and conclusive, unless appealed from as provided for in section 329. For the reason that the petition did not allege an appeal, and no showing was made that an appeal had been taken, or any excuse or waiver thereof, the cause was reversed and remanded. For a fuller statement of the by-laws, see the former opinion. Upon the second trial the same clerk testified that he refused the assessment for the reason that Dr. Taylor had been suspended by the local camp for being in arrears. He related what took place at a meeting of the local lodge on the evening of October 30, 1899, beginning with an informal gossip, before the lodge was called to order, as follows: "Then they drifted onto Taylor's matter, and asked me if I did not know it, and they said they had taken him away. This was on our meeting night, about October 30th, and they had taken him away. They told the reason why they had done so, that he was using opiates to excess, and then they dropped the question from then until the lodge opened up and got in working order. They went ahead with their work like any other business, and, when they came to that item, they brought it up before the lodge while all the members were there, and explained matters, and I said he was in arrears. I says, 'according to our by-laws, we will have to drop him,' and they said, if he is in arrears, to let him drop, and to instruct the assistant clerk not to accept any more dues, and I myself not to accept any more assessments or dues from that time. That was about all that was done then. I instructed the assistant clerk that no money was to be received from him until we heard from the head camp."

Plaintiff allowed this testimony to be given without objection, but moved to strike it out, as not the best evidence. The ground of the motion was too narrow. The evidence was irrelevant and immaterial. The answer did not plead a suspension by the camp, but did specially plead a suspension by the refusal of the clerk to accept the assessment upon other grounds, namely: "For the reason that said local clerk knew said T. E. Taylor to be in impaired health, and further, that he knew said T. E. Taylor to be addicted to the intemperate use of intoxicants and opiates to such an extent as to be frequently under the influence thereof, and that he knew and believed that said T. E. Taylor used drugs to such an extent as to injure his health." The answer further avers that this decision of the clerk, "with the reasons therefor," was communicated to Dr. Taylor at the time of the refusal of the tender of the delinquent assessment, and that no appeal from the decision of the clerk was ever made. It is apparent that the proof offered, not only differed materially from that given on the former trial, but it wholly failed to establish this particular defense, which, in the answer, is termed the "third defense." The by-laws provide for an appeal from the ruling of the clerk to the local camp, from the decision of the local camp to the executive council, and from the latter to the head council; but the evidence upon this trial shows a decision or ruling by the local camp which was merely communicated to Dr. Taylor by the clerk, and which was not a ruling of the clerk. Nor were the reasons given for the ruling the same as those claimed in the answer. As was said in the dissenting opinion of Mr. Justice Smith in the former case: "Forfeitures are not favored in the law, and courts lean against them." Defendant in error, in order to establish a forfeiture of the benefit certificate, must do so by strict compliance with the provisions of the contract itself, the by-laws of the order, and the rules of pleadings and evidence. Courts, "in construing the conditions of membership when a forfeiture is claimed, will preserve, if possible, the equitable rights of the holder of the certificate of membership." *Modern Woodmen v. Jameson*, 48 Kan. 718, 30 Pac. 460.

For convenience we shall now refer to what is termed in the answer the "second defense," which, briefly stated, is that Dr. Taylor failed to pay the October, 1899, assessment. C. A. Oursler, the father of Mrs. Taylor, testified that he tendered to Meeks, the assistant clerk of the camp, Dr. Taylor's assessment for October on the 20th day of October, 1899, and that Meeks said he could not receive it. Mrs. Taylor testified that on that same date she handed to her father 85 cents, the amount of the assessment, and asked him to take it to the clerk, as Dr. Taylor was out of town; that before leaving the doctor charged her to be sure to attend

to the payment. Her brother, R. L. Oursler, a member of the camp, testified that he paid his own assessment to Mr. Meeks on October 23, 1899, and asked him if Dr. Taylor's assessment had been paid for that month, as the doctor was away from home, and Meeks said that it had not been paid. Witness then said he would go and see his father about it and have it attended to; that Meeks replied that C. A. Oursler had been there several days before and made a tender of the assessment, but that he could not receive it. Meeks was a witness for the defense, and admitted that the tender was made by Mrs. Taylor's father, but fixed the date as of November 9th. Notwithstanding this direct conflict upon the material issue raised by the second defense, counsel for defendant in error argue that "there was no real conflict in the evidence adduced upon the trial—absolutely no conflict as to matters material to the determination of the issues." The answer set up three defenses. It is said in the briefs that the trial court gave the peremptory instruction to find for defendant upon the theory that there was no conflict in the testimony upon the issues raised by the first and third defenses. The record is silent as to this, but it is probable that such was the view taken by the court, as there can be no question of a direct and substantial conflict upon the issues raised by the second defense.

We now come to the first defense, which is that the benefit certificate contained a provision that the same should be void, if the holder of it should become intemperate in the use of drugs to such an extent as to "permanently impair his health." It also sets up an amendment to the by-laws, adopted June 9, 1899, known as section 13, which reads as follows: "If any member of this society, heretofore or hereafter adopted, shall become intemperate in the use of alcoholic drinks or in the use of drugs, the benefit certificate held by said neighbor shall by such acts become and be absolutely null and void as to benefits, and all payments made thereon shall be thereby forfeited." It is then alleged that Dr. Taylor, for a period of 18 months prior to the time of his death, became and was intemperate in the use of drugs, and that for that period, became addicted to and did use them to such an extent as to permanently impair his health. This defense is grounded in part upon the violation of section 13 of the by-laws, and in part upon the violation of the warranty clause in the benefit certificate. It will be considered from both standpoints, as it is contended by plaintiff in error that section 13 of the by-laws, having been adopted after the issue of the benefit certificate, cannot be given a retroactive effect, and that it was error to permit it to be introduced in evidence, as a violation of its provisions furnished no ground of defense. It will be observed that there is no penalty provided by

this amendment for a member who is or shall be addicted to the use of drugs at the time the amendment was adopted, June 9, 1899. The answer makes no claim that Dr. Taylor's condition or habit was acquired after the adoption of the amendment. The testimony of Dr. Simpson, the principal witness offered by defendant to prove the habit, is that he first saw the doctor April 15, 1899, and from the examination made at that time his opinion was that Dr. Taylor had been using morphine for at least two years. This examination was made prior to the adoption of by-law 13, and the question is whether this by-law is to be interpreted as intended to apply to a member who had already acquired the habit and had already become intemperate.

This court, in a recent case decided at this term (*Grand Lodge A. O. U. W. v. Haddock*, 82 Pac. 583), has had occasion to review the authorities upon a similar question. The by-law in that case provided as follows: "Any member of the order who shall after August 1, 1898, have entered, or who shall hereafter enter, into the business or occupation of selling by retail intoxicating liquors as a beverage, shall stand suspended from any and all rights to participate in the beneficiary fund." It was held that the by-law in that case "does not in terms apply to the case of a member who, prior to that time, was engaged in such business, and who remains in it continuously thereafter." In that case all payments made upon the certificate after the adoption of the amendment were tendered back to Mrs. Haddock after her husband's death. In the case at bar defendant claims apparently that it can accept and retain the payments made upon Dr. Taylor's certificate during the period from 18 months prior to his death, when it is alleged he became addicted to the use of drugs, and up to the time his assessment was refused, four months prior to his death, and still defeat an action upon the certificate by showing that he had become addicted to the use of drugs prior to the adoption of the amendment. It is not alleged in the answer that the knowledge of his habits in this respect was acquired by defendant after the acceptance of the previous assessments. In construing the by-law in the *Haddock Case*, *supra*, Mr. Justice Mason, speaking for the court, said: "A more difficult question is whether the law adopted in 1898 is to be interpreted as intended to affect the status of one who, like Haddock, having already engaged in the business of selling liquor, continued such occupation after that time without interruption. Construed literally, it has no application to such a case. Haddock did not enter into the forbidden occupation after August 1, 1898. He entered into it long before that time, and remained in it continuously. To make the expressions used apply to one in his situation, it would be necessary to give them a very liberal, if not strained, construction.

No freedom of interpretation, however, should be indulged to accomplish the forfeiture of property rights. If it had been the design of the framers of the new law that it should apply to members who were already liquor sellers, it is reasonable to suppose that language would have been employed plainly indicating such purpose, and that there would have been express reference to those who remained in the business, as well as to those who entered it. In that case it seems probable, too, that some time would have been fixed within which such persons might save their rights by changing their occupation. It is hardly conceivable that there was a deliberate intention to make the amended law operate as an immediate decree of expulsion against any members who were at the time engaged in the interdicted business. Yet such would be the effect given it by the interpretation proposed by the plaintiff in error. The provision that a member's certificate should become null and void from the date of his engaging in the business also supports the theory that the operation of the enactment was intended to be wholly prospective. We conclude that the law of 1898 did not affect, and was not intended to affect, the standing of Haddock."

We think the reasoning of that case and the authorities cited apply with equal force to section 13 in the case at bar. A man engaged in selling liquor can quit the business with much less difficulty than one of his steady customers can quit the habit of drinking it, or than one confirmed in the use of drugs can throw off the slavery of his habit and acquire his independence. In construing the provisions of such contracts courts should consider the frailties of human nature which, doubtless, were in the minds of the framers of the amendment to these by-laws. As is said in plaintiff's brief, this section "provides no penalty unless the members shall become intemperate. There is no penalty for one who is or shall be intemperate at the time of the enactment of the by-law. By the wording of this section it is manifest that the society intended making intemperance an offense only as to those members becoming intemperate after the by-law was passed. According to Webster, the word 'become' means to pass from one state to another; to enter into some condition, by a change from another condition; or by receiving new or additional properties or qualities. It is not alleged by defendant that Taylor's condition was different after the passing of section 13 than it had been before." Section 13 furnished no ground of defense to the action, and it was error to admit it in evidence.

The contention of defendant is, however, that the court was justified in giving the peremptory instruction, because the evidence was conclusive to the effect that Dr. Taylor had become intemperate in the use of drugs to such an extent as permanently to impair his health, and that this furnished a com-

plete defense aside from the provisions of section 13, inasmuch as this condition is in violation of the provisions of the benefit certificate itself. Dr. Simpson, a witness for defendant, refused to say that Dr. Taylor's health was "permanently" impaired, and no other witness testified upon this point. Defendant cites *Railway Co. v. Withers*, 69 Kan. 620, 77 Pac. 542, 78 Pac. 451, where it was held that a verdict should have been directed. That case has no application here. The opinion expressly states that the evidence of defendant added little to that offered by plaintiff. The plaintiff's own testimony, moreover, established contributory negligence sufficient to bar a recovery. In *Kelley v. Ryus*, 48 Kan. 120, 29 Pac. 144, it is said: "Where evidence is introduced on the trial which, if uncontradicted, would fairly prove all that is necessary for the plaintiff to prove in order to make out his case, it is error for the trial court to instruct the jury to find for the defendant, although such evidence might be contradicted by other evidence. The court has nothing to do with any conflict in the evidence, but must submit the question as to which is true and which not to the jury." To the same effect, see *Sullivan v. Phenix Ins. Co.*, 34 Kan. 170, 177, 8 Pac. 112; *Brown, Adm'r. v. A., T. & S. F. R. Co.*, 31 Kan. 1, 1 Pac. 605. The recent case of *Railway Co. v. Geiser*, 68 Kan. 281, 75 Pac. 68, is in point. That was an action for damages by fire, alleged to have been caused by the negligent operation of a locomotive engine. The court said: "In the case at bar sufficient evidence was offered by the plaintiff to make out a prima facie case. The railway company then offered proof tending to establish the fact that the engine which set out the fire was equipped with the latest and best appliances to prevent the escape of fire therefrom, was in good repair, and was being skillfully handled by competent employes. Here was a case of evidence against evidence. * * * If it is a question of evidence against evidence, or of a conflict of evidence, upon what theory would the court be authorized to take the decision out of the hands of a jury and pronounce, as a matter of law, that the railway com-

pany's witnesses were in all respects to be believed, and that their conclusions as to the condition of the engine and the skill of the employes were beyond the pale of contradiction?" The contention of the railway company in that case was that, the statutory presumption of negligence on the part of the railway company having been rebutted by positive evidence on behalf of defendant, the court should have directed a verdict. Here it is claimed that the prima facie case, made by the plaintiff was rebutted by the defendant's witnesses as to the intemperate use of drugs, and therefore the verdict should have been directed. But to do this the court would have to assume that the testimony of defendant's witnesses was to be taken as true as a matter of law. The rule which authorizes a trial court to direct a verdict is governed by the same principles which authorizes that court to sustain a demurrer to the evidence. The principles differ slightly in their application. There was a conflict of the evidence upon all the issues raised by the pleadings, and the case should have been submitted to the jury.

We have examined the reply, and do not think that plaintiff has, by pleading knowledge on the part of defendant with respect to the habits of Dr. Taylor, thereby admitted the use by him of drugs to the extent claimed in the answer. As the case must be reversed, it is proper to mention some errors complained of in reference to testimony. It appears that over the objections of plaintiff the clerk was permitted to state, in answer to several questions, what had occurred at meetings of the local camp, all of which were matters of record. He was also permitted to state the contents of a letter received from the head camp. All of these were mere conclusions, and, besides, no attempt was made to lay a foundation for secondary evidence. Some of the records of the local camp being offered by defendant, it was proper for plaintiff to introduce the entire record of the proceedings, if any of the records were proper under the pleadings as they stood.

The cause will be reversed, and remanded for further proceedings in accordance herewith. All the Justices concurring.

H. R. KAMM & CO. v. W. E. SLOAN & CO.

(Supreme Court of Kansas. Dec. 9, 1905.)

APPEAL—REVIEW—HARMLESS ERROR.

A trial court should clearly state to the jury the issues to be tried by them. It is not good practice to incorporate the pleadings into the instructions. Where, however, the pleadings are made up of a short petition alleging a contract, a breach, and resulting damages, and an answer which is a general denial, it is not prejudicial error for the court, after having plainly stated the issues, to incorporate the petition into the instructions.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 528.]

(Syllabus by the Court.)

Error from District Court, Sedgwick County; Thos. C. Wilson, Judge.

Action by W. E. Sloan & Co. against H. R. Kamm & Co. Decree for plaintiff, and defendant brings error. Affirmed.

I. P. Campbell & Son, for plaintiff in error. Dale & Amidon, for defendant in error.

GREENE, J. The plaintiff below recovered judgment for damages resulting to him from a breach of contract by defendant. The defendant prosecutes error.

The plaintiff pleaded an offer made to him at Wichita, Kan., by the defendant at New Castle, Colo., to sell and ship to him at Wichita six cars of potatoes of a particular kind and quality, for a given price, shipments to begin on or about October 26, 1903, and his acceptance of defendant's proposition, and a neglect and refusal by the defendant to comply with the contract, in consequence of which plaintiff was damaged \$315. The answer was a general denial. It would serve no purpose to discuss the facts or the evidence in this case. Suffice it to say that the evidence supports all of the material findings of the jury, and such findings made it necessary for the court to render judgment for the plaintiff.

Contentions of the plaintiff in error not disposed of by the above conclusion are, first, that the court misconceived the theory upon which the action was brought, and consequently his instructions were not applicable. Upon this question it is contended that the action was brought and tried on the theory that the plaintiff was selling potatoes on commission, therefore the failure of the defendant to fulfill its contract could only result in a loss to plaintiff of his commission for selling them, and that the instructions were based on the theory that plaintiff claimed

to be a dealer, and his damages should be measured by the difference between the contract price of the potatoes and the market value at the time and place when and where they were to be delivered. The theory of the action was not misconceived by the court. The action was not brought by plaintiff as a commission merchant, but as an independent dealer.

Another contention is that the court erred in copying the petition and exhibits into the instructions and submitting them as a whole to the jury. It is much better practice for the court to succinctly state the issues to the jury. In many cases the pleadings do not strictly conform to the Code in simplicity and therefore would tend to confuse rather than to elucidate the questions before the jury. *Railroad Co. v. Eagan*, 64 Kan. 421, 67 Pac. 887; *Stevens v. Maxwell*, 65 Kan. 835, 70 Pac. 873; *Myer v. Moon*, 45 Kan. 580, 26 Pac. 40; *Railroad Co. v. Dalton*, 66 Kan. 799, 72 Pac. 209. In this case, however, the petition was short, and the issues were distinctly stated in the instructions to the jury. Therefore it cannot be said that it was prejudicial error to incorporate a copy of such a petition in the instructions.

Another contention is that the amount awarded the plaintiff is grossly excessive, tending to indicate that it was the result of prejudice, and for that reason the verdict should have been set aside. The amount recovered was \$315 and interest. The plaintiff claimed that his purchase was six cars. The evidence is that a car holds about 500 bushels, and that before accepting the defendant's offer the plaintiff had sold 1,500 bushels, at an advance of 10 cents per bushel and 1,500 bushels at an advance of 11 cents per bushel. A computation shows plaintiff's loss because of defendant's breach of contract was \$315. To this amount the jury added interest amounting to \$5.51. It does not appear from the petition that the plaintiff asked for interest, but the court in one of its instructions told the jury that, if they found for the plaintiff, they might award him 6 per cent. interest on the amount so found due, and it was in pursuance of this instruction that the jury computed the interest. It cannot be contended that the awarding of this additional amount, under the instruction of the court, is conclusive evidence that the verdict was the result of passion or prejudice. There was no complaint of this instruction.

The judgment is affirmed. All the Justices concurring.

COMSTOCK v. ROBERTSON.

(Supreme Court of Kansas. Dec. 9, 1905.)

VENDOR AND PURCHASER—BONA FIDE PURCHASER.

Under the facts in this case, the grantor being estopped from asserting any title to the land in controversy as against the defendant in error, the plaintiff in error knowing the facts which estopped his grantor or having knowledge which put him upon his inquiry which evidently would have led to a knowledge of such facts, acquired no title by his quitclaim deed which he could assert against the defendant in error.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, § 290.]

(Syllabus by the Court.)

Error from District Court, Clark County; E. H. Madison, Judge.

Action by Claude M. Comstock against Lydia M. Robertson. From a judgment for defendant, plaintiff brings error. Affirmed.

Plaintiff in error brought suit in ejectment to recover certain described lands in Clark county, of which he alleged the defendant in error held unlawful possession and unlawfully kept him out of possession. The briefs of plaintiff and defendant indicate there was no controversy as to the facts. The land in question was owned by F. E. Chaddock who was a nonresident of the state. Arnold & Carson, a firm of abstractors, of which C. W. Carson was a member, brought suit for \$5.60 against Chaddock for making an abstract, and attached this land, recovered judgment on void service by publication, had the land sold at sheriff's sale, and C. W. Carson received and receipted the amount of the judgment. William Riley was the purchaser at the sheriff's sale, and thereafter he conveyed the land to Heffner, and Heffner conveyed the same to the plaintiff by a deed called "a special warranty deed," but which is in fact only a quitclaim deed. It is admitted that the sheriff's deed is void as shown by the records and files in the office of the clerk of the district court in the same county where the land is located, but there was no direct evidence that the plaintiff in error, plaintiff below, had any actual knowledge of the facts shown thereby. It is also admitted that the plaintiff's grantor, Carson, having procured the void judgment and the sheriff's sale, and the confirmation of the sale and issuance of the sheriff's deed thereunder, and having thereafter accepted the proceeds of such sale, was estopped from denying the title of the purchaser and grantees of the purchaser to the land in question. It is not admitted nor proved, except by the circumstances, that the plaintiff had actual knowledge of the facts constituting such estoppel. It is claimed that the plaintiff had knowledge of such facts as would have put him upon his inquiry, and even directed his attention to a source of information which would have fully apprised him. Of this last proposition the court took the affirmative view, and found for the de-

fendant. The correctness of this finding is the only question in the case.

Francis C. Price, for plaintiff in error.
Harry J. Bone (J. S. West, of counsel), for defendant in error.

SMITH, J. (after stating the facts). Here is the situation: The plaintiff is about to acquire a quitclaim deed to 160 acres of land for \$100, one-half the government price for pre-emption lands. He goes to the office of the register of deeds and traces the title from the United States to F. E. Chaddock. The next entry is of a deed of all the interest of F. E. Chaddock in said lands by the sheriff of the county to William Riley, then a deed from Riley to Heffner, and then one from Heffner to Lydia M. Robertson. Then we imagine he says: "What is this? a deed from F. E. Chaddock and wife to C. W. Carson—the very man that proposes to sell to me? If I cannot prove the contrary the sheriff's deed conveyed good title to Riley. Gen. St. 1901, § 4935. I have a great bargain here if I can get this land, and I will examine further. I see by the sheriff's deed that the sale was had in the case of Arnold & Carson v. F. E. Chaddock. Now for the files in the case. Why, this man, C. W. Carson, made the affidavit for attachment and says he is a member of the firm of Arnold & Carson, and this docket shows he got the proceeds of the sale. How about the service of the summons? There was no service and the affidavit for publication is bad and the judgment is void. I will just forget I saw anything but the summons returned 'Not found' and the worthless affidavit, and I will get this land."

In short, it does not seem possible, considering the identity of the names and the fact that the petition and affidavit for attachment in the case of Arnold & Carson v. Chaddock, shows Carson's relation to the case and that he was in the public business of abstracting, presumably at the county seat, that plaintiff could have discovered from an examination that the judgment against Chaddock was void without also discovering that his grantor, C. W. Carson, was estopped from profiting thereby, and that Carson acquired no title from Chaddock, which he could assert against the purchaser at the execution sale or against his grantees. If so, the plaintiff is also estopped. The records of the register of deeds office and of the clerk of the district court put him upon his inquiry, as did also his deed from Carson, and the very records that suggested the inquiry contained all the information necessary to establish the estoppel, save alone, the identity of the C. W. Carson named in the action with the C. W. Carson, who was grantor in the deed to plaintiff. Abundant sources of information upon this latter question were also suggested by the papers in the clerk's office, which the tracing of his title compelled him to examine. It would be futile to cite authorities to sustain the decision of the court.

Without conflict they all support the decision. The law does not permit a man to close his eyes to facts which he cannot otherwise fail to see, for the purpose of remaining in ignorance of them and thus acquiring an unjust advantage. Carson, by his deed from Chad-dock, acquired no title to the land as against the defendant in error, and under the facts of this case, the plaintiff in error by his quit-claim deed from Carson acquired no greater rights to said land as against defendant than Carson had.

The judgment of the district court is affirmed. All the Justices concurring.

McKIM v. CARRE.

(Supreme Court of Kansas. Dec. 9, 1905.)

ELECTION OF REMEDIES—WHAT CONSTITUTES.

The fact that one who claims to have acquired by prescription a right of way across the land of his neighbor institutes proceedings under a void statute to have the land condemned for a private road for his benefit is not such an election of remedies as will preclude him from thereafter asserting such prescriptive right.

(Syllabus by the Court.)

Error from District Court, Brown County; Wm. I. Stuart, Judge.

Action by Ebenezer B. McKim against Thomas L. Carre. Judgment for defendant, and plaintiff brings error. Affirmed.

S. F. Newlon and James Falloon, for plaintiff in error. Ryan & Ryan, for defendant in error.

MASON, J. In 1878 Thomas Harding owned the southeast quarter of a section of land and Martha Carre owned the north-east quarter of the southwest quarter of the same section. A public highway followed the south line of the section. Harding and Mrs. Carre made an arrangement by which she was permitted to use a strip of ground 20 feet wide, lying just east of the half section line, in going and coming between her place and this highway. She so used it until she sold the property to her son, T. L. Carre, in 1899, after which he continued such use. In 1902 E. B. McKim bought the Harding land, and in 1903 he began an action to enjoin the further use by Carre of the strip in question and to quiet his own title to it. He was denied relief and now prosecutes error.

There was testimony that the arrangement between Harding and Mrs. Carre amounted to an agreement that she should have a right of way over this strip, which he would fence, to the highway, in consideration of her keeping up the whole of the line fence between her place and Harding's. The plaintiff claims that whatever right was acquired under this contract was a license, and not an easement, and was revocable at the pleasure of the grantor. It has been held in this state that even an oral license may be irrevocable, where it is given for a valua-

ble consideration and is acted upon by the licensee. *Kastner v. Benz*, 67 Kan. 483, 73 Pac. 67. It is not necessary to determine whether the privilege granted to Mrs. Carre was revocable, if viewed as a license, or to consider the nice distinctions between a license and an easement. There was some conflict in the testimony as to what the original agreement was and as to what was done under it. The plaintiff insists that the use of the way as an outlet for the Carre land was permissive only, and could not ripen into an easement. There was sufficient evidence, however, to justify the trial court in finding, as it did, that the defendant and his predecessor traveled back and forth over the strip, which was fenced off by the plaintiff and is described by the witnesses as a lane, under a claim of right, and that their use of it was adverse, and having been continued for more than 15 years resulted in a permanent right.

A further claim is made by the plaintiff that, even if Carre at one time had a right to keep the lane open, he had forfeited it by his subsequent conduct. This is based upon the fact that when a dispute first arose concerning the matter McKim offered to grant Carre a roadway for \$75. Carre answered that he would rather pay this than to get into any trouble. He then prepared and presented a petition to the county board, reciting that he had no outlet from his place and asking that a private road be established for his benefit along the strip in controversy, under the provisions of sections 6053, 6054, and 6055 of the General Statutes of 1901. The petition was acted upon, and viewers were appointed, who assessed McKim's damages at \$1,000. This Carre refused to pay and the proceeding was dropped. The contention is that these acts on his part precluded him from the further assertion of any right by prescription or under the original contract, because they amounted to an election on his part to pursue one of two inconsistent remedies. The argument is made that when McKim forbade his use of the lane two remedies were presented for his choice: He might rely upon the contract and adverse use, and by injunction or other appropriate proceeding compel McKim to recognize his right thereby acquired; or he might, by petitioning for a private road, in effect ask the county commissioners to compel McKim to grant him such a right for a compensation to be fixed by appraisers. If the argument is otherwise sound, it fails for this reason: The statute under which Carre invoked the aid of the commissioners is unconstitutional, and all the steps taken under it were wholly void. *Clark v. Mitchell Co.*, 69 Kan. 542, 77 Pac. 284, 66 L. R. A. 965. In order for a party to be concluded by an election between two inconsistent remedies both must in fact be open to him. The pursuit of a remedy which he supposes he possesses, but

which in fact has no existence, is not an election between remedies, but a mistake as to what remedy he has, and will not prevent his subsequent recourse to whatever remedial right was originally available. 15 Cyc. 262; 7 Encycl. of P. & P. 366.

McKim was in no way misled or injured by what was done under the invalid act, and there is no room for the application of any principle of estoppel. Carre's statements made in his road petition were, of course, evidence against him, and strong evidence; but they were not absolutely conclusive. The trial court presumably gave them all the weight to which they were entitled and nevertheless found in his favor. No reason appears for overturning that decision.

The judgment is affirmed. All the Justices concur.

WALDRON v. CITY OF SNOHOMISH et al. (Supreme Court of Washington. Feb. 3, 1906.)

1. MANDAMUS—MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—WARRANTS—PAYMENT—REASSESSMENT—PLEADING.

The fact that an application for mandamus to compel city authorities to make a reassessment to pay certain improvement warrants alleged that the original ordinance under which the work was done was "duly" passed did not preclude relator from proving that such ordinance was invalid.

2. JUDGMENT—RES JUDICATA—PLEADING.

An allegation that the ordinance was adjudged void in an action in the superior court, and that the proceedings thereafter had been held to be of no validity or effect, was not defective for failure to show that the adjudication was "duly or regularly given or made," as provided by statute.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1795.]

3. SAME.

An allegation that the original ordinance was "adjudged void" was not objectionable, in that it did not affirmatively allege that the ordinance was actually void.

4. SAME—PERSONS WHO MAY PLEAD.

Under the statutory provision for reassessments, any person holding warrants for municipal improvements may plead any former adjudication holding assessments made to pay for the work on account of which the warrants were issued invalid; such right not being confined to the parties to the particular action, their privies or successors in interest.

5. OFFICERS—ACTIONS—SERVICE—EFFECT.

Where municipal officers were sued in their official capacity, any service on them was binding on their successors in office.

6. ESTOPPEL—MUNICIPAL CORPORATIONS—IMPROVEMENT WARRANTS—PAYMENT—MANDAMUS.

That the holders of certain municipal improvement warrants accepted money from the city, collected under certain ordinances subsequently held to be invalid, in payment of a part of their warrants, did not preclude them or their successors in interest in the other warrants which they held from proceeding in mandamus to compel the city to take proper action to collect the money necessary to pay the warrants outstanding.

7. MANDAMUS—REASSESSMENT—PAYMENT OF WARRANTS.

Where an original ordinance providing for a city improvement was invalid, and several reassessment ordinances were subsequently adjudged void, the holder of warrants given in payment of the improvement was entitled to compel the city to pass a proper ordinance for reassessment to raise money to pay such warrants.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 202.]

Appeal from Superior Court, Snohomish County; John C. Denney, Judge.

Mandamus, on relation of C. W. Waldron, against the city of Snohomish and others. From a decree granting the writ, defendants appeal. Affirmed.

W. H. Abel, A. M. Abel, and John W. Miller, for appellants. Frank D. Nash and Cooley & Horan, for respondent.

ROOT, J. Relator instituted this proceeding to compel the city of Snohomish to make a reassessment, in order to pay certain special fund warrants held by him. From a judgment and decree directing such reassessment, this appeal is taken.

Appellants filed a motion to quash the writ, and later a demurrer to the writ and application; said motion and demurrer being denied and overruled. Thereupon appellants made answer, presenting the following defenses: (1) Plea in abatement, alleging that the terms of office of G. L. Turner, as mayor, and F. S. Anderson and W. O. Dolsen, as councilmen, had expired, and that F. S. Anderson had succeeded Turner as mayor, and that H. D. James and Matt Albert were successors as councilmen to Anderson and Dolsen; (2) certain denials of allegations in the application and writ; (3) a plea of estoppel based on the acceptance by Palmer and Plaskett, the original owners of the warrants, of certain payments theretofore made; (4) a plea of laches, to the effect that said Palmer and Plaskett and all subsequent holders, including relator, had full notice and knowledge of the alleged defects in the original assessment, and acquiesced therein for an unreasonable length of time. The relator filed a reply controverting the affirmative defenses. Upon the trial the relator moved the court to substitute as defendants E. L. Colburn, S. D. Dunn, and C. T. Mescher, in place of defendants F. M. Evans, C. D. Slater, and C. H. Crippen, whose terms of office as officials of said city had expired, which motion was granted. The original application alleged that the ordinance under which the work was done was "duly" passed.

Appellants urge that under this allegation the relator could not be permitted to prove that the same was invalid. We think there is no merit in this contention. The application alleged that the ordinance in an action in the superior court was adjudged void, and the proceedings thereunder held to

be of no validity or effect. Appellants contend that this allegation was insufficient, as it does not show that said adjudication was "duly or regularly given or made," under the provisions of the statute, and does not state who were the parties thereto. We do not think this contention can be sustained. These were matters of evidence. Appellants claim that the petition alleges the original ordinance to have been "adjudged void," but does not affirmatively allege that it was actually void. This contention has nothing to commend it. It is urged that the former adjudications, wherein said original assessment ordinance and a reassessment ordinance were held to be invalid, were binding only upon the parties and their privies. Under the statutory provisions for reassessments any person holding warrants is entitled to plead any former adjudications holding void the assessments made to pay for the work on account of which his warrants were issued. The right is not confined to the parties to that particular action and their privies or successors in interest.

The original application and alternative writ ran against G. L. Turner, as mayor, and F. M. Evans and C. H. Crippen and C. D. Slater, as councilmen. Upon the trial the substitution was made as aforesaid. It does not appear that the writ was served upon the substituted parties, or that a demand was made upon them after coming into office, and it is urged by appellants that judgment could not be taken against them. We do not think this position tenable. The object of this proceeding was to compel the doing of an official act. The original defendants were sued in their official capacity, and the effect of any service and of any notice made upon them as such officials applied to and was binding upon their successors in office to the same extent as if they had continued in office. The successors assumed the offices held by their predecessors cum onere.

We do not find anything in the record or

evidence touching the payments accepted by said Plaskett and Palmer which should be construed as constituting an estoppel as against them or their successors in interest. As the holders of warrants, they were entitled to receive such payments as the city sought fit to tender. That they accepted money from the city, collected under these ordinances, in payment of part of their warrants, furnishes no reason that would forbid a proceeding in mandamus to compel the city authorities to take appropriate action for collecting the money necessary to make the payment of the other warrants which they held.

The original ordinance providing for the improvement made was invalid. Several reassessment ordinances were subsequently adjudged by a court of competent jurisdiction to be void. This being true, the relator, as the holder of warrants given in payment for the improvement in question, was entitled to have a proper ordinance for reassessment passed by the proper city officials; and, when they refused to do this, his right to a writ of mandate against them accrued. As bearing upon some of the questions involved herein, and especially as authority for a judgment and decree directing a reassessment, we may cite the following cases: *Abernethy v. Town of Medical Lake*, 9 Wash. 112, 37 Pac. 306; *Frederick v. Seattle*, 13 Wash. 428, 43 Pac. 364; *Cline v. Seattle*, 13 Wash. 444, 43 Pac. 367; *State ex rel. Hemen v. Ballard*, 16 Wash. 418, 47 Pac. 970; *Phillips v. Olympia*, 21 Wash. 153, 57 Pac. 347; *Wasmund v. Harm*, 36 Wash. 170, 78 Pac. 777; *Port Angeles v. Lauridsen*, 26 Wash. 153, 66 Pac. 403.

We think the judgment of the superior court should be affirmed, and it is so ordered.

MOUNT, C. J., CROW, RUDKIN, FULLERTON, HADLEY, and DUNBAR, JJ., concur.

STATE v. ADAMS.

(Supreme Court of Washington. Feb. 2, 1906.)

RAPE—INFORMATION—DUPLICITY.

Under Ballinger's Ann. Codes & St. § 7062, providing that "a person shall be deemed guilty of rape who (1) shall forcibly * * * ravish any female of the age of 18 years or more; * * * (3) shall carnally know any female child under the age of 18 years," an information alleging that defendant did "forcibly and against her will ravish * * * a female child under the age of 18 years" charges but one offense.

Appeal from Superior Court, Lincoln County; W. T. Warren, Judge.

Walter Adams was informed against for rape. A demurrer to the information was sustained, and the state appeals. Reversed.

R. M. Dye and E. A. Hesselstine, for the State. Hibschan, Merritt & Merritt, for respondent.

RUDKIN, J. The information in this case charges that the defendant "on the 28th day of October, 1905, at the county of Lincoln, state of Washington, did unlawfully, feloniously, and forcibly, and against her will, ravish and carnally know Maud Stephey, then and there being, said Maud Stephey then and there being a female child under the age of 18 years, to wit, of the age of 17 years." To this information the defendant demurred "on the ground that more than one crime is charged therein." The demurrer was sustained, and, the prosecuting attorney electing to stand on the information and refusing to plead further, judgment of dismissal was entered. From this judgment the state has appealed.

The statute defines the crime of rape as follows: "A person shall be deemed guilty of rape who (1) shall, by force and against her will, ravish and carnally know any female of the age of 18 years or more; * * * (3) shall carnally know any female child under the age of 18 years." Ballinger's Ann. Codes & St. § 7062. The appellant contends that this information charges but one crime under subdivision 3 of said section, and that the allegations of force and want of consent should be rejected as surplusage. The respondent, on the other hand, contends that the information charges the crime of rape under both the first and the third subdivisions, and that therefore two crimes are charged. It seems to us the demurrer was improperly sustained, whichever view we adopt. If the contention of the appellant be sustained, it is manifest that the information charges but one crime; and in our opinion the same conclusion follows if we adopt the views of the respondent. The statute defines but one crime and prescribes but one penalty therefor. Where a statute provides that crime may be committed in different ways or by different means, the act constitutes but a single offense, whether one or all of the ways and means be employed in

its commission, and it is proper to charge in an information that the crime was committed in one of the ways or by one of the means specified in the statute, or in all the ways and by all the means conjunctively. The rule is thus stated in Enc. of Pl. & Pr. vol. 10, p. 536: "When a statute enumerates several acts in the alternative, the doing of any of which is subjected to the same punishment, all of such acts may be charged cumulatively as one offense. And where the statute provides in the alternative several means by which the offense may be committed, or where the intent or purpose is set out in several aspects disjunctively, they may all be charged in setting out one and the same offense." In *Fahnestock v. State* (Ind.) 1 N. E. 372, the court said: "When a statute makes it an offense to do some one or another act, naming them disjunctively, either of which would constitute one and the same offense, and amenable to the same punishment, all the acts may be charged conjunctively in the one count as constituting a single offense." In *People v. Harrold* (Cal.) 24 Pac. 106, the court said: "An indictment for forgery which enumerates each one of the series of acts, either one of which constitutes such crime under the Penal Code, charges but one offense, since under said section they all constitute but a single offense." In *People v. Gosset* (Cal.) 29 Pac. 246, the court said: "An indictment charging that defendant did deal, play, carry on, and conduct the game of faro, charges but one offense; Pen. Code, § 330, inflicting a penalty on every person who deals, plays, or carries on, or who conducts any game of faro." In *People v. Leyshon* (Cal.) 41 Pac. 480, the information charged the forging and uttering of a promissory note. A demurrer was overruled and in affirming the judgment the court said: "Where, in defining an offense, a statute enumerates a series of acts, either of which separately, or all together, may constitute the offense, all such acts may be charged in a single count: for the reason that, notwithstanding each act may, by itself, constitute the offense, all of them together do no more. * * * The information charges but one offense, and the demurrer was properly overruled." In *People v. Gustl* (Cal.) 45 Pac. 263, the court said: "Of course, an indictment or information must charge but one offense, and if it charges more than one it is subject to demurrer upon that ground. The question then is, did the information here charge two offenses? We do not think it did. It is a well-settled rule of law that 'when a statute enunciates a series of acts, either of which separately, or all together, may constitute the offense, all of such acts may be charged in a single count, for the reason that, notwithstanding that each act may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense.'" See, also, *State v. Newton*, 29 Wash. 373, 70 Pac. 31; *Crain*

v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; Flohr v. Territory (Okla.) 78 Pac. 565; State v. Howard (Mont.) 77 Pac. 50. In the last case cited the information charged the crime of robbery "by means of force and putting in fear," and that the property was taken "from the person and possession and from the immediate presence" of the prosecuting witness. It was held that the information charged but one crime.

Of course, this rule does not apply if the different ways or means are repugnant to each other. If it be said of this case that the first subdivision of section 7062 applies only to females of the age of 18 years or more, and the third subdivision to female children under the age of 18, the answer is that this information would in that event utterly fail to charge a crime under the first subdivision. We are satisfied that an information charging carnal knowledge of a female child under the age of 18 years charges but a single crime, regardless of the ways or means by which the act was accomplished.

The judgment is therefore reversed, with directions to overrule the demurrer.

MOUNT, C. J., and FULLERTON, HADLEY, CROW, DUNBAR, and ROOT, JJ., concur.

ROE v. STANDARD FURNITURE CO.

(Supreme Court of Washington. Feb. 2, 1906.)

1. JUDGMENT NOTWITHSTANDING VERDICT—MOTION—GROUNDS.

Under Ballinger's Ann. Codes & St. § 5056, authorizing the trial court to consider errors upon the hearing of a motion for a new trial, or a motion for judgment notwithstanding the verdict, and section 6521, authorizing the Supreme Court to affirm, reverse, or modify the judgment or order appealed from, it is proper practice for the trial court, upon the hearing of a motion for judgment notwithstanding the verdict, to enter final judgment in favor of either party, where such judgment is warranted by the undisputed evidence, and a verdict should have been directed accordingly when the case was submitted to the jury.

2. MUNICIPAL CORPORATIONS—USE OF STREETS—CONTRIBUTORY NEGLIGENCE—INJURIES TO SERVANT.

A servant driving a light wagon at a moderate gait, with his horse under full control, was guilty of contributory negligence in endeavoring to drive between a large van driven by a fellow servant and the curb, towards which the van was backing, when he could and should have driven out and passed in front of the van.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Francis J. Roe against the Standard Furniture Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Vince H. Faben, for appellant. Richard Saxe Jones, for respondent.

CROW, J. Respondent, Standard Furniture Company, a corporation, was, on February 27, 1903, engaged in the furniture busi-

ness in the city of Seattle, and used eight delivery wagons of various kinds and sizes, for which it employed drivers. Appellant, Francis J. Roe, employed by respondent, was the driver of a one-horse wagon, and was engaged in the occupation of delivering light furniture. One Hi Glass, of whom appellant complains, was also employed by respondent to drive a two-horse van or wagon, and deliver heavy furniture. In his complaint appellant made no reference to the fact that the relation of master and servant existed between respondent and himself, but alleged that on February 27, 1903, he was carefully driving a single team, consisting of a horse and wagon, on Madison street; that, when he arrived at the intersection of Boylston avenue and Madison street, said large van, in charge of the agents and employes of respondent, was negligently, recklessly, and carelessly driven into, upon, and against the wagon in appellant's charge, with such force and violence as to wreck the same and throw appellant to the ground, causing him to sustain severe personal injuries; that said large van was controlled by a reckless and incompetent driver, and was operated by him in a reckless and incompetent manner—all of which was well known to respondent, but unknown to appellant. The answer denied said allegations of negligence, and pleaded the affirmative defenses of assumption of risk, negligence of a fellow servant, and contributory negligence, which defenses were denied by the reply. Upon the trial appellant made no attempt to show that Hi Glass, the driver of the van, was incompetent or that respondent had been negligent in employing him. At the close of the evidence respondent moved for a directed verdict, on the grounds: (1) That any negligence shown was that of appellant; (2) that, if any other negligence was shown, which respondent denied, it was that of a fellow servant, and (3) that the case was one of assumption of risk on the part of appellant. The trial court denied the motion, and submitted the case to the jury, which returned a verdict in favor of appellant, assessing his damages at \$3,000. Respondent immediately moved for a new trial, and by separate motion also asked for judgment notwithstanding the verdict, on the same grounds on which it had based its previous request for a directed verdict. The trial court granted the motion for judgment, for the reason that from the undisputed evidence it appeared that appellant and Hi Glass were fellow servants. Thereupon judgment of dismissal was entered, from which this appeal has been taken.

In his assignments of error appellant has contended that respondent's motion for judgment notwithstanding the verdict should not have been entertained, as it was not made in the manner or form required by law, and that the court erred in granting said motion after its prior denial thereof during the trial. In his argument appellant says: "The motion for judgment notwithstanding the verdict was

originally a motion for judgment upon the pleadings by the plaintiff, and at common law it was unknown for the defendant to share in this privilege. Originally, it was purely a motion by the plaintiff upon the record alone, and was a motion by the plaintiff addressed to the sufficiency of the defense, which, if admitted to be true, was no defense; and if the court upon investigation found the defendant's pleadings to be bad in form, but by amendment possibly could be made more complete, the court would order a repleader by the defendant; and this is the general rule today, where no statute is found to the contrary in the practice of the forum where the motion is made." In support of this position appellant cites numerous authorities, including 11 Enc. Pl. & Pr. 917-921, on which he places special reliance, and further insists that no section of our Code provides for a judgment non obstante veredicto after a cause has been submitted to a jury and their verdict has been returned; that after verdict a defendant's only remedy is by motion for a new trial; and that, the jury being the exclusive judges of the facts, when the evidence has once been submitted to them, the court can only grant a rehearing. There is no doubt but that appellant's statement of the early common-law rule is historically correct, but the practice in this state has been modified, and such modification is warranted by certain provisions of our Code hereinafter mentioned. If the rule of practice contended for by appellant as pertinent to a motion for judgment non obstante veredicto be approved, then no available method would exist by which a trial court could correct its own mistake in erroneously submitting a case to the jury, other than that of granting a motion for a new trial, and such new trial would have to be granted, even though it was indisputably apparent that a plaintiff had no possible right of recovery. Section 6521, Ballinger's Ann. Codes & St., provides: "Upon an appeal from a judgment or order * * * the Supreme Court may affirm, reverse or modify any such judgment or order appealed from, as to any or all the parties, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. * * *

"Assuming that the trial court erred in denying respondent's motion for a directed verdict, if it had thereafter entered final judgment upon the verdict returned, this court, upon an appeal based on proper assignments of error, would not only order a reversal, but would also direct a final judgment dismissing the action. This being true, the trial court should be permitted to make the order without the necessity of an appeal. Section 5056, Ballinger's Ann. Codes & St., after providing that this court on appeal may review orders, rulings, or decisions to which no exceptions need be taken, and also those to which proper exceptions have been taken, contains the following language: "* * * And any such alleged error shall also be considered in the

court wherein or by a judge whereof the same was committed, upon the hearing and decision of a motion for a new trial, a motion for judgment notwithstanding a verdict, or a motion to set aside a referee's report or decision, made by a party against whom the ruling or decision to be reviewed was made, whether the alleged erroneous ruling or decision is a part of the record or not, where the alleged error, if found to exist, would materially affect the decision of the motion. * * *

This court has repeatedly reviewed decisions of trial courts, refusing to direct verdicts, and we are of the opinion that it is the proper practice for a trial court, upon the hearing of a motion for judgment non obstante veredicto, to enter final judgment in favor of either party, where it is warranted by the undisputed evidence. The facts being undisputed, it becomes the duty of the court to apply the law; there being no issue to submit to a jury. While the above rule of practice may not have been heretofore expressly announced by us, we have, nevertheless, in a number of cases, put it into practical effect and recognized the principle above enunciated. *Larson v. American Bridge Co.* (Wash.) 82 Pac. 294; *Dyer v. Middle Kittitas Irrigation Dist.* (Wash.) 82 Pac. 301; *Bancroft v. Godwin* (Wash.) 83 Pac. 189. In *Larson v. American Bridge Co.*, supra, the defendant challenged the sufficiency of the evidence, and moved for a dismissal of the action. This challenge being denied, a general verdict was returned in favor of the plaintiff, and special interrogatories submitted at the request of the defendant on the question of independent contractor were answered against the defendant's contention. A new trial being granted, the plaintiff appealed. This court, having found that neither the general verdict nor the answers to the special interrogatories were supported by the evidence, speaking through Hadley, J., said: "When ruling upon the motion for new trial, the court stated that, as there was no competent evidence whatever to sustain the findings, they would be set aside. The court was then convinced that it had misapprehended the evidence at the time respondent interposed its challenge thereto. Such was clearly the case, and it was not error to set aside the findings and also the general verdict. Respondent asks, inasmuch as the evidence shows no cause of action against it, that the cause shall be remanded with instructions to dismiss the action. We think this request should be granted. Respondent was entitled at the trial to have its challenge to the evidence sustained, and it is still entitled to it. *Bernhard v. Reeves*, 6 Wash. 424, 83 Pac. 878." In *Dyer v. Middle Kittitas Irrigation District*, on a jury trial, the plaintiff moved the trial court to discharge the jury, and render judgment in his favor, which motion being denied, a verdict was returned in favor of defendant. The plaintiff immediately moved for a new trial,

and for judgment notwithstanding the verdict. Before the motions were passed upon, the motion for a new trial was withdrawn and the plaintiff's rights were submitted upon the motion for judgment, which the trial court denied, entering judgment upon the verdict. On appeal this court reversed the judgment of the trial court, and remanded the cause, with directions to enter judgment for plaintiff for the amount due.

Was respondent entitled to a directed verdict and judgment of dismissal at the time defendant interposed its challenge to the sufficiency of the evidence? Without passing upon the defenses of fellow servant or assumption of risk, we think the final judgment was justified, for the reason that appellant's evidence shows the accident to have been the direct result of his own negligence. Madison street, wide and well paved, running east and west, is intersected by Boylston and Broadway, parallel streets, running north and south one block apart; Broadway being east of Boylston. According to appellant's own evidence, he drove north on to Madison street from Boylston avenue, and proceeded east on the south side of Madison, traveling at a moderate gait, with his horse under full control. About the same time, Hi Glass, coming south on Broadway at a moderate gait, turned into Madison towards the west. Having a heavy piece of furniture to deliver at a

house on the south side of Madison, a short distance from Broadway, he (Glass) drove directly across Madison and was in the act of backing his van up to the curb when the collision occurred. Without detailing the evidence, we find that appellant, without reason or excuse, attempted to drive between the large van and the curb, when as a careful driver he should have known he could not do so, and at a time when he, having full control of his horse, could either have halted or have driven out upon the street and passed in front of Glass's team and van; there being no obstructions anywhere in the street. The accident occurred late in the afternoon, when appellant was making his last delivery, and he simply appears to have taken unnecessary chances in order that he might proceed more quickly to the completion of his day's labor. We fail to find any evidence showing negligence on the part of Glass. As said in *Larson v. American Bridge Co.*, respondent was entitled at the trial to have its challenge to the evidence sustained, and is still entitled to it. The trial court committed no error in sustaining respondent's motion non obstante verdicto.

The judgment is affirmed.

MOUNT, C. J., and ROOT, RUDKIN, DUNBAR, FULLERTON, and HADLEY, JJ., concur.

(41 Wash. 561)

SWANSTROM et ux. v. WASHINGTON TRUST CO.

(Supreme Court of Washington. Feb. 2, 1906.)

VENDOR AND PURCHASER—BONA FIDE PURCHASERS—UNRECORDED DEED.

Under Ballinger's Ann. Codes & St. § 4535, requiring deeds, etc., to be recorded, and declaring them valid as against bona fide purchasers from the date of their filing for record, a bona fide purchaser, who at the time of his purchase has no notice, actual or constructive, of a prior unrecorded deed, acquires a prior title to that of the holder of the unrecorded deed, although the latter records his deed before the recording of the deed to the former.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 513, 526.]

Appeal from Superior Court, King County; Geo. C. Hatch, Judge.

Action by Frederick E. Swanstrom and wife against the Washington Trust Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

H. R. Cilse, for appellant. Peters & Powell, for respondents.

RUDKIN, J. The question of priority between two deeds for the same property from the same grantor is the only question presented on this appeal. On the 5th day of December, 1903, one Angus W. Young conveyed certain property to the appellant, by warranty deed, to secure the payment of the sum of \$8,000. This deed was not filed for record or recorded until the 10th day of June, 1904. On the 27th day of May, 1904, said Angus W. Young conveyed, by deed, a portion of the same property to the respondents, for a valuable consideration. The respondents purchased the property, paid the purchase price, and received their deed, without either actual or constructive notice of the prior deed to the appellant. This deed was not filed for record or recorded until the 7th day of March, 1905. On these facts the respondents contend that their deed has priority, because they were bona fide purchasers without actual or constructive notice of the prior and unrecorded deed. The appellant, on the other hand, contends that its deed has priority because it was first in time and was first recorded.

The decision of this question depends upon our registration laws. Section 4535, Ballinger's Ann. Codes & St., provides that "all deeds, mortgages, and assignments of mort-

gages, shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against bona fide purchasers from the date of their filing for record in said office, and when so filed shall be notice to all the world." It is not necessary that the subsequent conveyance should be first recorded in order to gain priority, unless the statute so provides. The rule is thus stated in Webb on Record of Titles, § 13: "The statutes of nearly one-third of the states and territories provide that an unregistered conveyance shall be void as against a subsequent purchaser in good faith 'whose conveyance shall be first recorded.' Where the statute does not by such express terms make the rights of the subsequent purchaser depend on priority of record, such priority, or the want of it, is immaterial; and the courts have almost uniformly held that a subsequent conveyance for valuable consideration, taken without notice of a prior unrecorded one, prevails over such prior instrument, whether the later one be first recorded or not." "Recordation is required for the protection of subsequent purchasers only. To require a subsequent conveyance of title to be recorded in order that a prior purchaser of the same property may be able to obtain information of its existence would not be in furtherance of the general design of these statutes, which was to protect purchasers from being undone by prior secret conveyances by making the means of obtaining information thereof available to that end. And so it is not necessary to his full protection in the absence of statutory provisions so requiring that the subsequent purchaser record the instrument under which he claims before the recordation of the conveyance of the prior purchaser." 24 Am. & Eng. Enc. of Law (2d Ed.) p. 140. The authorities cited to sustain the above statement of the law fully support the text.

Inasmuch as our statute does not require a prior registration of the subsequent deed in order to give it priority, the court below correctly ruled that such prior registration is unnecessary.

The judgment is affirmed.

MOUNT, C. J., and FULLERTON, HADLEY, OROW, DUNBAR, and ROOT, JJ., concur.

GRANT v. WALSH.

(Supreme Court of Washington. Feb. 1, 1906.)

1. APPEAL — SUBSEQUENT APPEALS — FORMER DECISION AS THE LAW OF THE CASE.

The interpretation placed on a contract by the Supreme Court on appeal in an action thereon is the law of the case on a subsequent trial.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4661-4665.]

2. CONTRACTS — CONSTRUCTION — RIGHTS ACQUIRED.

A contract between plaintiff and defendant required defendant to incorporate a company and issue 150,000 shares to plaintiff, and place 300,000 shares in the treasury as treasury stock, and to equally divide the balance between himself and three other persons. It was subsequently agreed that an existing corporation with 1,000,000 shares of stock should issue stock according to the contract. 150,000 shares were delivered to plaintiff, 300,000 shares were placed in the treasury, 87,500 shares were issued to each of the three persons who assigned their interests to plaintiff. The shares to be divided equally between the three persons and defendant were 550,000. Held that since under the contract the three persons had an equal interest with defendant in the stock, plaintiff by virtue of the assignment became the owner of 150,000 additional shares but entitled to only 100,000 shares because of the agreement of the stockholders by which a third of their holdings were set aside for the benefit of the company and by virtue of which agreement defendant set aside one third of all his holdings including the 150,000 shares claimed by plaintiff.

Mount, C. J., dissenting.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by James S. Grant against Michael M. Walsh. From a judgment for defendant, plaintiff appeals. Reversed.

B. C. Mosby, for appellant. H. S. Stoolfire, for respondent.

ROOT, J. The appellant was the locator and owner of the Buckhorn mining claim, situated in Okanogan county. He sold an undivided one-half interest in the property to Patrick Donley and Gustavus A. Hutchinson, and these purchasers took into an equal partnership with themselves in said property John J. Stevens and Michael M. Walsh, this respondent. Some time thereafter appellant and respondent executed the following instrument, concerning the other one-half interest:

"Escrow Deed. Jas. Grant to M. M. Walsh.

"To Republic Bank: $\frac{1}{2}$ in. in Buckhorn M. claim, Myers Ck., Okanogan Co., Wash. Consideration \$200.00—to be paid to said Grant on receipt by this bank of a satisfactory abstract of title to said mining claim, then this deed to be delivered to said Walsh; he is to incorporate the said Buckhorn Mining claim; the capital stock of said incorporation is not to exceed 1,000,000 shares of the par value of \$1.00 per share, non-assessable; 150,000 shares of said capital stock is to be delivered to the said Jas. S. Grant as soon as corporation is complete; not less than 300,000 shares of said stock to be placed as

treasury stock for the exclusive benefit of the corporation; the remainder of the stock to be divided equal between said Walsh and other owners other than said Grant; in case all agreements above mentioned are not well and truly carried out by said parties, then this deed to be void and of no effect.

"M. M. Walsh.

"James S. Grant."

Thereafter respondent paid appellant the \$200 mentioned in said instrument. Instead of incorporating a new company, it was agreed by all parties concerned that the mining claim should be transferred to the Monterey Gold Mining company, already incorporated, and its stock divided in the same proportion as would have been that of the new company which it was originally intended to incorporate. 150,000 shares of the capital stock of the Monterey company was consequently issued and delivered to appellant, and 300,000 shares of said stock was placed in the treasury of the corporation for its benefit. 87,500 was issued to Donley, Hutchinson, and Stevens, each. Sometime thereafter each of these three men made an assignment, conveyance and bill of sale of all of his right, title, and interest in and to said corporation, and its property over and above the said \$87,500 of stock, received as aforesaid, said transfer, conveyance and bill of sale being made to his appellant. The latter then demanded from respondent 150,000 shares of the capital stock, it being his claim that each one of the three men mentioned was entitled to 50,000 shares of stock over and above the 87,500 which he had received. All of the stock of the corporation had theretofore been issued to respondent, excepting the treasury stock and the stock issued to appellant and the three other men as hereinbefore mentioned. Respondent refused to transfer to appellant said 150,000 shares demanded, or any portion thereof, claiming that each of said men had received the full amount due him when he received the 87,500, and that said amount had been received and accepted by each of said men as the full amount due him, and that the conduct of each of said men and of appellant in connection with the corporation, and in the matter of voting their stock at stockholders' meetings was such as to estop appellant, and each and all of said three men, from asserting any claim to any greater amount than the said 87,500 shares. The case must turn upon the construction to be given the instrument hereinbefore set forth.

Respondent claims that Donley, Hutchinson, and Stevens, although referred to in said instrument, were not parties thereto, and had no interest whatever therein; that appellant was one party to said agreement, and that respondent alone was the other party and beneficiary; that said three men referred to had no interest in, through, or under said agreement. Appellant maintains

that each of said men had an equal interest with respondent in the property involved in said transaction. This case was before this court once before, and the opinion rendered is found in 36 Wash. 190, 78 Pac. 786. The construction, by this court, placed upon the instrument hereinbefore set forth, seems to be in accordance with appellant's contention, and contrary to the interpretation contended for by respondent and accorded by the trial court at the last trial. This court having at that time placed an interpretation upon this contract, the same should have been accepted as the law of the case, and as binding upon the trial court. We, therefore, think that appellant, under the contract as heretofore construed and the assignments made by the three persons mentioned, became the owner of 150,000 shares of the capital stock in addition to that already received. Of this amount we think, however, that he is rightfully entitled now to only 100,000 shares. Upon the 23d of February, 1899, all of the stockholders entered into an arrangement by which they set aside one-third of their

stock to be sold for the benefit of the company. Respondent then set aside 95,000 as his pro rata share; this being one-third of all of his holdings, including the amount of stock in controversy herein. Appellant thereby set aside 50,000 of his shares, being one-third of his original 150,000 only. As a matter of equity and justice, we think respondent should have credit for 50,000, which was a third of the stock involved herein.

The judgment of the honorable superior court is reversed, with instructions to enter judgment in favor of appellant against respondent for the delivery of 100,000 shares of the stock; and if said stock cannot be delivered within a reasonable time, that appellant be given judgment for the value of said stock as of the present time, or as of any date appellant may elect since making his demand upon respondent for the delivery of said stock. Costs to appellant.

DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur. CROW, J., took no part. MOUNT, C. J., dissents.

MEMORANDUM DECISIONS.

PEOPLE v. BUELNA. (Court of Appeal, First District, California. Feb. 1, 1906.) Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge. Louis Buelna was convicted of an offense, and he appeals. Affirmed. John W. Johnston and John H. Leonard, for appellant. U. S. Webb, Atty. Gen., and Benjamin K. Knight, Dist. Atty., for the People.

PER CURIAM. No brief having been filed herein on behalf of the appellant, and no appearance of counsel having been made in his behalf when the case was called for argument, upon motion of the Attorney General the appeal was submitted upon the record in the transcript, and the court, having examined the same and finding no error therein, now renders its judgment that the judgment of the superior court be, and the same is, hereby affirmed.

BILLINGS v. KANSAS CITY-LEAVENWORTH R. CO. (Supreme Court of Kansas. Feb. 10, 1906.) Error from District Court, Leavenworth County; J. H. Gillpatrick, Judge. Action by Mary C. Billings against the Kansas City-Leavenworth Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed. Feulon & Feulon and Waggener, Doster & Orr, for plaintiff in error. Atwood & Hooper, for defendant in error.

PER CURIAM. The verdict of the jury was against Mary C. Billings who claimed damages from the Kansas City-Leavenworth Railroad Company, now known as the Kansas City Western Railroad Company, for the death of her son, who was killed in a railway accident. The offer of testimony to the effect that the track of the railway was above the surface of the street was not material, and its exclusion was not error. The ordinance of the city required that the tracks of the railway should be constructed at the same level as the established grades of the street; but as there was no testimony of the violation of that ordinance that question was not in the case. None of the rulings upon the admission of testimony appear to be prejudicial error, nor can we say that the remarks made by the trial judge of which complaint is made furnish a ground for reversal. The instructions appear to fairly present the case to the jury. The matter of excessive speed was submitted, and the jury were rightly told that the provisions of the city ordinance as to the speed at which cars should be operated had reference to the ordinary operation, and had no application to the exceptional acts of the company in clearing its tracks of snow. An examination of the criticisms of the instructions given and refused shows that no material error was committed in charging the jury, nor is any reason seen why the motion for a new trial should have been allowed. Judgment affirmed.

BLOMBERG et al. v. FAULKNER. (Supreme Court of Kansas. Feb. 10, 1906.) Error from District Court, Marshall County. Action by Frank J. Faulkner against Eric Blomberg and another. Judgment for plaintiff, and defendants bring error. Affirmed. Isaac A. Rigby, for plaintiffs in error. E. A. Berry and Gregg & Gregg, for defendant in error.

PER CURIAM. The plaintiffs in error prosecute this proceeding to reverse an order of the district court refusing to open up the case in which a judgment had been rendered against

them, that they might have another opportunity to make a defense therein. The action was on a promissory note bearing the signature of both of the defendants. Summons was properly served upon both, and they appeared and participated in the trial. The judgment was rendered May 7, 1903, and the application to have it set aside was filed October 6, 1903. The application states no defense to the action. It states no facts why the court should open the case and permit the defendants to relitigate the questions. The order of the court denying the application of the plaintiffs in error is affirmed.

BORDERS v. CARROLL. (Supreme Court of Kansas. March 10, 1906.) Error from District Court, Sumner County; C. L. Swarts, Judge. Action by A. Carroll against F. M. Borders, administrator of John T. Stewart. Judgment for plaintiff, and defendant brings error. Reversed. Ed. T. Hackney and Kos Harris, for plaintiff in error. W. W. Schwinn, for defendant in error.

PER CURIAM. This is one of several actions originating in the purchase of stock in the Wellington National Bank by John T. Stewart while he was the president and manager of the bank. The sellers of the stock in each case claimed that Stewart, while president and in the actual management of the bank, fraudulently manipulated the assets and the books of the bank so as to cause the stock to appear to be of much less than its actual value, for the purpose of deceiving the stockholders and inducing them to sell their stock to him for a sum greatly less than its true value. The plaintiffs in each of the actions sought to recover from Stewart the difference between what they received for the stock sold to him and its actual value when sold. In this action, as in the others, the plaintiff recovered judgment. The defendant brings the case here, alleging that the court erred in including certain items in its computation in determining the value of the stock at the time of the sale. In the case of Stewart v. Smith (No. 14,383) 82 Pac. 482, these precise questions were involved, and it was held that such items should not have been included in making the estimate. For further facts of this case, see Stewart v. Smith, supra. In addition it is now contended by the defendant in error that he was entitled to punitive damages on account of the fraud of Stewart, and, if it should be held that the items referred to should not have been included in estimating the value of the stock when Stewart purchased, that, inasmuch as plaintiff was entitled to punitive damages, the amount allowed by the court in excess of the actual value of the stock should be allowed to stand as such damages. The action was brought to recover the difference between what plaintiff received and the actual value of the stock, which is alleged to have been worth \$400 per share. The objectionable items were included for the purpose of fixing the value of the stock when sold and not as punitive damages. There was no claim for punitive damages, and the court did not allow any. The judgment of the court is reversed, on the authority of Stewart v. Smith, supra, and the cause remanded.

CITY OF HUMBOLT v. DICKINSON. (Supreme Court of Kansas. Jan. 6, 1906.) Error from District Court, Allen County; Oscar Foust, Judge. Action by Lillian Dickinson against the city of Humbolt. Judgment for

plaintiff, and defendant brings error. Affirmed. *La Vergne Orton, G. A. Amos, Travis Morse, and W. A. Choguill*, for plaintiff in error. *Ewing, Gard & Gard*, for defendant in error.

PER CURIAM. The petition of Lillian Dickinson stated a cause of action against the city of Humbolt for injuries resulting from a defective sidewalk. There is nothing material in objections to rulings of the court on the admission of testimony. The evidence sufficiently sustains the findings of the jury that the city was negligent in the maintenance of the walk. The alleged negligence involved to some extent the defect in the board walk, the delivly from that to the stone upon which the plaintiff stepped and the instability of the stone. The findings show the extent to which each contributed to the injury, and also that it did not occur through the fault of Mrs. Dickinson. That the city had at least constructive notice of the defect in the walk is well shown, and no difficulty is found in harmonizing the findings of the jury with each other and with the general verdict. The case appears to have been fairly submitted to the jury, and no material errors in the proceedings are discovered; and hence the judgment will be affirmed.

CITY OF LIBERTY v. BUNDY et al. (Supreme Court of Kansas. March 10, 1906.) Appeal from District Court, Montgomery County; *Thos. J. Flannelly, Judge*. *H. N. Bundy and John Hill* were convicted of violating a city ordinance, and appeal. Reversed. *Dooley & Keith*, for appellants. *A. L. Billings*, for appellee.

PER CURIAM. This is an appeal from a conviction under a city ordinance, the validity of which is assailed under the rule announced in *Re Van Tuyl*, 81 Pac. 181. The city has filed no brief, from which fact we assume that it is admitted that the ordinance is void under that decision. The judgment appealed from is therefore reversed.

CREAMERY PACKAGE MFG. CO. v. PETERS. (Supreme Court of Kansas. Jan. 6, 1906.) Error from District Court, Wyandotte County; *J. McCabe Moore, Judge*. Action by *George Peters* against the Creamery Package Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed. *McAnany & Alden*, for plaintiff in error. *Getty, Hutchings & Dean*, for defendant in error.

PER CURIAM. The questions presented in this case have so often been discussed and decided by this court that little could well be added by an extended dissertation upon them. The first objection is that the court erred in overruling the demurrer to the evidence of the plaintiff below. We think there is abundant evidence to justify the submission of the case to the jury. (2) The plaintiff in error says that the court erred in refusing ten instructions asked by it. It sets out none of them. See rule 10. (3) The plaintiff complains of ten instructions given by the court on its own motion. It sets out two of these, and we think there is no error in them. (4) That the court erred in overruling the motion for a new trial by reason of the misconduct of counsel for plaintiff below. It is true counsel did in a measure apparently attempt to override the rulings of the court, did make an improper statement, and did not accord to his opponent all the courtesies the ethics of the profession require; but there was some excuse for this, and the errors of counsel were so far corrected by the court and by the voluntary withdrawal of the unwarranted remark by the counsel himself that we are unable to conclude that any prejudice to the rights of plaintiff in error re-

sulted. We find no prejudicial error in the admission or rejection of evidence. There seems to have been a fair trial, and the judgment for a reasonable amount is well supported by the evidence. The judgment is affirmed.

HARRIS v. GIBSON et al. (Supreme Court of Kansas. March 10, 1906.) Error from District Court, Douglas County; *C. A. Smart, Judge*. Action by *Lee H. Harris* against *William Gibson* and others. Judgment for defendants, and plaintiff brings error. Affirmed. *R. E. Melvin*, for plaintiff in error. *Bishop & Mitchell*, for defendants in error.

PER CURIAM. This action was brought in the district court of Douglas county by the plaintiff in error against the defendants in error for the dissolution of the copartnership and for an accounting between the partners, consisting of the plaintiff and defendants. The pleadings in evidence show that on or prior to the 5th day of May, 1902, the partnership consisted of the plaintiff, the defendant *William Gibson*, and his son *Lucien Gibson*; and the court finds that on said day said copartnership was dissolved, and that shortly thereafter *Lucien Gibson* died, his only heirs being his widow and minor son, defendants with *William Gibson* in this action. The court also finds, in substance, that an accounting was had between the parties, plaintiff and defendants. At least it must be said that the findings of the court of the amount of property owned by the partnership and the amount of indebtedness against the partnership and that each partner had withdrawn his entire capital invested therein, with the order of the court appointing a receiver, the sale of all the partnership property by the receiver under the orders of the court, the confirmation of such sale, and the application of the proceeds to the payment of the debts, amounted to an accounting and settlement of the partnership estate. While there is a conflict in the evidence, there is certainly sufficient evidence to sustain the findings and the judgment of the court, and we cannot weigh the evidence here. The judgment of the district court is affirmed.

SHATTUCK v. BELKNAP SAVINGS BANK et al. (Supreme Court of Kansas. Feb. 10, 1906.) Error from District Court, Harvey County; *P. J. Galle, Judge*. Action by *Sarah G. Shattuck* against the *Belknap Savings Bank* and others. Judgment for defendants, and plaintiff brings error. Affirmed. *S. W. Shattuck, Jr.*, for plaintiff in error. *Whitcomb & Hamilton*, for defendants in error.

PER CURIAM. On the authority of *Kelsa v. Norton*, 65 Kan. 778, 70 Pac. 896, 93 Am. St. Rep. 308, and *Henthorn v. Security Company*, 70 Kan. —, 79 Pac. 653, this case is affirmed. Under the uncontroverted facts, the only legal right, if any, the plaintiff has in the land in question, is to redeem and have an accounting for rents.

VOLLE et al. v. COOK et al. (Supreme Court of Kansas. March 10, 1906.) Error from District Court, Marshall County; *Sam Kimble, Judge*. Action between *Art Volle* and *A. D. Mayo and Patrick Cook* and *Bridget Cook*. From the judgment *Volle* and *Mayo* bring error. Affirmed. *R. P. Evans* and *W. S. Glass*, for plaintiffs in error. *W. W. Redmond*, for defendants in error.

PER CURIAM. The action of the district court from which this proceeding in error arises related to a boundary which it was claimed had been fixed by parol and acquiesced in so as to bind the parties and their subsequent grantees. The only question is if the evidence

supports the judgment of the trial court. A careful canvass of the record leads to the conclusion that the evidence is sufficient for that purpose, and the judgment is affirmed.

BARKER, Appellant, v. BARKER, Respondent. (No. 1,745.) (Supreme Court of Montana. June 12, 1905.) Appeal from District Court, Cascade County; J. B. Leslie, Judge. On motion to dismiss appeal. Fletcher Maddox and H. G. McIntire, for appellant. T. E. Brady and Wm. G. Downing, for respondent.

PER CURIAM. Upon motion of appellant this appeal is by the court dismissed.

CLARK, Appellant, v. WALL et al., Respondents. (No. 2,146.) (Supreme Court of Montana. Jan. 3, 1905.) Original. Injunction pending appeal. J. L. Wines, for appellant. Jas. E. Murray and McBride & McBride, for respondents.

PER CURIAM. Appellant's motion for an injunction pending appeal herein is hereby granted, and an injunction ordered issued upon the filing and approval of a good and sufficient undertaking in the sum of \$5,000, conditioned according to law, said undertaking to be approved by the clerk of this court. Upon motion of respondents, injunction granted above was dissolved on January 23, 1905.

In re CLARKE'S ESTATE. (No. 2,123.) (Supreme Court of Montana. Feb. 15, 1905.) Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge. On motion to dismiss appeal. Carpenter, Day & Carpenter, for appellant. Walsh & Newman, for respondent.

PER CURIAM. The motion to dismiss the appeal herein is hereby sustained, and the appeal dismissed.

DE WITT, Appellant, v. MORASE, Respondent. (No. 1,943.) (Supreme Court of Montana. Sept. 28, 1904.) Appeal from District Court, Fergus County; E. K. Cheadle, Judge. On motion to dismiss appeal. Cort & Worden, for appellant. R. Von Tobel, for respondent.

PER CURIAM. Upon motion of the respondent herein, the appeal is hereby dismissed.

FINLEN, Appellant, v. HEINZE et al., Respondents. (No. 2,063.) (Supreme Court of Montana. Jan. 18, 1905.) Original. Injunction pending appeal. A. J. Shores, for appellant.

PER CURIAM. Appellant's application for an injunction pending appeal is hereby denied.

FREEMAN, Appellant, v. EDELMUTH, Respondent. (No. 2,165.) (Supreme Court of Montana. Feb. 15, 1905.) Appeal from District Court, Carbon County; Frank Henry, Judge. On motion to dismiss appeal. Albert I. Loeb, for appellant. George W. Pierson and Wallace & Donnelly, for respondent.

PER CURIAM. The motion to dismiss the appeal herein is hereby sustained, and the appeal dismissed; and it is further ordered that the order of supersedeas heretofore issued herein be, and the same is, hereby vacated and set aside.

GALLATIN LIGHT, POWER & RY. CO., Appellant, v. CITY OF BOZEMAN, et al., Respondents. (No. 2,092.) (Supreme Court of Montana. March 24, 1905.) Appeal from Dis-

trict Court, Gallatin County; W. R. C. Stewart, Judge. Hartman & Hartman, for appellant. John A. Luce, for respondents.

PER CURIAM. Upon motion of counsel for respective parties, this cause is hereby dismissed as settled.

HENNESSY MERCANTILE CO., Respondent, v. KALOUSEK et al., Appellants. (No. 2,122.) (Supreme Court of Montana. Dec. 1, 1904.) Appeal from District Court, Silver Bow County. On motion to dismiss appeal. C. M. Parr, for appellants. M. J. Cavanaugh, for respondent.

PER CURIAM. Upon motion of respondent herein, this appeal is dismissed.

In re HERRON. (No. 2,197.) (Supreme Court of Montana. April 24, 1905.) Original. Application for writ of mandate directed to John W. Tattan, judge of the district court of Valley county, commanding said judge to enter petitioner Herron's name as counsel for one Malcolm, charged with the crime of murder. Walsh & Newman and Henry N. Blake, for relator. A. J. Galen, Atty. Gen., for respondent.

PER CURIAM. The relator's petition for a writ of mandamus herein, set for hearing this day, was, after the introduction of testimony by the relator, argued by counsel for the respective parties, and upon due consideration the said application is denied, and the proceedings are hereby dismissed.

HYNES, Respondent, v. BARNES, Constable, Appellant. (No. 2,075.) (Supreme Court of Montana. Sept. 30, 1904.) Appeal from District Court, Granite County; Welling Napton, Judge. On motion to dismiss appeal. D. M. Durfee and J. Shull, for appellant. Geo. A. Maywood, for respondent.

PER CURIAM. Upon motion of the respondent herein, this appeal is hereby dismissed.

KEHOE, Appellant, v. KEHOE et al., Respondents. (Supreme Court of Montana. May 5, 1905.) Appeal from District Court, Silver Bow County; E. W. Harney, Judge. O. M. Parr, for appellant.

PER CURIAM. The appellant and respondents having failed to file their briefs herein, it is now here ordered and adjudged that the order of the court below, made and entered on the 25th day of May, 1904, be, and the same is, hereby affirmed at the cost of appellant.

LOVE, Appellant, v. FLAHERTY et al., Respondents. (No. 2,067.) (Supreme Court of Montana. Dec. 6, 1904.) Appeal from District Court, Missoula County; F. C. Webster, Judge. On motion to dismiss appeal. Toole & Bach, for appellant. Woody & Woody, and E. E. Hershey, for respondents.

PER CURIAM. Upon motion of the appellant, the appeal herein is dismissed without prejudice.

LYNCH, Respondent, v. HERRIG, Appellant. (No. 2,065.) (Supreme Court of Montana. Sept. 28, 1904.) Appeal from District Court, Flathead County; D. F. Smith, Judge. On motion to dismiss appeal from order denying new trial. S. M. Logan, for appellant. Noffsinger & Folsom, for respondent.

PER CURIAM. Upon motion of respondent herein, the appeal from the order denying the motion for a new trial is hereby dismissed.

MACKEL, Appellant, v. BARTLETT, Respondent. (No. 1,980.) (Supreme Court of Montana. Nov. 23, 1904.) Appeal from District Court, Silver Bow County; William Clancy, Judge. On motion to dismiss appeal. Peter Breen and John A. Shelton, for appellant. John J. McHatton, for respondent.

PER CURIAM. Upon motion of the respondent herein, this appeal is hereby dismissed.

MACKEL, Appellant, v. NORTHERN PAC. RY. CO., Respondent. (No. 2,121.) (Supreme Court of Montana. Jan. 31, 1905.) Appeal from District Court, Silver Bow County; E. W. Harney, Judge. On motion to dismiss appeal. Mackel & Meyer, for appellant.

PER CURIAM. Upon motion of the appellant, this appeal is hereby dismissed, without costs to either party.

MAURY, Respondent, v. FARISS, Appellant. (No. 1,986.) (Supreme Court of Montana. October 15, 1904.) Appeal from District Court, Silver Bow County; William Clancy, Judge. On motion to dismiss appeal. Thomas J. Walker, Geo. F. Shelton, and J. J. McHatton, for appellant. J. E. Healy, for respondent.

PER CURIAM. This appeal is hereby dismissed, as per stipulation of counsel for respective parties.

NICHOLS et al., Appellants, v. MAHER, Treasurer, Respondent. (No. 2,006.) (Supreme Court of Montana. Dec. 19, 1904.) Appeal from District Court, Silver Bow County; E. W. Harney, Judge. On motion to dismiss appeal. E. M. Lamb, C. F. Kelley, E. S. Booth, and Kirk & Clinton, for appellants.

PER CURIAM. Upon motion of the appellants, the appeal herein is hereby dismissed.

In re NISSLER. (No. 2,174.) (Supreme Court of Montana. Feb. 23, 1905.) Original. Application to prohibit Hon. Michael Donlan, a judge of the district court of Silver Bow county, from hearing and considering certain matters. M. J. Cavanaugh, for relator.

PER CURIAM. Relator's application for a writ of prohibition herein is hereby denied.

PERHAM, Appellant, v. SMITH et al., Respondents. (No. 2,183.) (Supreme Court of Montana. April 17, 1905.) Appeal from District Court, Silver Bow County; E. W. Harney, Judge. On motion to dismiss appeal from judgment. McBride & McBride and J. Bruce Kremer, for appellant. Robert B. Smith, for respondents.

PER CURIAM. Respondent's motion to dismiss the appeal from the judgment herein is sustained, and the appeal from the judgment hereby dismissed.

RICHARDS, Respondent, v. JONES, Appellant. (No. 2,100.) (Supreme Court of Montana. Dec. 6, 1904.) Appeal from District Court, Choteau County; John W. Tattan, Judge. On motion to dismiss appeal. Walsh & Newman, for appellant.

PER CURIAM. Upon motion of the appellant herein, this appeal is dismissed.

STATE, Respondent, v. ELSNER, Appellant. (No. 2,148.) (Supreme Court of Montana. June 14, 1905.) Appeal from District Court, Silver Bow County; John B. McClerman,

Judge. On motion to dismiss appeal for failure to file brief. A. J. Galen, Atty. Gen., for the State.

PER CURIAM. The respondent's motion to dismiss the appeal herein is granted, and the appeal is hereby dismissed.

STATE ex rel. BAUM v. SECOND JUDICIAL DIST. COURT OF MONTANA et al. (No. 2,205.) (Supreme Court of Montana. May 1, 1905.) Original. Application for writ of review. Maury & Hogevoil, for relator.

PER CURIAM. Relator's application for a writ of review is hereby denied.

STATE ex rel. BORDEAUX v. DISTRICT COURT OF SECOND JUDICIAL DIST. IN AND FOR SILVER BOW COUNTY et al., Respondents. (No. 2,116.) (Supreme Court of Montana. Oct. 22, 1904.) Original. Injunction. B. S. Thresher, C. F. Kelley, and Peter Breen, for relator.

PER CURIAM. Relator's application for a writ of injunction herein is hereby denied.

STATE ex rel. CALKINS v. SECOND JUDICIAL DIST. COURT et al. (No. 2,170.) (Supreme Court of Montana. Feb. 16, 1905.) Original. Application for writ of supervisory control. Davies & Haskins, for relator.

PER CURIAM. Relator's application for a writ of supervisory control herein is hereby denied.

STATE ex rel. DALY v. SECOND JUDICIAL DIST. COURT OF SILVER BOW COUNTY et al. (No. 2,141.) (Supreme Court of Montana. April 20, 1905.) Original. Application for writ of prohibition. Argued and submitted upon demurrer December 24, 1904. Demurrer overruled. J. Bruce Kremer, for relator. T. J. Walsh, for respondents.

PER CURIAM. The foregoing cause is hereby dismissed for want of prosecution.

STATE ex rel. DONLAN v. SECOND JUDICIAL DIST. COURT et al. (Nos. 2,138, 2,139.) (Supreme Court of Montana. April 20, 1905.) Original. Applications for writs of prohibition. Argued and submitted upon demurrers December 24, 1904. Demurrers overruled. Geo. F. Shelton, Bernard Noon, and C. F. Kelley, for relator. T. J. Walsh, for respondents.

PER CURIAM. The foregoing causes are hereby dismissed for want of prosecution.

STATE ex rel. DONOVAN v. DISTRICT COURT OF FIRST JUDICIAL DIST. IN AND FOR LEWIS AND CLARKE COUNTY, Respondent. (No. 2,083.) (Supreme Court of Montana. June 24, 1904.) Original. Certiorari and mandamus. James Donovan, Atty. Gen., pro se.

PER CURIAM. The relator's application for a writ of review and mandate is hereby denied, and proceeding dismissed.

STATE ex rel. DONOVAN, Atty. Gen., v. INTERNATIONAL HARVESTER CO. OF AMERICA. SAME v. CUDAHY PACKING CO. SAME v. ARMOUR PACKING CO. SAME v. HAMMOND PACKING CO. OF CHICAGO. SAME v. HAMMOND PACKING CO. OF PUEBLO, COLO. SAME v. SWIFT & CO. OF CHICAGO. (Nos. 2,129, 2,132-2,136.) (Supreme Court of Montana. Dec. 24, 1904.) Original. Applications for injunction. James Donovan, Atty. Gen., pro se.

T. J. Walsh, E. B. Burling, J. C. McMath, and M. S. Gunn, for respondent International Harvester Co. of America. M. S. Gunn, for other respondents.

PER CURIAM. These causes having been heretofore argued and submitted upon demurrers, it is hereby ordered and adjudged that the demurrers herein be, and they are, hereby sustained, and the proceedings dismissed.

STATE ex rel. HARRINGTON v. DISTRICT COURT OF SECOND JUDICIAL DIST. et al. (No. 2,203.) (Supreme Court of Montana. May 1, 1905.) Original. Application for writ of prohibition to restrain respondents from proceeding further in a cause entitled Calkins v. Harrington, pending in the district court of Silver Bow county. Maury & Hogevoil, for relator.

PER CURIAM. Relator's application for a writ of prohibition is hereby denied.

STATE ex rel. HENNESSY v. DISTRICT COURT OF SECOND JUDICIAL DIST. IN AND FOR SILVER BOW COUNTY et al. (No. 2,107.) (Supreme Court of Montana. Sept. 24, 1904.) Original. Supervisory control. B. S. Thresher, for relator.

PER CURIAM. Relator's application for a writ of supervisory control herein is hereby denied.

STATE ex rel. NEVIN v. SECOND JUDICIAL DIST. COURT OF SILVER BOW COUNTY et al. (No. 2,140.) (Supreme Court of Montana. April 20, 1905.) Original. Application for writ of prohibition. Argued and submitted upon demurrer December 24, 1904. Demurrer overruled. J. Bruce Kremer, for relator. T. J. Walsh, for respondents.

PER CURIAM. The foregoing cause is hereby dismissed for want of prosecution.

STATE ex rel. STRUTCEL v. DISTRICT COURT OF SECOND JUDICIAL DIST. et al. (No. 2,212.) (Supreme Court of Montana. June 6, 1905.) Original. Application for writ of supervisory control. John Lindsay and James H. Baldwin, for relator.

PER CURIAM. The relator's petition for writ of supervisory control herein is hereby denied.

STATE ex rel. WORTMAN v. SECOND JUDICIAL DIST. COURT IN AND FOR SILVER BOW COUNTY et al. (No. 2,087.) (Supreme Court of Montana. July 11, 1904.) Original. Supervisory control. Kirk & Clinton, for relator.

PER CURIAM. Relator's application for a writ of supervisory control, or some other appropriate writ herein, is hereby denied.

FIRST NAT. BANK OF ROFF, IND. T., v. SMITH. (Supreme Court of Oklahoma. Sept. 7, 1905.) Error from District Court, Noble County; before Justice Bayard T. Hainer. Action by the First National Bank of Roff, Ind. T., against C. A. Smith. Judgment for defendant, and plaintiff brings error. Dismissed. Rehearing denied January 10, 1906. J. R. Scott and H. A. Smith, for plaintiff in error. Doyle & Cress, for defendant in error.

PER CURIAM. The petition in error was filed in the court on December 13, 1904. By rule 6 (82 Pac. xiii), appellants are required to file briefs within 40 days after the filing of the case-made and petition in error. On April

5, 1905, no briefs having been filed by appellant, the appellee filed a motion to dismiss the appeal for failure to file briefs. On April 6, 1905, the appellant filed an application to be permitted to file briefs out of time. We have examined the showing made by the respective parties and are of the opinion that the appeal should be dismissed. There was a part of the time in which the counsel for plaintiff was sick and could not prepare the briefs for his client; but there was plenty of time which counsel could have employed in that work, and the only reason he assigned for not doing so was the press of business. This court has repeatedly held that press of business is not a sufficient excuse for such failure. The appeal is hereby dismissed, at the cost of appellant. All of the Justices concurring, except HAINER, J., who presided at the trial below, not sitting.

BRILL v. HAYFORD. (Supreme Court of Washington. Jan. 20, 1906.) Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge. Action by George F. Brill, Jr., against Eugene Hayford. From a judgment for plaintiff, defendant appeals. Affirmed. James Dawson, for appellant. T. D. Rockwell, for respondent.

PER CURIAM. The appellant entered into a written agreement with the respondent, in which he acknowledged receipt of the sum of \$5 as part payment of the purchase price of two certain lots situated in the city of Spokane, and agreed to convey the lots by warranty deed to such person as the respondent should direct on the payment of the further sum of \$245, if paid within six months from the date of the execution of the agreement. Before the expiration of time fixed in the agreement the respondent tendered the balance remaining due on the contract and demanded a deed of the property to himself. The appellant refused to execute the deed, and this action was brought to compel him to do so. Judgment went for the respondent, and this appeal is taken therefrom. The appellant defended the action on the ground of fraud and misrepresentation. He contended that the respondent had been for some time prior to the execution of the agreement his agent for the sale of the property, and had as such agent acquired information concerning the property and its surroundings which he purposely and fraudulently concealed from the appellant, and that the appellant by reason of such fraudulent concealment was induced to enter into a contract for the sale of the property at less than its actual value, and a contract he would not have entered into had the respondent dealt fairly with him. The case was tried out on this issue, and much testimony introduced on each side. The evidence of the parties is squarely in conflict, and we are unable to say after its careful perusal that it does not preponderate in favor of the respondent. The judgment is affirmed.

HARRIS et al., v. CITY OF TACOMA. (Supreme Court of Washington. Jan. 9, 1906.) Appeal from Superior Court, Pierce County; Thad Huston, Judge. Action by W. H. Harris and another against the city of Tacoma. From a judgment for defendant, plaintiffs appeal. Reversed. Emmett N. Parker, and W. H. Harris, for appellants. O. G. Ellis, J. J. Anderson, and R. E. Evans, for respondent.

PER CURIAM. This case was submitted with the case of Harris v. City of Tacoma, 81 Pac. 691, under a stipulation that the same disposition should be made of it as the court should make of that case. Pursuant to the stipulation, therefore, it is ordered that the judgment appealed from be reversed, and the cause remanded, with instructions to reinstate the appeal.

